

CANADA / JUDGMENT

Potratz v. Potratz

2015 BCSC 1608

COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 1608 Potratz v. Potratz

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Potratz v. Potratz,

2015 BCSC 1608

Date: 20150908

Docket: E016237

Registry: New Westminster

Between:

Michele Merle Potratz

Plaintiff

And

Perry Scott Potratz

Defendant

Before: The Honourable Madam Justice E.A. Arnold-Bailey

Reasons for Judgment on Contempt Application

Counsel for Plaintiff:

Joan Dreyer

Counsel for Defendant:

David H. Goodwin

Place and Dates of Hearing:

New Westminster, B.C.

January 13, 2012

April 2, 2013

November 21, 2013

January 21-23, 2015

April 2, 2015

Place and Date of Judgment:

New Westminster, B.C.

September 8, 2015

Introduction

- [1] This proceeding concerns the application of Michele Merle Potratz (the "Plaintiff") to find Perry Scott Potratz (the "Defendant") in contempt for his failure to comply with various court orders, including an order for the Defendant to pay the Plaintiff retroactive spousal and child support, a money judgment relating to the division of family property, a share in the Defendant's RRSPs and a costs' award. These orders were the result of protracted family proceedings that concluded in 2009.
- [2] The parties were married for eight years of their 14-year relationship. Prior to the marriage, the Plaintiff had not completed high school and had worked at various low-paying jobs in the service industry. The Defendant was a savvy businessman who worked as a fish broker for other companies, as well as operating his own fish brokering company, Flagship Fisheries Ltd. ("Flagship"). The Plaintiff worked during the marriage until she became pregnant. She served as the primary caregiver of their daughter, C., until the end of their marriage.
- [3] After the parties separated, the Plaintiff sought to upgrade her education and took high school equivalency courses, as well as college courses. The Defendant wound down his company, but kept it for the purposes of writing off expenses. He returned to work as a fish broker at a different company, Grand Hale Marine Products Co. Ltd. ("Grand Hale") for a salary of \$75,000.
- [4] The parties initially had shared custody of C., who spent one week on and one week off with either parent.
- [5] Similar to the summary trial dealing with the valuation and division of family property, spousal support and child support, the present contempt proceedings have been fraught with delay and complexity. These proceedings took place over three years, as they were initially scheduled for January 13, 2012 and concluded on April 3, 2015.

- [6] The key issues relating to these proceedings are as follows:
- (a) Have the Defendant's rights under s. 11(b) of the Charter of Rights and Freedoms [Charter] been violated due to unreasonable delay?
 - (b) Has the Defendant's right to not be compelled to incriminate himself under s. 11(c) of the Charter been violated?
 - (c) Has the Plaintiff complied with the notice requirements for civil contempt under Rule 21-7(11) of the Supreme Court Family Rules, B.C. Reg. 169/2009 [Rules]?
 - (d) Has the Plaintiff proven that the Defendant is in contempt of the orders in question beyond a reasonable doubt?

Summary Trial Reasons

- [7] On December 1, 2009, the Court rendered written reasons in relation to a summary trial regarding the division of the parties' family property, as well as retroactive and ongoing spousal support and child support: *M.M.P. v. P.S.P.*, 2009 BCSC 1652 (the "Summary Trial Reasons"). Given that the court orders associated with the present contempt application were rendered in the Summary Trial Reasons, I will provide an overview of the substance of these proceedings.
- [8] The proceedings were protracted, hard fought and fraught with delay and complexity. A number of previous proceedings relating to this matter resulted in prior orders between 2003 and 2009 (at para. 4). The summary trial was initially scheduled for February 2006, but was adjourned generally due to health complications of both parties. It was again rescheduled for March 2007, but was unable to proceed due to a death in the Defendant counsel's family. A new date was set down for later that month, and the Defendant declined to consent to an adjournment despite the fact that the Plaintiff had just retained counsel to act on her behalf 11 days prior. Both matters were adjourned by Crawford J. on March 22, 2007 (at para. 5).
- [9] The proceeding was scheduled as a short summary trial over two days. It resulted in a nine day hearing, comprised of multiple applications and cross-examination of the parties and a business valuator, taking place in five segments over 13 months on June 17 and 18, 2008, December 18, 2008, January 21 and 22, 2009, June 29 and 30, 2009 and July 2 and 3, 2009 (at para. 8).
- [10] The substance of the Summary Trial Reasons is as follows.
- [11] The Plaintiff brought an application for a share in the Defendant's business and other assets, retroactive and ongoing spousal support and child support for the parties' daughter, C., who was 14 years old at the time. The family assets in question included the Defendant's vehicle, his bank account, the Defendant's RRSPs, a share in \$30,000 of RRSP funds that the Defendant withdrew at the time of separation and CPP credits (at para. 50). The Plaintiff

alleged significant ambiguities in the Defendant's financial records, especially in relation to Flagship.

- [12] The Defendant also sought a division of assets, an order apportioning Flagship's debt, an order rescinding support arrears and a determination of the amount of support owed based on the child's change in residence. The Defendant submitted that the Plaintiff played a significant role in the protracted nature of the proceedings and earned more income than she disclosed from a business raising parrots and working as a cleaning person. He alleged the Plaintiff's debts were due to poor money management and alcohol addiction. He also asserted that Flagship was worth significantly less than the evidence provided by Mr. Hooge, a business valuator called by the Plaintiff (at para. 53).
- [13] The Court found that the Plaintiff was an honest and reliable witness, and that the gaps in her evidence relating to her financial position were due to her lack of sophistication and general stress level, rather than a calculated effort to mislead the Court (at paras. 57-58).
- [14] In contrast, the Court held that the Defendant was a less than honest witness in relation to his income and employment. Throughout the proceedings, the Defendant was "argumentative, reluctant, evasive, surly and fundamentally uncooperative" (at para. 61). The Court notes the Defendant's efforts to frustrate the process at para. 61 as follows:

He made a great deal out of the disclosure that he had provided, while assiduously avoiding past requests made to him through his counsel to provide documentation to address the specific issues and concerns raised on behalf of the plaintiff, which would have expedited or resolved those concerns. He unilaterally terminated interim spousal support after becoming ill in February 2006 and then did not reinstate payment to the plaintiff upon his recovery. Nor did he comply with the court order as to payments to the plaintiff as a "without prejudice" advance on family assets.

- [15] The Court outlined other instances where the Defendant had exhibited dishonesty, such as selling and keeping the proceeds of his GMC pickup truck in violation of a court order, failing to disclose his employment with Grand Hale in his financial statement and ceasing to pay interim spousal support after becoming ill while paying significant expenses to other persons with whom he had romantic relationships (at paras. 61-62). As a result, where the evidence of the Defendant contradicted that of the Plaintiff, the Court preferred the evidence of the Plaintiff (at para. 57).

- [16] The Court made the following findings relating to the property in question:

- The Plaintiff was entitled to half of the value of Flagship, which the Court valued at \$131,000, relying on Mr. Hooge's evidence (at para. 73), resulting in an amount owing to her by the Defendant of \$58,272, which represented half of \$131,000, less the \$7,228 that the Defendant paid as advances on the Plaintiff's share of Flagship (at para. 84);

- The Plaintiff was entitled to half of the \$15,000 advance from Flagship that was used to pay the initial deposits on the parties' separate residences. Although the Plaintiff initially received \$5,000 of the advance, the Defendant had threatened to collapse the sale of the matrimonial home unless she repaid him the \$5,000 she used for the deposit on her new residence, and therefore she repaid him the \$5,000. Hence, she was owed half of the \$15,000 advance. The Defendant also owed her \$700 for her share in the sale of the family horse, for a total of \$8,200 (at paras. 85-86);
- The Plaintiff was entitled to half of the Defendant's RRSPs valued at \$72,220, as well as entitled to half of the \$30,000 of the RRSPs that the Defendant cashed in on March 11 and 12, 2003, for a total amount owed to her of \$51,110 (at paras. 87-92). The Court rejected the Defendant's evidence that he had cashed out the RRSPs in order to satisfy a debt relating to Flagship;
- The Plaintiff was entitled to \$18,500 as half of the Defendant's 1957 GMC pickup truck valued at \$37,000, which the Defendant sold contrary to a prior order and without notice to the Plaintiff (at paras. 93-97);
- The Plaintiff was entitled to \$6,096, representing a half interest in the funds deposited in the Defendant's bank account totalling \$12,191 three days prior to the court application before Master Nitikman on March 13, 2003 (at para. 102);
- The Canada Pension Plan credits generated during the course of the parties' cohabitation (from May 1, 1989 to February 6, 2003) would be split equally between them (at para. 103);
- The Defendant was entitled to the amount of \$2,500, representing a half interest in the Plaintiff's African Grey parrot breeding business, Stealth Aviary, valued at \$5,000 at the time of its sale (at para. 100);
- The Court declined to consider Flagship's shareholder's loan to be a family debt (at para. 108).

[17] It is important to note that the parties appeared before Master Nitikman on March 13, 2003, at which time an order was made restraining either party from dealing with family assets. As discussed below, the Defendant flouted this order when he cashed in additional RRSP monies in the 30 days following the release of the Summary Trial Reasons on December 1, 2009.

[18] In terms of the parties' income, the Court concluded, at para. 112, that the Plaintiff had accurately reported her annual income, and declined to impute an income of \$50,000.

[19] The Court outlined the gross business revenue generated by Flagship for the years 2000 to and including the first four months of 2007 at para. 115:

2000 - \$8,353,686

2001 - \$7,640,199

2002 - \$3,255,731

2003 - \$1,315,491

2004 - \$3,654,566

2005 - \$6,871,309

2006 - \$4,794,199

2007 - \$2,209,429

2008 - \$720,553 (four months)

[20] At para. 114, the Court noted the Defendant's income as reported on his income tax returns for the same period as follows:

2000

\$62,513

2001

\$112,081

2002

\$65,879

2003

\$88,950

2004

\$64,400

2005

\$67,289

2006

\$49,227

2007

\$58,279

[21] Accordingly, determining the Defendant's income was a more complicated matter, given that there was a lack of separation between the Defendant's personal business and the business of Flagship. This led to significant discrepancies between the Defendant's reported annual income on his tax returns and Flagship's gross business revenues during the relevant period. The Court concluded that additional monies taken by the Defendant from Flagship through various shareholder's loans ought to be considered income (at para. 118). The Court also considered additional income from 2000 to 2003 that was attributed to the Plaintiff via "income splitting" that was earned by the Defendant (at para. 117).

- [22] The valuation expert, Mr. Hooge, "noted that personal expenses can be concealed in a variety of ways in a company's records." Mr. Hooge considered some of the typical expenses that a small business could deduct, even though they would not necessarily generate sales or revenue, such as automotive expenses, advertising, promotional costs, meals and entertainment expenses (at para. 123). He noted that Flagship's financial statements showed that, between 2000 and 2007, some of these types of expenses fluctuated significantly from year to year. The Court concluded that the Defendant had written off many personal expenses as Flagship business expenses (at para. 127). This continued in 2008, when the Defendant was no longer engaged as a fish broker through Flagship, yet continued to write off his fuel, repairs, insurance, lease payments, restaurant meals, travel, home phone, cell phone and other miscellaneous expenses as Flagship business expenses (at para. 129).
- [23] Based on these findings, the Court made the following findings relating to the Defendant's income:
- [132] Given the defendant's pattern of withdrawing the retained earnings of Flagship under the guise of a shareholder's loan and not paying tax on this money, I find, in accordance with sections 18(1) and 18(2) of the Guidelines that, in accord with the analysis of Mr. Hooge, all the monies available to the defendant in the various tax years in issue should be attributed to a determination of the defendant's Guideline Income. Thus, in accordance with section 18(2) of the Guidelines, I find that the various amounts the defendant has expensed to Flagship as salaries, wages, management fees and other payments or benefits on his behalf or to his benefit are to be added back into his personal income for the year to which they pertain.
- [133] Therefore, I accept that Mr. Hooge's adjusted income for the defendant for the years of 2000 to 2007 is correct, and that the foregoing expense amounts are properly added to the amounts determined by Mr. Hooge, resulting in the adjusted income amounts for the defendant for the years 2003 to 2007, as set out below
- [134] It is noteworthy that in 2003 and 2007 the defendant's income is recorded as a loss. Based on the above amounts, the defendant's average adjusted income for 2002, 2004, 2005 and 2006 (and not including 2003 and 2007) is \$123,203.56.
- [135] Further, pursuant to s. 19 of the Guidelines, I find that the average earnings of the defendant for the years 2002, 2004, 2005 and 2006 when he actually worked, namely \$123,203.56, is to be imputed as income to the defendant for 2003 and 2007 when he was capable of generating an income but decided not to work.
- [24] Based on the Defendant's imputed income of \$123,203.56, the Court also made both retroactive and prospective orders pertaining to spousal and child support, detailed below.
- [25] The Court summarized the orders made at paras. 183-186 as follows:
- [183] The defendant is hereby ordered to pay the plaintiff the following amounts:

- \$58,272 for the plaintiff's share of Flagship as a family asset;
- \$8,200 in relation to the sale of the matrimonial home and family horse;
- \$36,110 as the plaintiff's share of the defendant's current RRSP value;
- \$15,000 in the form of a compensation order in relation to money withdrawn from the defendant's RRSP immediately prior to separation;
- \$18,500 in relation to the 1957 GMC pickup truck that was sold;
- \$6,096 as the plaintiff's share of the defendant's savings account;
- \$113,709 for retroactive spousal support to November 30, 2009; and
- \$16,742 for retroactive child support to November 30, 2009.

[184] These amounts total \$272,629, and the defendant is entitled to a credit of \$2,500 in relation to the plaintiff's sale of the African Gray parrots and the equipment associated with the parrot-breeding business, resulting in a net amount of \$270,129 payable to the plaintiff by the defendant.

[185] Based on the current annual Guideline Incomes of \$29,047 for the plaintiff and \$75,000 for the defendant, the defendant's child support obligation is fixed at \$698 per month. In the event that arrangements are made for continuing shared custody and the correct offset is recognized (the plaintiff's amount is \$271), the defendant's child support obligation is \$427 per month payable to the plaintiff on or before the first day of every month, commencing December 1, 2009. The defendant is therefore ordered to commence paying child support to the plaintiff in the amount of \$698, payable on the first day of each month, commencing December 1, 2009, to be reduced to \$427 if the custody of C. is shared.

[186] The defendant is also ordered to commence paying spousal support to the plaintiff in the amount of \$700, payable on the first day of each month, commencing December 1, 2009, until the order is varied by the court, and it is reviewable after three years from the date of filing of these reasons.

[26] In terms of costs, although the Court noted, at para. 196, that it was "tempting in light of the Defendant's overall conduct to award the Plaintiff special costs, particularly in terms of his ceasing to pay interim spousal support and selling the GMC pickup and keeping the proceeds contrary to the court order", the Plaintiff retained a small measure of responsibility for the protracted nature of the proceedings. Thus, the Court declined to award the Plaintiff special costs.

[27] Nonetheless, as the successful party, the Court awarded the Plaintiff her costs at Scale C, as the matter was of more than ordinary difficulty. Further, the Plaintiff was entitled to be fully reimbursed for all reasonable costs relating to the valuation expert, Mr. Hooge (at para. 197).

[28] On January 13, 2011, these costs were valued by Registrar Sainty at \$109,394.

The order

[29] Following the release of the Summary Trial Reasons, draft orders were prepared by counsel for the Plaintiff and presented to counsel for the Defendant. Neither party could settle the order's terms.

[30] Although an appeal was filed, the Defendant filed an application to have the Court reconsider certain aspects of the Summary Trial Reasons. These supplementary reasons for judgment were given on September 14, 2010, and indexed as 2010 BCSC 1405 (the "Supplementary Reasons"). The Defendant asked the Court to reconsider issues such as failing to take the Defendant's period of illness into account when calculating his income for the purposes of spousal support, and whether the order relating to the Defendant's RRSPs were to be paid outright or be transferred through a spousal rollover (at paras. 1-2).

[31] The Court noted the only reasonable conclusion to be drawn by the Defendant's instructions for asking the Court to reconsider the Summary Trial Reasons at para. 6:

[T]he defendant, as the overall unsuccessful party in this protracted litigation, now wishes to continue to deprive the plaintiff of the funds to which she is properly entitled to (absent a successful appeal) for as long as possible. The defendant was in fact the cause of much (but not all) of the length and complexity of this matter due to his recalcitrant behaviour regarding a fair and proper valuation of family assets, and fair and proper settlement of his family support obligations.

[32] In terms of clarifying the Summary Trial Reasons with respect to the Plaintiff's interest in the RRSPs, the Court noted that the Plaintiff was to be reimbursed in cash for the amount that the Defendant had removed from his RRSPs in March 2003, and was entitled to half of the Defendant's remaining RRSP by way of spousal rollover (at para. 22).

[33] Following the release of the Supplementary Reasons, an order was entered into on November 24, 2010 (the "Order"). The Order required the Defendant to pay the Plaintiff \$103,568 for her share of the family assets, stated as follows at para. 4:

\$58,272.00 for the Plaintiff's interest in Flagship Fisheries Ltd.; plus

\$7,500.00 for the Plaintiff's interest in monies cashed out of the business Flagship Fisheries Ltd.; plus

\$700.00 for the Plaintiff's interest in the proceeds of sale from the sale of the family horse; plus

\$15,000.00 in the form of a compensation order in relation to money withdrawn by the Defendant from the Defendant's RRSP; plus

\$18,500.00 for the Plaintiff's interest in the 1957 GMC pick up truck that was sold; plus

\$6,096.00 for the Plaintiff's interest in the Defendant's savings account; less

\$2,500.00 for the Defendant's interest in the African Grey parrot business.

[34] Additionally, the other relevant provisions to the Order to these contempt proceedings are as follows:

5. One-half of the Defendant's RRSPs most recently valued in this litigation at \$72,220.00 shall be rolled over to the Plaintiff by way of tax-deferred spousal roll-over pursuant to the provisions of the Income Tax Act;
11. The Defendant shall pay the Plaintiff retroactive spousal support in the amount of \$113,709.00 for the period June, 2003 to and including November, 2009;
13. Commencing December 1, 2009 and continuing thereafter on the first day of each and every month until further order of the court, the Defendant shall pay spousal support to the Plaintiff pursuant to the Divorce Act (Canada) in the amount of \$700.00 per month.
15. The Defendant shall pay the Plaintiff retroactive child support for [C.'s] support in the amount of \$19,523.67 for the period June, 2003 to and including June 1, 2009
16. the Defendant's child maintenance obligation to the Plaintiff for [C.'s] support based upon his Guideline Income of \$75,000 is \$698.00 and the offset amount payable by the Defendant to the Plaintiff for child support is \$427.00 per month commencing December 1, 2009 and continuing thereafter on the first day of each and every month for so long as [C.] continues to be a child of the marriage

[35] Also on November 24, 2010, counsel for the Plaintiff brought an application seeking double costs from the date of her offer to settle, June 23, 2004, which was granted by the Court. Counsel for the Defendant, although served with the application, advised that he took no position and did not appear.

Other applications

[36] On August 29, 2011, the Defendant filed an application seeking to revisit child support for C. He alleged that C. had been residing with him since shortly after the summary trial had concluded. He submitted that child support arrears assessed against him for the months following August 29, 2011 should be cancelled, and sought an order that the Plaintiff pay child support and contribute to s. 7 expenses incurred by him on C.'s behalf. He also sought to cease certain aspects of the enforcements actions being taken by the Family Maintenance Enforcement Program ("FMEP"), such as the suspension of his passport.

[37] The s. 7 expenses contemplated in the Defendant's application included horse-boarding and horse-related expenses for C. of \$350.00 per month for the period of December 1, 2010 to May 31, 2011. However, no documents supporting these expenses were provided. Nor was any evidence that sharing these expenses was discussed between the parties. The Defendant also sought a proportionate sharing of C.'s expenses relating to her resident care aid course in the amount of \$5,000 in tuition and book expenses (Affidavit of Helen Luyben, November 21, 2013, Exhibit "A").

- [38] On December 20, 2011, the Plaintiff filed a cross-application (amended on January 11, 2012), initiating the present contempt proceedings at bar. In this application, the Plaintiff alleged that the Defendant had failed to comply with the Summary Trial Reasons and subsequent Order in terms of monies owed to her in relation to the asset division and failure to roll over the RRSPs. Further, she alleged that although he had been paying spousal support of \$700 per month, he had not paid anything towards spousal support arrears or child support arrears, nor had he contributed to the costs award. The Plaintiff noted that post-judgment interest had accumulated in relation to those amounts.
- [39] On January 13, 2012, the parties entered into a consent order with respect to aspects of the Defendant's application. The consent order fixed the Plaintiff's child support obligation at \$291 per month, to be credited to the arrears owed by the Defendant in regards to child and spousal support. This order also cancelled arrears in the amount of \$7,686 due to payments made by the Defendant since C. had come to live with him in his home. The Defendant also received a further credit in the amount of \$3,252 for the Plaintiff's retroactive child support owed to him since C. had come to reside with him on a full-time basis.
- [40] On January 14, 2015, the Defendant filed a further application to cancel his spousal support obligation effective November 22, 2013. In addition, the Defendant sought credit for payments made since November 22, 2014 towards his arrears owing to the Plaintiff, as well as an order that he only be required to pay \$300 per month towards the various judgment amounts owing pursuant to the Summary Trial Reasons. The return date for the Plaintiff's response to the notice of application was January 23, 2015. The Plaintiff submits that there was no advance notice provided by the Defendant's counsel of this application. The continuation of the contempt proceedings had already been scheduled for January 21, 2015, two days prior to when the application response was due. On January 22, the Defendant's application was adjourned with the direction that it be reset for hearing after the contempt proceedings were completed.

FMEP involvement

- [41] FMEP first became involved in collecting child and spousal support arrears from the Defendant in November 2004. As at the end of 2014, the Defendant owed \$104,583.64. As at January 23, 2015, the last day of evidence provided in these proceedings, the arrears totalled approximately \$104,314.
- [42] The Plaintiff provided additional FMEP records as at the April 2, 2015 hearing date, when the parties were providing their closing submissions. However, the Court declined to consider the subsequent FMEP payment history, given that the evidence in the matter was closed and the Defendant finished his testimony on January 23, 2015.

[43] In response to the Defendant's submission that the contempt proceedings should only be used as a last resort, and the Plaintiff should have sought other creditor remedies, the Plaintiff submitted that she is limited in terms of what she can do given that she is enrolled in FMEP. Recipients enrolled with FMEP are required to obtain the permission of the program director before they can engage in independent enforcement actions.

[44] Under the Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127, the Director of Maintenance Enforcement has the exclusive jurisdiction to enforce a maintenance order, except in accordance with s. 5, which reads as follows:

5 (1) While a maintenance order is filed with the director, no person may enforce the order except

- (a) the director, or
 - (b) the creditor, if authorized to do so under subsection (2).
- (2) Unless the maintenance order is assigned to the minister under the Employment and Assistance Act or the Employment and Assistance for Persons with Disabilities Act, the director
- (a) may, in writing, authorize the creditor to enforce a maintenance order while it is filed with the director, and
 - (b) may include any conditions in the authorization.

[45] The Plaintiff advised that she had to obtain such approval in order to initiate these contempt proceedings, and given the Defendant's history of flouting court orders, the contempt application was the only appropriate court process to initiate.

Contempt proceedings

Adjournments

[46] On December 28, 2011, the Defendant was personally served with the notice of application, filed December 20, 2011, along with the Plaintiff's affidavit and financial statement sworn December 19, 2011 (the "Original Notice"). The Original Notice sought an order that he be found in contempt for failing to comply with various orders made under the Summary Trial Reasons, such as failure to pay child and spousal maintenance, failing to pay costs as ordered by Registrar Sainty in the amount of \$109,394 plus interest, and for cashing out RRSPs as opposed to rolling them over to the Plaintiff pursuant to the Order. It also stated at para. 2, "Pursuant to Rule 21-7 of the Supreme Court Family Rules, an order that the Defendant pay the sum of \$103,568.00 for her interest in the family assets as ordered pursuant to the Order "

- [47] Two weeks later, on January 11, 2012, the Plaintiff filed an amended notice of application seeking a further order that the Defendant "be found in contempt for failing to pay the sum of \$103,568" pursuant to the Order (the "Amended Notice"). The Amended Notice was not personally served on the Defendant, but was instead served on his counsel.
- [48] On January 13, 2012, the Defendant sought to adjourn the contempt proceeding in order to allow him an opportunity to give viva voce evidence in addition to his affidavits and to subpoena two Canada Revenue Agency ("CRA") employees to provide evidence on his behalf. He also informed the Court that he wanted his accountant to give evidence regarding his financial affairs, and his physician to testify as to his health difficulties.
- [49] The Defendant's application for an adjournment was granted and the hearing was adjourned for almost nine months, to proceed on October 3-5, 2012. However, it was unable to proceed on those dates because the Court had a criminal trial that carried over during this time, resulting in a further adjournment that caused an additional six month delay.
- [50] On April 2, 2013, the contempt proceedings resumed. The hearing was shortened due to the fact that the Defendant was no longer seeking to call third party witnesses, such as the CRA employees, his accountant or his physician. The Defendant's counsel advised that he could complete his case and make final submissions in two hours' time. However, the proceedings did not conclude. The Defendant's counsel contends that it was the Plaintiff's counsel who underestimated the time requirements for the Defendant's cross-examination.
- [51] During the April 2, 2013 hearing, the Defendant gave viva voce testimony in addition to his affidavit evidence. He also sought to admit new documents into evidence regarding his business dealings and financial affairs. The Plaintiff's counsel contends that this contributed to the delay in her cross-examination.
- [52] Two days were scheduled to complete the contempt proceedings on November 21 and 22, 2013. On November 21, 2013 there was a delay in commencing the proceedings due to both counsel and the Court being late given traffic difficulties related to a heavy snowfall.
- [53] Additional delay was then incurred on that date due to the Defendant's health difficulties. His counsel informed the Court that the Defendant had suffered a heart attack one week earlier and undergone surgery while in the Philippines. The Defendant was present, having just returned to Canada, and was not seeking an adjournment. However, his counsel alerted the Court of the Defendant's precarious medical condition in the event that the Defendant experienced medical difficulties during his cross-examination. He also advised that during this time the Defendant had acquired a fiancé and six month old baby in the Philippines.
- [54] During these proceedings, the Plaintiff tendered two bound volumes of documents, which contained the Defendant's various financial records that were copied from the documents provided by the Defendant pursuant to the document production order made on April 2, 2013. The Defendant submitted at the hearing that he did not have proper or prior notice of the volumes of documents, and that they should be excluded on the grounds of late delivery

under Rule 9-1(18) of the Rules. He further alleged that there had been an abuse of process in that the alleged contemnor was being obliged to provide evidence before the Plaintiff had proven her case. On this basis, the Defendant applied for a mistrial due to the fact that his client's s. 11(c) Charter right to not be compelled to testify against himself had been violated. He also objected to the order for production of documents, made on April 2, 2013, on the basis that it violated the Defendant's s. 11(c) Charter rights. The Court dismissed the mistrial application.

- [55] The Defendant also sought to convert the proceedings into a settlement conference given that a "with prejudice" settlement proposal had been made, which further delayed the hearing. Accordingly, the contempt proceedings were adjourned on November 21, 2013 to the next available dates, resulting in a further delay of seven and a half months.
- [56] As noted above, the Defendant filed an application to cancel spousal support on January 14, 2015, returnable on January 23, 2015. The Plaintiff submits that this was a delay tactic to further complicate matters, as the Defendant had ample opportunity to instruct his counsel and file an earlier application in a timely manner (Michele Potratz Affidavit, January 21, 2015, at para. 5).
- [57] The contempt proceedings continued on January 22 and 23, 2015. Cross-examination of Defendant was concluded, as was the direct and cross-examination of his bookkeeper. The hearing was adjourned to April 2, 2015 to allow for written and oral submissions from both parties, and then put over for written reasons.

Document production

- [58] During the hearing on April 2, 2013, the Defendant was ordered to produce all documents requested by counsel for the Plaintiff by April 30, 2013, and to make his bookkeeper available to answer questions on the accounting records of Flagship. These included appropriate disclosure of his company's financial records and copies of his company's and his personal bank accounts and credit card statements.
- [59] However, the circumstances in which this order was made related to the Defendant himself seeking to admit new financial and business documents into evidence during the hearing. The Plaintiff's counsel submits that this was done despite the length of time the parties' applications had been before the court, the various requests made for financial disclosure and the Defendant's failure to comply with those requests within a reasonable time. Particularly, when the Defendant tendered his bank account passbook, the following exchange occurred:

Ms. Dreyer: Your Honour, this is a new document, I've never seen it, and it's inappropriate to put to the witness in this way, given that we had requested disclosure of this nature in kind on December 19th, 2011.

As to complete records, again, we've been requesting the account statements of the company, the account statements for Mr. Potratz, his credit card statements and numerous correspondence, and in the affidavit material itself, outstanding since December 19th, 2011.

The Court: Yes. No, I understand, and disclosure in these matters is always ongoing.

Mr. Goodwin: Yes.

[60] In response to the Defendant tendering further documents, including Flagship's financial statements, his corporate income tax return for 2012, without the supporting general ledgers, and some bank account statements from his personal account, counsel for the Plaintiff, Ms. Dreyer, stated the following at p. 13 of the April 2, 2013 Transcript:

Ms. Dreyer: The difficulty is I've received a letter from Mr. Goodwin dated March 26th, 2013, providing a 2012 income tax return, financial statements, for Flagship Fisheries the financial records, and FMEP account statements. I'm certainly not taking issue to those documents going in. But now produced to me are copious pages of -- of trial balance and ledgers that take time to review, for the year ending February 28th, 2013, and for the period ending June 30th, 2012, which could have been provided ages ago, given that we have been requesting them.

[61] The Plaintiff's counsel submits that this late tendering of documents gave rise to her cross-examination of the Defendant being unable to conclude during the time allotted.

[62] During cross-examination, the Defendant made reference to several other exculpatory documents he had in his possession. For example, on p. 57 of the April 2, 2013 Transcript, the following exchange occurred between the Defendant and the Plaintiff's counsel:

Q: Well, if you're employed with Grand Hale Marine and pulling \$59,227.23 out of the company -- How is it that on, for instance, October 30th, 2009, you're depositing \$32,820.24 back into the company.

A: I did not pull \$59,270 out of the company Or I was being credited with --

Q: Well, it says "Deposit", Mr. Potratz, next to your name on that October 30th, 2009 entry.

A: You'll see there's lots of entries at the bottom of that page that have no --

Q: Those aren't my questions. Mr. Potratz. My question is where there's a deposit on your shareholders loan account of \$32,820.24 on October 30th, 2009, when you purport to be employed with Grand Hale Marine, how is it that you're putting money into your company?

A: That's an answer I cannot give you. I'm not sure what -- what that line --

Q: And we see a similar deposit on December 1st, 2009 for \$4,988.99?

Q: Can you explain that deposit, on December 1, 2009?

A: It has a reference number. If I could correlate the reference number to the general ledger, I should be able to tell you exactly what it is.

Q. But how is it that you're making a deposit, you yourself are making a deposit?

A You are assuming that's a deposit.

Q: That's what it says.

A: You are assuming it's a deposit.

[Emphasis added.]

[63] In addition, the Defendant gave the following evidence when questioned about whether it was convenient for him to not disclose certain financial statements and company ledgers in the context of this proceeding (April 2, 2013 Transcript at pp. 62-63):

Q: And I put it to you, Mr. Potratz, that it's those deferred cash or those deferred sales that in fact enabled you to credit monies back to your shareholders loan account and operate.

A: I have been audited by Revenue Canada. I have a CA that does my books. I have a bookkeeper. My employment is buying and selling fish. And I'm not going to you're treating me like a criminal. I'm not a criminal.

Q: I'm asking you to explain why there are deposits on your shareholders loan account for monies that I presume you didn't earn from Grand Hale Marine.

A: You are presuming something. I am saying that those could be credits for wages that I made. They would be in the books in the proper position, and they were put there for a reason.

[Emphasis added.]

[64] These potentially exculpatory documents referred to by the Defendant were the subject matter of the production order.

[65] At the April 2, 2013 hearing, the following submissions were made by the Defendant's counsel in relation to the production of further documents (April 2, 2013 Transcript (after the break) at p. 1):

Mr. Goodwin: My Lady, if I may comment, I spoke to Mr. Potratz at the break, and I think he understands what Your Ladyship is indicating. One of the things he assures me of is that all of these, whether they're cash transactions or cheques to him, are all properly documented. There are back-up documents. This has been reviewed by CRA. It's been audited. The paperwork is there, and he's indicated that he can make his bookkeeper available.

If Ms. Dreyer wants to either hire an accountant or if she wants to submit the entries that she wants documentation for or if she wants to meet with the bookkeeper with the list, any one of those options is available.

Mr. Potratz is saying that he is prepared to be fully cooperative

[66] Later, when discussing the proper mechanism for delineating the required documents, the Defendant's counsel stated the following (at pp. 6 and 11 of the April 2, 2013 Transcript):

The Court: So it's -- they're your client's books.

Mr. Goodwin: Yes.

The Court: He was audited by the CRA. So the onus is on him to explain the matters that have been raised, and the further matters that will be raised in the cost-effective way possible.

Mr. Goodwin: Yes. And that's why I've suggested that if Ms. Dreyer wishes to put forward a list of particular entries -- they're all transaction numbers for every entry so there's a document that backs up a transaction number.

The Court: And, Mr. Potratz, you're agreeing to make that material -- I want there to be no ambiguity here. You are agreeing to make those materials available; is that right?

Perry Potratz: Absolutely.

[67] By referencing various documents of an exculpatory nature that had not been previously disclosed by him and informing the Court that he would be cooperative if the Plaintiff provided a list of particular entries for disclosure, I find that not only did the Defendant consent to the order for production of documents personally and through his counsel, but the Defendant raised certain issues that he suggested could be further explained to his advantage in documents that he had not disclosed. It cannot reasonably be said that he was unfairly taken advantage of with regards to this issue in the context of these contempt proceedings. I also note that the Defendant had brought applications in which his financial affairs, including his on-going financial affairs were at issue, while the contempt proceedings were ongoing.

[68] In oral reasons for judgment on November 21, 2013 relating to the proposed cross-examination of the Defendant on these late disclosed materials in the contempt proceeding, the Court noted the following in the context of the Defendant's mistrial application:

[4] In the course of his cross-examination, it became clear that there were further materials from Flagship Fisheries, as I recall, from the year end June 30, 2012, that had not been made available, and which are very important in terms of him dealing with the contempt allegation made against him in the context of his non-payment of his judgment.

[5] It would have been a relatively simple thing, I suppose, had we not run out of time, to say, well, you have not produced this material, you owe this amount, and you are in contempt. But instead, further inquiries were made and documentation was provided by Mr. Potratz.

[6] It is very unfortunate that having gone through the documents, albeit late, and because of some difficulties Ms. Dreyer had, that she did not serve a binder of the documents upon which she intended to base her further cross-examination at least seven days in advance of

this hearing. In my view, having reviewed the Supreme Court Family Rules in relation to contempt, a period of seven days' notice is appropriate in these circumstances: R. 21-7(11). Mr. Potratz has provided proof of a very recent emergency heart surgery from which he is still recovering.

- [7] I am not prepared to grant a mistrial, nor am I prepared to have Mr. Potratz cross-examined on these documents without notice, which would have permitted him to review their contents and consider his position

[Emphasis added.]

- [69] These reasons, in combination with the Plaintiff's submissions, suggest that the material the Court ordered the Defendant to produce was likely to include exculpatory documentation "important in terms of him dealing with the contempt allegation made against him " (at para. 4). The Court concluded that the Defendant should not be cross-examined on the documents in question without notice and the Plaintiff was granted an adjournment.

Speaking with Counsel

- [70] On April 2, 2013, the contempt proceeding commenced as scheduled for one day. The Defendant provided viva voce evidence on direct examination, but counsel for the Plaintiff was unable to complete her cross-examination of him within the remaining time. At this time, the Defendant was ordered to have no communication with anyone, including his counsel, regarding matters in issue pending the conclusion of the cross-examination.
- [71] During this hearing, after the matter of document production was discussed, the Court stated the following at p. 13 in relation to the Defendant's ability to speak with counsel while under cross-examination:

The Court: So, in that case, I think it's prudent to maintain that unless Mr. Potratz decides himself that he wishes to deal with things a different way, and the financial disclosure has been done, and you can reappear before me on a brief application to be relieved of the usual obligation not to discuss the matter with your client while he's under cross-examination.

- [72] In the oral ruling given on November 21, 2013, the Court also addressed the fact that the Defendant had not been permitted to consult with his counsel given that the prior hearing had been adjourned during his cross-examination. The Court concluded at para. 11:

Although he is in cross-examination, it seems to me that because of these additional materials, he should have an opportunity to discuss them with his counsel in the context of the overall proceeding, and I think an exception should be made. So I am going to permit that.

- [73] Accordingly, an order issued the same day varied the April 2, 2013 order that precluded the Defendant from discussing his evidence or the issues in this case with his counsel pending the completion of his cross-examination (Michele Potratz Affidavit, January 21, 2015, Exhibit "B").

- [74] However, the Defendant submits that counsel understood that the restrictions on communications continued, save and except to review the book of documents, but not otherwise.
- [75] In May 2014, the Defendant filed a request to appear seeking to vary the order limiting communications between himself and his counsel. The Defendant set out that communication between himself and his counsel was required in order for him to bring an application to vary or cancel spousal support obligations. No application was scheduled, as the Court provided a memorandum on July 11, 2014 expressing that her intent was that the restriction had been lifted, and counsel was permitted to discuss all matters with the Defendant.
- [76] The Defendant also submits that the Plaintiff's counsel maintained the position that he was not at liberty to speak with his counsel throughout this period except to discuss the book of documents. He submits that the Plaintiff's counsel acceded to the Defendant's position in an e-mail dated July 22, 2014 following the receipt of the Court's memorandum. Nonetheless, the Defendant states that the Plaintiff's interpretation of these restrictions contributed to his understanding that he was not at liberty to communicate with his counsel.
- [77] On October 6, 2014, the order pronounced on November 21, 2013 was entered such that the Defendant was at liberty to communicate with counsel on all matters. It is on this basis that the Defendant submits he was without the benefit of being able to consult with his legal counsel for 19 months.
- [78] The intent of my order on November 21, 2013 was to lift the communication restriction as between the Defendant and his counsel. Therefore, the Defendant was unable to contact his counsel for six and a half months. I note that even if the Defendant found the order to be unclear, his counsel waited until May 2014 to seek clarification. Therefore, a significant measure of responsibility regarding this matter remains with the Defendant, who waited six months to clarify the order. The Defendant cannot accede to the delay in remedying this matter, and then point to its delay as inflicting prejudice upon him.
- [79] In fact, there is no evidence that his inability to discuss the case with his counsel during this time resulted in actual prejudice to the Defendant. It must be remembered that the Defendant's cross-examination on April 2, 2013, that gave rise to this direction from the Court, was extended in part due to his own indication that there were further documents in his possession that would help him to explain matters relevant to the alleged contempt. The Defendant's cross-examination did not continue after April 2, 2013 or on the appearance on November 21, 2013. He did not resume his testimony until January 21, 2015. The Defendant had almost four months after October 6, 2014 (when the order made November 21, 2013 lifting his restriction on speaking to his counsel was entered) prior to resuming his testimony to freely consult with his counsel about all matters pertaining to this proceeding, as he had prior to the commencement of his cross-examination.

Mr. Potratz's evidence in the present proceeding

Shift from Grand Hale to Flagship

[80] During his evidence in direct examination, the Defendant testified that he stopped working for Grand Hale in May 2011 and resumed operating Flagship as a fish broker, as he "couldn't get ahead" at the wage he earned at Grand Hale (April 2, 2013 Transcript at p. 16). At the conclusion of the Summary Trial, the Defendant deposed he earned \$75,000 per year while working at Grand Hale.

[81] The Defendant acknowledged in cross-examination that by securing salaried employment with Grand Hale, he had created certainty in relation to his Guidelines' income for child and spousal support purposes during the Summary Trial. This avoided the need to delve further into Flagship's books and his cash dealings on an ongoing basis (April 2, 2013 Transcript at pp. 62-63).

[82] The Defendant testified that in June 2011 he began renting a fish-processing plant in Richmond, BC, which he ran for approximately one and a half years. He also stated that he had up to 20 employees during this time. He testified that operating the fish plant took the following toll on his life and health (April 2, 2013 Transcript at p. 16):

So I had approximately 20 employees, including my daughter working for me, was processing fish, and unfortunately it was a 12 to 14-hour a day job, and due to two or three different circumstances, ultimately one being my health situation, I couldn't work 12, 14 hours a day every day. It was starting to really affect my blood pressure and my health.

[83] However, the Plaintiff submits that no documents were provided to support this contention, and although an adjournment was provided to enable the Defendant to gather medical evidence and call his physician as a witness, he declined to do so.

[84] The Plaintiff submits the fact that the Defendant began operating a fish processing plant was not disclosed in the Defendant's affidavit in support of his application, or his response affidavit to the Plaintiff's application, adversely affects his credibility and the suggestion that he was without the means to pay the outstanding judgment. Rather, the Defendant merely referred to himself as a "fish broker."

[85] The Defendant testified that in order to continue operating the processing plant he was required to maintain a federal licence, which would have required him to "invest a bunch of money that I did not have" into a building that he was only leasing. As a result, he gave the licence back and discontinued his lease in October 2012 (April 2, 2013 Transcript at p. 16-17).

[86] However, the Plaintiff submits that this evidence runs contrary to the Defendant's general ledgers, which indicates he undertook significant leasehold improvements and purchased substantial equipment. The Defendant agreed that these leasehold improvements totalled \$71,373.52, in addition to a five-ton reefer truck valued at \$13,000 and fish totes and containers totalling \$25,420. All of these purchases were made in cash, without financing

(January 22, 2015 Transcript at pp. 9-10). The Defendant stated the following in relation to his decision to pay cash for these improvements, as opposed to undertaking financing and making payments to the Plaintiff, during his testimony on January 22, 2015 (at p. 10):

Q: Okay. So you didn't pay Ms. Potratz anything, but you expanded your business by way of cash without any financing, correct?

A: Correct.

Q: Now, why would you do that? Why wouldn't you perhaps look to expand your business by way of a loan, make monthly payments, and use some of the cash available to you to satisfy your judgments.

A: Interest payments are more money coming out of the pie.

Q: Do you not think that interest is accruing on your various judgments?

A: Yes, I understand that.

[87] This exchange and others in a similar vein make it very clear that the Defendant continued over time to prioritize his business without regard for the amounts due to the Plaintiff pursuant to the Summary Trial Reasons and the Order, despite the fact that he clearly had liquid assets available to him. His testimony that he chose not to finance these business expenditures in order to avoid interest payments, despite the fact that interest was accruing on his judgment debts, also shows a conscious decision to subordinate his obligations to the Plaintiff.

[88] The Defendant also acknowledged that his profitability increased from 10 or 11% to 22% gross profits while he was operating the fish processing plant (April 2, 2013 Transcript at p. 16). Nonetheless, he decided to shut down the operation.

[89] Although the Defendant denied in cross-examination that he closed the plant in order to travel to the Philippines to spend time with his new wife and child, the Plaintiff submits that it is undeniable that the timing of the plant closure coincides with the start of the Defendant's relationship with the woman who became his new wife.

[90] The Defendant maintained that since October 2012, his business activity was limited to fish brokering. This resulted in a 10 to 11% profit. After payment of expenses, operating costs and the Defendant's wage, he stated he leaves between \$10,000 and \$20,000 in Flagship each year (April 2, 2013 Transcript at p. 18), none of which has been used towards payment of the outstanding judgment.

- [91] The Defendant also testified that, currently, he mostly buys salmon from Canada (April 2, 2013 Transcript p. 19), whereas the Plaintiff's counsel notes that the Defendant stated in his affidavit evidence that he required his passport to allow him to travel to California and Alaska to purchase fish roe. However, he failed to produce any travel documents confirming this. Rather, the evidence suggests that most of the Defendant's travels were to the Philippines to spend time with his new romantic partner and their child born in April 2013.

Spousal and child support payments

- [92] The Defendant also stated that he increased his payments to the Plaintiff from \$700 to \$950 per month due to the fact that FMEP was refusing to reinstate his passport. He stated that he needed his passport "for my employment, being both working for myself and working for Grand Hale". He then testified that he voluntarily increased his payments to \$1,200 thereafter (April 2, 2013 Transcript at p. 6).
- [93] However, the Plaintiff submits that the Defendant was not working at Grand Hale in January 2012, when he increased his payments to the Plaintiff. Rather, it was increased after the Plaintiff filed her contempt application in December 2011. When the Defendant was shown the FMEP Payment Record, he acknowledged that he only began paying \$1,200 per month in July 2012 after he was pressed by FMEP to increase payments if he wanted to keep his passport. Thus, this effort at compliance was not an entirely voluntary action on his part (April 2, 2013 Transcript at p. 31).

The Defendant's new family in Philippines

- [94] On cross-examination, the Plaintiff's counsel put to the Defendant that the real reason he sought to have his passport reinstated was to travel to the Philippines to see his 23-year-old wife, whom he married on January 13, 2014, as well as his daughter, born April 16, 2013, and his four-year-old step-son (January 22, 2015 Transcript at p. 49). The Defendant denied this. However, he conceded that the first time he disclosed his new family in the Philippines was in November 2013, a week prior to the scheduled resumption of the contempt proceedings. He also stated that he goes to the Philippines roughly once every three to four months, for periods ranging in length from three weeks to two months (January 22, 2015 Transcript at p. 46).
- [95] The Plaintiff submits it was only after the Defendant was forced to disclose his credit card statements, which showed multiple trips to the Philippines, that the Defendant reluctantly disclosed these salient facts.
- [96] The Defendant also gave evidence on his expenditures relating to his new family in the Philippines, including travel and other expenses. He acknowledged he continued to travel there every three or four months, and stayed a period of between a few weeks to two months. He stated average airfare was \$1,200 per trip. The Defendant was also paid \$500 per month for their rent, in addition to paying \$1,000 per month to his new wife for groceries,

cell phone, water, internet, electricity, medical and other items for his daughter and four year old step-son (January 22, 2015 Transcript at pp. 46-49).

Inadequate financial disclosure by the Defendant

[97] The Defendant was cross-examined at length in relation to his inadequate and late financial disclosure. The Plaintiff raised the following points:

- a. The Defendant failed to provide any documents to confirm his corporate earnings for Flagship for the year ending June 30, 2011 at the time his application was filed in August 29, 2011, despite the year-end occurring almost two months prior to filing his material;
- b. The Defendant stated he could not supply these records earlier due to administrative delays with his bookkeeper and accountant (April 2, 2013 Transcript at p. 29);
- c. When asked why he did not ask his bookkeeper to provide an interim statement, he maintained he would not do this because it would cost him money and he was "not going to produce a document that isn't completely accurate" (April 2, 2013 Transcript at p. 29);
- d. This evidence was contradicted in that he provided a partial trial balance sheet, income statement and general ledger for Flagship as at February 28, 2013 in court on April 2, 2013;
- e. The Defendant did not produce a financial statement for Flagship for the year ending June 30, 2011 until January 5, 2012, eight days before the original January 13, 2012 hearing date;
- f. The Defendant did not produce Flagship's general ledgers for year end 2010 or 2011, nor his personal and company bank account or credit card statements, despite the Plaintiff requesting these from the Defendant's counsel in December 2011. The Defendant stated he had never seen the letter, but later admitted to having reviewed the Plaintiff's December 2011 affidavit, to which the letter was attached (April 2, 2013 Transcript at p. 34);
- g. The Defendant acknowledged how important the general ledgers were in determining Flagship's accounts and expenses, how money moved through his company and how that would be necessary to determine his actual income (April 2, 2013 Transcript at p. 38). Nonetheless, the ledgers were not supplied until October 2012;
- h. Despite acknowledging the importance of the general ledgers, when the Defendant updated his 2012 Financial Statement, he again failed to provide general ledgers for Flagship (April 2, 2013 Transcript at p. 41); and
- i. The general ledger for Flagship for the year ending June 2012, as well as a partial general ledger for July 2012 to February 2013, was not produced until April 2, 2013 (April 2, 2013 Transcript at p. 46).

[98] The Court finds that these contempt proceedings have been plagued by the Defendant's late or non-disclosure of documents relevant to his financial affairs.

Shareholder's loans and dividends

- [99] The Defendant testified that he crystallized the shareholder's loan in the amount of \$200,000, causing Flagship to issue him a dividend which he claimed on his 2009 tax return. This resulted in the CRA assessing income tax owed by him at approximately \$80,000. He stated that he still owed \$75,537.58 on that debt (April 2, 2013 Transcript at p. 5).
- [100] The Plaintiff submits that no T5 was provided to substantiate the amount of the dividend allegedly paid or its source. Rather, there is reference to a \$211,500 dividend issued by Flagship to the Defendant on June 30, 2010, yet there was a \$264,375 dividend, grossed up for tax purposes, claimed by the Defendant on his 2009 income tax return (attached to his financial statement). The Defendant acknowledged that the dividend claimed on his 2010 income tax return had the effect of reducing his shareholder's loan account from \$191,507.65 to a credit of \$19,992.35 (April 2, 2013 Transcript at p. 60; January 22, 2015 Transcript at p. 24).
- [101] Accordingly, the Plaintiff submits that the Defendant claimed a larger tax liability than he needed to in order to retire the shareholder account. This allowed the Defendant to withdraw monies in the future to offset the credit to the shareholder loan account without having to issue a dividend or pay tax on those monies.
- [102] The Defendant accepted that after he claimed a dividend, Flagship was left in a credit position on his shareholder's loan of \$19,992.35. This credit was continuing until 2015, where Flagship showed a credit of \$24,808.10 on his shareholder's loan account (January 22, 2015 Transcript at p. 25).
- [103] This and other similar dealings show without any doubt that the Defendant was able to control his income via the shareholder's loan account with Flagship.

RRSPs

- [104] In terms of the RRSPs owed to the Plaintiff, the Defendant testified that shortly after the Summary Trial Reasons, he cashed out his RRSPs as opposed to rolling over half to the Plaintiff, as per the Order. He testified that he gambled with that money in order to generate winnings with which to pay the Plaintiff. The Defendant testified as to his state of mind and the reasoning behind his actions as follows (April 2, 2013 Transcript at p. 20):

I was basically in shock and totally at a loss how I was going to make this right. I realized that I couldn't get a loan, because my house already had judgments against it. I -- my credit rating has knocks against it. I was in a dire situation. I didn't know what to do. I was -- I was at a total loss. And based on health -- the way my health was, and I really believe I went into a depression over it, that it was a shock to my system, that I didn't know how to deal with it.

So at the time I have a girlfriend that was employed in the casinos as a dealer, and has spent most of her time on the high limit tables. And she would always come home and tell me about how people would come in and -- and be betting \$10,000, \$20,000 at a time, and lucking out with \$50,000, \$60,000, \$70,000. And I don't know what happened at the time. I guess I panicked, I didn't know what to do. So I thought that I could go and start gambling and make the money back that way, and at least try to make something to knock this debt down so I could deal with it.

[Emphasis added.]

[105] The Defendant's 2009 income tax return attached to his financial statement confirms that the Defendant cashed in \$88,591.41 of the RRSPs. The Defendant did not provide any medical evidence supporting his contention that he was sufficiently depressed so as his thought process and impulse control was impaired.

[106] It is crystal clear that the Defendant knew the Plaintiff had an interest in his RRSP funds when he chose to cash them in and gamble them away, if in fact, that is what he did with the funds.

The Defendant's income

[107] The Plaintiff submits that the combined effect of the Defendant crystalizing his shareholder's loan and cashing in his RRSP in 2009 resulted in a taxable income of \$430,966.41 for that year, with taxes owing of \$77,619.71.

[108] The Defendant was audited by the CRA as a result of this tax liability, who concluded that his books were accurate. Accordingly, they agreed to let him pay \$300 per month towards this liability. However, the Defendant's bookkeeper, Janice Fisher, noted that the CRA audit was a payroll audit, as opposed to an audit of the Flagship books to determine the accuracy of the Defendant's income and expense reporting (January 23, 2015 Transcript at p. 50).

[109] The Defendant also testified that he only drew \$5,000 per month as income from Flagship. He testified (at pp. 10-11 of the April 2, 2013 Transcript) that this amount was used to cover the following expenses:

I take an approximate draw of \$5,000 per month, and from that I pay my VISA bill, the mortgage, any of the household bills, and it basically balances off from what I take, so what I pay out is evidence in my bank statement that I don't have a -- a lot of extra money to pay anything with.

[110] In addition, the Defendant testified that in 2012 he also took a \$14,000 shareholder's loan from Flagship, resulting in a combined income of \$74,000 (April 2, 2013 Transcript at pp. 10-11).

[111] However, the Plaintiff submits that the Flagship ledgers suggest a different pattern of money paid out to the Defendant.

Flagship's financial viability

- [112] In terms of Flagship's fiscal viability, the general ledger indicates that as of May 30, 2012 it had \$446,282.29 in its bank account (Plaintiff's Document Book, Tab 7, p. 11).
- [113] The Plaintiff also submits that the Defendant's books show Flagship's liquidity, evidenced by the ability of Flagship to make high risk loans and other payments during the period where he was indebted to the Plaintiff.
- [114] For example, the company ledgers show that the on March 25, 2011, Flagship agreed to loan NCL Trading Company \$30,000 cash. The Defendant insisted that this was not a "loan", but rather "an advance for product that was coming to [his] company", despite what was stated in Flagship's books (January 22, 2015 Transcript at p. 12). Although a cheque was never issued by Flagship, there was a \$22,000 petty cash advance, along with NLC's subsequent repayment of \$22,000 cash, in addition to indirect reference to an \$8,000 personal loan advanced to NLC by the Defendant personally.
- [115] When questioned as to why, as the operating mind of the company, the Defendant was willing to take the risk to lend NCL funds on an unsecured basis, the Defendant replied, "Cause everything in the fish business is unsecured". The Plaintiff suggested that the Defendant accepted this risk because he could afford to lose the \$30,000, which was denied (January 22, 2015 Transcript at p. 14).
- [116] Further, Flagship also loaned MT Processor \$62,000 on February 1, 2011 (Loan agreement, Plaintiff's Document Book, Tab 12). This was a 25 day short-term loan, where MT Processor was to pay \$5,000 in interest. Cheque 3507 for \$32,000 was listed on the company bank account ledger (Chamber's Record, Tab 15, p. 52). There is also indirect reference to \$30,000 loaned by the Defendant personally, to which he received credit for \$30,000 on his shareholder's loan account ledger (Chambers Record, Tab 15, p. 60). The Defendant did not register a security interest against this loan. Although there are deposits from MT Processor that suggest Flagship paid the Defendant back, there is no reference to the \$5,000 interest payment.
- [117] On January 22, 2015, the Defendant also acknowledged in cross-examination that a \$9,041.48 loan receivable on the Flagship ledger from July 2011 to June 2012 under "Shiny Mag Usura" represented monies paid to his new wife in the Philippines that were expensed through Flagship (January 22, 2015 Transcript at pp. 21-22).
- [118] Clearly, the Defendant personally, and through Flagship, did not feel constrained from engaging in high risk transactions involving significant sums.
- [119] The monies withdrawn by the Defendant from Flagship and the status of the shareholder's loan account also suggest his financial viability. For example, between July 2010 and June 2011, the Defendant received cheques from Flagship totalling \$116,600 (Plaintiff's Document Book, Tab 3).

- [120] Between July 2011 and June 2012, cheques written by the Defendant recorded on Flagship's account ledger were received by him in the amount of \$342,700. When asked why he did not see fit to repay the Plaintiff despite receiving these monies, he stated "it wasn't my money" (January 22, 2015 Transcript at p. 23; Plaintiff's Document Book, Tabs 7 and 8).
- [121] The Defendant also issued himself two \$50,000 bank drafts on June 1, 2012. The cheques written during the same period show that the Defendant's shareholder loan account was in a surplus position until June 6, 2012, when another \$100,000 withdrawal resulted in a \$40,490.21 deficit.
- [122] The Defendant explained the two \$50,000 bank drafts as follows. He stated that he heard on a Wednesday that a fishery was going to open on a Saturday, and he needed cash to buy fish. Given that there was a 48 hour wait at the bank to secure this amount, he borrowed money from friends via the bank drafts made out personally to the Defendant himself. He stated that when he was done purchasing fish, he repaid his friends and re-deposited the monies into his company account (January 22, 2015 Transcript at pp. 26-27).
- [123] The Plaintiff submits that this explanation is illogical, as a bank draft written in the Defendant's name would not properly secure a debt obligation to a third party, as the third party would be unable to do anything with the bank draft in the event the Defendant failed to pay back the monies owed.
- [124] Additionally, this explanation is inconsistent when looking at the company ledgers and Flagship's general accounting practices. Janice Fisher, the Defendant's bookkeeper, testified that cash was customarily used to buy fish from fishermen, and would be recorded in the petty cash journal, as opposed to the shareholder's loan account. This would be done on the basis of "fish slips" issued by various fishermen. These slips indicated the name of the fisherman that the fish were purchased from, the name of the vessel, the CFB number of the boat and the type of fish. The total amounts of petty cash expended for these purchases were then allocated to the appropriate ledger categories (January 23, 2015 Transcript at pp. 25-33).
- [125] The Plaintiff submits that contrary to the practice described by Ms. Fisher, the bank drafts issued to the Defendant were recorded in the Defendant's shareholder loan account on June 1, 2012 at a time when Flagship owed the Defendant money. While \$100,000 in cash was also withdrawn in close proximity to the two bank drafts, on June 6, 2012, this withdrawal was recorded as a debt to his shareholder's loan account, without any reference to a cash withdrawal on the petty cash ledger. Although the Defendant maintained that these bank drafts were cancelled and the cash returned after the cut-off date for the company year end, the Defendant was conveniently only required to produce his ledgers up to June 30, 2012. Nonetheless, in the 30 days prior to the June 2012 year end cut-off, neither the two \$50,000 bank drafts nor the \$100,000 cash withdrawal was returned or adjusted for differently in Flagship's accounts.

[126] The Defendant produced a balance sheet for the June 30, 2013 year end (Exhibit 9). The Plaintiff submits that given that the shareholder loan balance changed from -\$10,960 (Flagship owed the Defendant these amount) as of July 1, 2012 to \$70,056 (the Defendant owed Flagship this amount) as at June 30, 2012, the Court should infer that the \$200,000 in bank drafts and cash withdrawals on June 1 and 6, 2012, were never repaid to the company. If they had been, then the shareholder's loan account would most likely have been in a surplus position as opposed to a deficit position.

[127] Despite the fact that Flagship's bank account contained as much as \$446,282.20 on deposit as of May 30, 2012, the Defendant resisted any suggestion that he could have taken out a loan, using Flagship's liquidity and bank account as security, to pay out monies owed to the Plaintiff (January 22, 2015 Transcript at pp. 28-30). The Defendant testified as follows:

Q: You have \$446,000 in your operating account. Are you telling me that you cannot enter into any arrangement with a bank, with that kind of money flowing through your bank account, to ensure that you were able to satisfy your judgment amounts?

A: I'd love -- I would love to do that. Release the liens on my house and we can clean this matter up a little bit. But you've got liens on my house, you've got my credit rating destroyed. With all your reporting requirements, you have my hands tied behind my back. This is your fault, not mine.

Q: You've been making the payments towards the arrears of spousal support, not towards the property debt, and not towards the costs, unless I'm mistaken Mr. Potratz.

A: I send money to FMEP

Q: All right. Let me clarify. In addition to the money that you send to FMEP, have you paid any other amounts to Ms. Potratz directly?

A: Directly? No.

Personal and lifestyle benefits gained by the Defendant through Flagship

[128] The Defendant also received various financial benefits through expensing his personal and lifestyle expenses through Flagship, as evidenced by the company ledgers between July 2011 and June 2012 (Plaintiff's Document Book, Tab 8; January 22, 2015 Transcript at p. 32-45). For example, on February 15, 2012, the Defendant received a reimbursement for \$3,223.40 in travel and hotel expenses, as well as almost \$1,000 in meals and fuel, which pertain to the Defendant's trip to the Philippines between January 30 and February 8, 2012 (Plaintiff's Document Book, Tab 9, pp. 110, 111, 113, 116 and 199).

[129] The Defendant agreed that there was approximately \$64,039.22 in credit card expenses that were credited to him as against the Flagship shareholder's loan agreement. These monies were, in turn, offset against monies owing to the Defendant on his shareholder's loan account (January 22, 2015 Transcript at p. 33-34).

[130] The various expenses shown on the Defendant's credit card statements show personal expenditures written off through Flagship, such as extensive travel, paying off insurance claims to prevent insurance premiums from increasing, repairs for his 2005 Corvette, and the purchase of a F150 Ford Truck after trading in the Corvette. These expenses totalled \$40,159.98 broken down as follows:

- Total Corvette Repair Expenses - \$4,698.15
- Total Trips to Philippines Expenses - \$6,770.93
- Total ICBC Payouts to avoid premium increase - \$3,272.50
- 2010 Ford F150 Truck Purchase after trade in of 2005 Corvette - \$25,418.40

[131] The Defendant also wrote off other expenses that blurred the lines between personal and business expenditures, such as meals, fuel, cell phone and internet charges. His credit card statements indicate that the full amount of these expenses were allocated to Flagship's general ledger account, and Ms. Fisher acknowledged that she would not question any of the receipts the Defendant provided to her in terms of what was a personal expense and what was for business. Further, the Defendant acknowledged that he used the cell phone and internet for both personal and business use (January 22, 2015 Transcript at pp. 37-38; January 23, 2015 Transcript at pp. 51-54).

Ms. Potratz's evidence

[132] In the Plaintiff's first affidavit, sworn December 19, 2011, she maintained that the Defendant had cashed in his RRSPs, which were supposed to be rolled over to her, and that he had not paid her any amount towards the costs award (at para. 9). She also noted how she owed a considerable amount of money due to the protracted nature of the proceedings leading up to the Summary Trial Reasons, causing her to repeatedly re-finance her home. Ultimately, she had to list her home for sale, as she could no longer afford it (December 19, 2011 Affidavit at para. 11).

[133] The Plaintiff also noted her health difficulties relating to stress, and that she had been referred to a cardiologist and prescribed medication to reduce her rapid heartbeat (December 19, 2011 Affidavit at para. 12).

[134] In the Plaintiff's affidavit sworn March 23, 2013, she maintained that she had sold her home, but had no equity left after paying out the mortgage and other debts that she had incurred during the previous years.

[135] The Plaintiff also deposed how her income decreased in 2014 due to personal issues that caused her to take time off work (January 21, 2015 Affidavit at para. 15).

- [136] The Plaintiff also noted that she sold her previous home due to being unable to afford the increased mortgage payments. She states that she increased the mortgages in order to allow her to pay her bills and legal fees while the Defendant was not paying support. She now lives in a 600 square foot coach home that she rents (January 21, 2015 Affidavit at para. 17).
- [137] The Plaintiff bought a Mazda Miata after she traded in her prior vehicle due to the fact that it was costing too much to repair. She states that she had to borrow money to purchase the vehicle at a high interest rate (January 21, 2015 Affidavit at para. 18).
- [138] The Plaintiff also deposed that the Defendant has been threatening bankruptcy since the Summary Trial Reasons were released in an effort to avoid the judgment. She says that he has also told her he could move to the Philippines and continue working as a fish broker (January 21, 2015 Affidavit at para. 13).
- [139] The Plaintiff stated that since she and the Defendant separated, she has done her best to get back on her feet financially. However, there have been significant hurdles; the most significant of which is the Defendant's failure to comply with the Order and pay her what she is owed (January 21, 2015 Affidavit at para. 14).
- [140] While the Court recognizes that it is the Defendant who is before the court regarding an alleged contempt, there was no objection taken to the Court receiving the Plaintiff's evidence by affidavit, and in particular her January 21, 2015 Affidavit. There was also no application to cross-examine the Plaintiff with regards to this evidence.

Application of the Charter

- [141] The Defendant's counsel has alleged two Charter violations in relation to these contempt proceedings. Firstly, he submits that there has been unreasonable delay in violation of s. 11(b) of the Charter. Secondly, he alleges a violation of s. 11(c), which protects the Defendant's right to be protected against self-incrimination. I will deal with each alleged violation in turn.

Does the Charter apply?

- [142] Both s. 11(b) and s. 11(c) of the Charter protect the rights of an individual who has been "charged with an offence". The relevant portions of s. 11 are as follows:

Any person charged with an offence has the right

- (b) to be tried within a reasonable time;
- (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

- [143] Thus, the first inquiry as to whether s. 11 of the Charter applies to civil contempt proceedings is to determine whether the Defendant has been "charged with an offence" in order to attract the protection of these sub-sections. In determining this issue I have had regard to additional authorities not provided to the Court by counsel for the parties.
- [144] Section 11 of the Charter is clearly restricted to both criminal and penal matters. Specifically, these rights protect those who are prosecuted by the state for public offences involving punitive sanctions, including quasi-criminal offences: *R v. Wigglesworth*, [1987] 2 S.C.R. 541 [Wigglesworth] at p. 554.
- [145] Regarding the test to determine whether a proceeding falls under the umbrella of a "criminal or penal matter" so as to attract the protection of s. 11, courts may consider whether (a) the proceeding is by its very nature a criminal proceeding; or (b) a conviction in respect of the offence may lead to a true penal consequence: *Wigglesworth* at p. 559.
- [146] Wilson J. notes that the purpose of s. 11 is to provide procedural safeguards in proceedings that may attract penal consequences, even if they are not "criminal" in the strict sense. The learned justice further comments on the type of matter that could be considered "penal" in nature at pp. 560-561:

In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity

This is not to say that if a person is charged with a private, domestic or disciplinary matter which is primarily intended to maintain discipline, integrity or to regulate conduct within a limited private sphere of activity, he or she can never possess the rights guaranteed under s. 11. Some of these matters may well fall within s. 11, not because they are the classic kind of matters intended to fall within the section, but because they involve the imposition of true penal consequences. In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity

[Emphasis added.]

- [147] In terms of s. 11(c), there is clear authority stating that the rights protected under this section apply to an alleged contemnor in civil contempt proceedings. In *Denman Island Trust v. 4064 Investment*, 2000 BCSC 1645 [Denman Island], at para. 48, the court clearly concludes in relation to civil contempt proceedings that "[g]iven the possible penal sanctions, the Defendant has the right to invoke the protection provided to it under s. 11(c) of the Charter."

- [148] Accordingly, given that the Defendant in the present case is facing potential incarceration, s. 11(c) clearly has application in these civil contempt proceedings.
- [149] However, in terms of s. 11(b), I can find no authority where the accused's right to be tried within a reasonable time has been applied in the context of civil contempt proceedings.
- [150] In *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, the majority of the Court stated that the right to be tried within a reasonable time under s. 11(b) does not apply to administrative proceedings, and should only be applied in the criminal context. The Court noted that there are fundamental differences between criminal and human rights' proceedings but, more importantly, s. 11(b) is restricted to a pending criminal case.
- [151] Both the majority (five justices) and the minority (four justices) in *Blencoe* did consider the impact of delay on the right to a fair hearing, albeit in the context of administrative proceedings. The majority noted that remedies are available to deal with state-caused delay in human rights' proceedings. However, delay, without more, will not warrant a stay of proceedings as an abuse of process, as there must be proof of significant prejudice.
- [152] Clearly, the present civil contempt proceeding, in which the Defendant is facing the possibility of imprisonment, differs greatly in its nature and potential consequences when compared to criminal or administrative proceedings. Without any additional case authority, I am of the view that it is likely that civil contempt proceedings are the type of quasi-criminal proceedings contemplated by *Wigglesworth* to fall under s. 11, as they involve the potential imposition of "true penal consequences". Accordingly, I will proceed with a s. 11(b) analysis regarding delay in the present case notwithstanding the lack of clear authority on this point.

Section 11(b)

- [153] Section 11(b) of the Charter states that any person charged with an offence has the right to be tried within a reasonable time. A total of 39 months elapsed from the commencement of this contempt proceeding to its conclusion on April 2, 2015.

The Law

- [154] Section 11(b) of the Charter serves to protect an individual's right to security of the person, right to liberty, and the right to a fair trial. The right to security of the person is protected under s. 11(b) by seeking to minimize anxiety and stigma that an individual can experience by being exposed to penal proceedings; the right to liberty relates to minimizing restraints on liberty, such as incarceration and strict bail conditions; and the right to a fair trial is protected by attempting to ensure proceedings take place when the evidence is available and fresh: *R v. Morin*, [1992] 1 S.C.R. 771 [*Morin*] at p. 786.

[155] Section 11(b) also protects secondary societal interests. Society as a whole has an interest in seeing that its citizens are treated in a humane and fair way, and prompt trials serve to instill confidence in the public. At the same time, society has an interest in ensuring that those who transgress the law are brought to trial and dealt with accordingly: Morin at pp. 786-787.

[156] In Morin, Sopinka J. outlined the factors to be considered in analyzing whether a delay has reached the threshold of unreasonableness under s. 11(b). The Court notes that this is not a mathematical or administrative formula, but rather a "judicial determination balancing the interests in which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay" (at p. 787). Accordingly, courts must balance the following factors:

1. the length of the delay;
2. waiver of time periods;
3. the reasons for the delay, including
 - (a) inherent time requirements of the case,
 - (b) actions of the accused,
 - (c) actions of the Crown,
 - (d) limits on institutional resources, and
 - (e) other reasons for delay; and
4. prejudice to the accused.

[157] In terms of the length of delay, a trial judge presiding over a criminal case is to measure the length of delay from the swearing of the information to when the trial was set to conclude.

[158] When the accused experiences 14 to 18 months of institutional delay, courts may infer prejudice in the absence of actual prejudice: Morin at p. 801, R v. Williamson, 2014 ONCA 598 [Williamson].

[159] In terms of prejudice, Lamer J. stated the following in Mills v. The Queen, [1986] 1 S.C.R. 863 in dissent at pp. 919-20:

security of the person is not restricted to physical integrity; rather, it encompasses protection against "overlong subjection to the vexations and vicissitudes of a pending criminal accusation" These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to outcome and sanction.

Position of the Defendant

- [160] The Defendant asserts that the delay has substantially been of an institutional nature due to the lack of available court time before this judge.
- [161] Specifically, the first adjournment may be partially attributable to the delay inherent in the Defendant asserting his right to mount a defence to a case with this history and level of complexity, and partially attributable to institutional delay in terms of the court providing a three day-hearing date before this judge. These factors combined resulted in a nine month delay in setting a three-day hearing for October 3-5, 2012.
- [162] The Defendant further asserts that the adjournment in October 2012 is attributable to further institutional delay, as the Court had other commitments at this time. This led to a further five months' delay to April 2013. (The Court notes that this period actually resulted in six months' delay, from October 3, 2012, to April 2, 2013.)
- [163] The Defendant submits that the delay that resulted from the adjournment from April 2013 to November 21, 2013 is attributable partially to the Defendant and partially to institutional delay. He asserts that Plaintiff's counsel seriously under-estimated the time required to cross-examine him.
- [164] The Defendant further argues that during the continuation of the proceedings on November 21 and 22, 2013, the Defendant was prejudiced by the production of documents at a late stage, without the benefit of counsel to review the same. Proceedings were adjourned, in part to allow the Defendant to review the documents, to January 21-23, 2015, resulting in 14 months' institutional delay.
- [165] In terms of prejudice, the Defendant submits that he has been facing the potential for incarceration with "a cloud over his head" for a period of time far in excess of what is reasonable, such that his rights as protected under s. 11(b) have been violated. He suggests that the Court can take judicial notice of the stress and anxiety he has experienced, in addition to his history of health issues. In addition, the Defendant has faced various health issues, such as kidney issues, high blood pressure and a heart attack while visiting the Philippines, all of which served to amplify his stress and anxiety.
- [166] As addressed by the Court above, the Defendant also argues that the prejudice suffered by him was amplified during this period due to the fact that he was precluded from speaking to his counsel for 19 months.

Position of the Plaintiff

- [167] The Plaintiff submits that the Defendant is responsible for significant delays in relation to these proceedings.
- [168] In January 13, 2012, he sought an adjournment to call witnesses, yet never produced these witnesses.

- [169] As noted above, the Defendant engaged in multiple delays relating to document production for documents that were requested at the outset of the application. During the April 2, 2013 hearing, the Defendant produced selective disclosure some of Flagship's general ledgers that he had not previously provided. The late tendering of these documents added to the time associated with the Defendant's cross-examination that could not be foreseen when the hearing date was scheduled. This in part led to an adjournment in order to allow the Defendant to provide further document disclosure.
- [170] The Plaintiff submits that additional court time was taken up during the time set on the November 21 and 22, 2013 hearing dates due to the Defendant's application for a mistrial under s. 11(c) of the Charter, which was made without any notice. This application was dismissed. (The Court notes that no proceedings regarding this case took place on November 22, 2013). The Defendant also sought to convert the hearing into a settlement conference, which was resisted. The Plaintiff submits that these antics were the result of posturing by the Defendant, who was likely motivated to bring these applications in order to regroup and discuss options with his counsel (Oral ruling on contempt application November 21, 2013). The hearing was also adjourned on November 21, 2013 in part due to the Defendant's health difficulties, as he had suffered a very recent heart attack while in the Philippines.
- [171] The Plaintiff submits that the Defendant has not been prejudiced by the contempt application in the same way as an accused facing criminal charges. He has been free to live his life, work and travel without impediment. After working at Grand Hale as an employee, he has resumed a more lucrative position at Flagship and expanded the company. For example, he opened and operated the fish-processing plant as part of his business. He travels three to four months a year to the Philippines to be with his new wife. Further, there is no similar stigma related to these proceedings, as their existence is largely unknown to the public except where the parties have disclosed them to third parties. Any party involved in litigation experiences some associated stress and anxiety, but the Plaintiff submits that that experienced by the Defendant does not reach the level contemplated under s. 11(b) of the Charter.

Analysis and findings

- [172] Given that the length of delay is traditionally measured from the date of the swearing of the information, likewise the period of delay in a civil contempt proceeding should likely commence on the date upon which the initial notice of the Plaintiff's contempt application was served upon the Defendant.
- [173] In terms of waiver, it does not appear that the Defendant waived any of the periods of delay.
- [174] I find that the periods of delay in the present case are to be characterized as follows:

- From December 28, 2011, when the Defendant was served with the notice of application in this matter, to January 13, 2012, when the contempt application was adjourned to the trial list, resulted in .5 months of inherent delay;
- From January 13, 2012, when the proceedings were adjourned, to October 3, 2012, when the proceedings were scheduled for three days given the Defendant wanting to mount a full defence, resulted in approximately eight months of inherent delay;
- From October 3, 2012 to April 2, 2013, when the original trial date was adjourned due to the seized judge being unavailable, resulted in six months of institutional delay;
- From April 2, 2013, when the Plaintiff was unable to complete her cross-examination of the Defendant and he was ordered to produce documents, to November 21 and 22, 2013, when the trial was rescheduled, resulted in seven and a half months of delay attributable the actions of the Defendant in terms of referring to undisclosed documents in his testimony on April 2, 2013, ostensibly to assist him in answering the question posed to him in cross-examination, which in turn, impacted on the Plaintiff's counsel's time estimates;
- From November 21, 2013, when the Defendant applied to exclude a book of documents (compiled by the Plaintiff's counsel from documents he had disclosed) due to late delivery by the Plaintiff, advised of his very recent heart attack and the potential problems he may have in testifying, and applied for a mistrial based on s. 11(c) of the Charter, which was dismissed, to January 21, 2015, when the contempt proceedings were rescheduled, is properly described as due to both institutional delay and delay attributable to the parties. This resulted in a further 14 months of delay. An apportionment of this time period is necessary. I attribute seven months of it to institutional delay in terms of the Court's availability. I attribute three and a half months to the Defendant, based on his applications for mistrial and to convert the hearing into a settlement conference, and his precarious medical condition that likely would have made proceeding with his cross-examination too risky in terms of his recovery. I also attribute three and a half months' delay to the Plaintiff due to her counsel's failure to serve upon the Defendant in a timely way the book of documents she selected for further cross-examination.
- From January 23, 2015, when cross-examination of the Defendant and direct and cross-examination of his bookkeeper concluded, to April 2, 2015, when written and oral submissions were produced and the hearing concluded, a delay of approximately two months inherent to the proceedings.

[175] Accordingly, the delay could be divided into the following categories:

- Inherent delay: approximately 11.5 months;
- Actions of the Plaintiff: 3.5 months of delay;
- Actions of the Defendant: 11 months of delay;
- Institutional delay: 13 months.

- [176] Therefore, the total delay is 39 months. Institutional delay constitutes 13 months. If one were to attribute several additional months of delay to institutional delay (for example, a portion of the initial nine months' delay in setting the matter for hearing, or a greater portion of the 14 months from November 21, 2013 to January 21, 2015, than the seven months already included), then the amount of institutional delay would increase slightly and reach the amount of delay (14 to 18 months) from which the Court may infer prejudice, based on the authorities of Morin and Williamson. However, I have found that institutional delay in the present proceedings have not met this threshold. I decline to infer that the Defendant has experienced prejudice from delay in the absence of evidence of actual prejudice.
- [177] Furthermore, I note that the Defendant was also responsible for a portion of the delay (attributed at three and a half months) arising from the 14 month adjournment from November 21, 2013 to January 21, 2015, which gave rise to an attribution of seven months' delay to institutional delay. Had he made timely financial disclosure, as was required, it is likely that these proceedings would have concluded within a reasonable time after April 2, 2013. Also, the Defendant initially advised that he planned to call witnesses that he then did not call, necessitating an initial three day hearing date of October 3-5, 2012 to be set on January 13, 2012, which increased the inherent delay to some degree. In total, the Defendant himself is responsible for an additional 11 months of delay.
- [178] Accordingly, surveying the history of these proceedings and the history of the summary trial proceedings, one may reasonably infer that the Defendant had no wish to expedite these proceedings given the amount of money that he stood to pay to the Plaintiff by virtue of a judgment that he disagreed with. Having initially decided to appeal the judgment, he then did not proceed with an appeal.
- [179] One also may reasonably infer that a party operating a successful business with a personal judgment owing to a former spouse might use the passage of time, in the present context referred to as "delay", to put his financial house in order and come up with a graduated payment plan to avoid the unpleasantness and cost associated with the present proceedings. That has not occurred.
- [180] In terms of actual prejudice, I am not satisfied that the Defendant has provided sufficient evidence to establish he has experienced prejudice to his security of the person throughout the 39 months of delay. This was not a criminal matter that could garner a degree of stigma, or a matter in which the community at large was aware of. Although I am sure the Defendant did experience stress in relation to these proceedings, such is the nature of most litigation, as he has no doubt experienced from other aspects of his personal and business life. Thus, there is no evidence before me that the length of these proceedings resulted in anything other than the normal stress and anxiety that a litigant faces.

[181] In fact, when the Court considers the Defendant's overall behaviour in this matter, it is reasonable to conclude that in conducting himself as he has over the years since the filing of the Summary Trial Reasons in December 1, 2009 he has contributed considerably to his own stress and anxiety. Despite reference to a depression and other medical concerns, the Defendant has not produced any independent evidence of actual prejudice to himself attributable to these contempt proceedings from their commencement in late December 2011, to their conclusion in 2015.

[182] For these reasons, I decline to find that the Defendant's right to be tried within a reasonable time under s. 11(b) of the Charter has been violated.

Section 11(c)

[183] In the present contempt proceedings, the Defendant submits that he has been compelled to testify against himself contrary to s. 11(c) of the Charter.

[184] As discussed above, the specifics of this allegation are that on November 21, 2013, the Plaintiff's counsel tendered two bound volumes of documents to be used in her continuing cross-examination of the Defendant. They were compilations of documents disclosed by the Defendant since the April 2, 2013 hearing. The Defendant submitted that these binders were provided without proper notice (although the Defendant himself was the source of the documents), and applied to exclude them due to late delivery. His counsel applied for a mistrial on the basis that the Defendant was being compelled to testify against himself contrary to s. 11(c) of the Charter, which was denied.

[185] The Defendant submits that orders to produce documents should have been made prior to the commencement of trial and before the Defendant elected to give evidence. The Defendant also submits in final submissions that the order for production of documents, made on April 2, 2013, violated his rights under s. 11(c).

[186] The Plaintiff responded by noting that the Defendant had elected to take the stand and give viva voce evidence, at which time he sought to introduce further financial and business records. This gave rise to the right of cross-examination, and within this examination the Defendant made reference to various exculpatory documents that could explain the difficulties that the records he produced posed. Ms. Dreyer made the following submissions in this regard (November 21, 2013 Transcript p. 27):

Ms. Dreyer: Now, as it turned out, Mr. Potratz elected not to call witnesses, and when we returned before the court, and he proceeded with his evidence, he took the stand. That was an election made by counsel, by Mr. Potratz, in taking the stand, giving evidence, attempting at that juncture to introduce documentation, some of which was admitted, some of it which was not, which gave right to the right to cross-examination

Now, within the context of cross-examination, it became apparent that Mr. Potratz may do well to -- it may well serve Mr. Potratz to gather up and produce documentation so that he could explain difficulties associated with his financial records, difficulties emanating from the documents that he and his counsel elected to put forth in the back and forth materials that they filed, and it's within that context that while under cross-examination, I suppose Mr. Potratz wasn't able to speak with his counsel, but certainly the documentation that Her Ladyship ordered be produced within the context of that matter may assist Mr. Potratz.

[T]he other troubling aspect that I have with my friend's submissions is that the the claimant is somehow now responsible for documenting or disclosing back to the respondent the very documents that the respondent has disclosed. That obligation lies with Mr. Potratz, with all due respect.

[187] The Plaintiff also submits that of the 15 documents included in the two document books, tendered as Exhibit 6 and 7, the documents at Tab 1 and 2 had previously been provided by the Defendant. Only a portion of the Defendant's documents at Tab 6 and 7 were new documents that his counsel may have not reviewed, comprised of the trial balance and ledger of Flagship for the complete business year spanning July 1, 2012 to June 30, 2013. Furthermore, the bulk of these documents referred to during the Defendant's cross-examination were Flagship's general ledgers, which were the Defendant's own documents.

[188] On November 21, 2013, after considering both parties' submissions, the Court declined to declare a mistrial and dismissed the application to exclude the Plaintiff's document books from evidence. The Defendant was not cross-examined on these documents without the benefit of consulting with his counsel. The hearing was adjourned to allow the Defendant sufficient time to review the document books, and the continuation was scheduled for and proceeded on January 21, 22 and 23, 2015 (Oral Ruling on Contempt Application November 21, 2013 at para. 7).

[189] In closing submissions on April 3, 2015, the Defendant again asserted that his rights as protected under s. 11(c) of the Charter had been violated due to the order for production pronounced on April 2, 2013. The Defendant submits that the order that he produce financial records after he made an election to give evidence and was in cross-examination violated his rights under s. 11(c), and was prejudicial to his being able to properly mount a defence to the contempt proceeding. He asserts that he had a right to receive all of the Plaintiff's materials being relied upon prior to making his election to give viva voce evidence.

[190] There is an element of res judicata to the Defendant's continuing assertion that his s. 11(c) Charter rights were violated in these proceedings, given that this allegation was raised and dismissed in the context of the unsuccessful mistrial application on November 21, 2013. Neither at that time nor since has the Court received any submissions with regards to notice and whether the Defendant was obliged to provide the same to the Plaintiff or the Court in terms of an alleged Charter violation. Nor was any authority provided in support

of the Court granting a mistrial based on the alleged Charter violation.

[191] However, despite the element of res judicata inherent in the Defendant's claim that his s. 11(c) rights were violated by virtue of the April 2, 2013 order and the document production that ensued, I appreciate that he advances that claim in two different contexts, one in relation to the mistrial application, which has been dealt with, and one in relation to the context of the contempt proceedings as a whole. I will now address the latter.

The Law

[192] In *Denman Island, Sinclair Prowse J.* discusses whether the Charter could apply to the civil contempt proceedings given that one or more of the defendant directors or officers could be imprisoned if found in contempt. She concluded at para. 48:

[48] Given the possible penal sanctions, the Defendant has the right to invoke the protection provided to it under s.11(c) of the Charter.

[50] As was set out in both *Videotron Ltee* and *Arnold*, a party has the right to the protection of s.11(c) of the Charter in civil proceedings if that party is facing possible penal sanctions. Section 11(c) Charter protection extends to a party in a civil proceeding because of the nature of that proceeding. Therefore, it follows that that protection would exist until that proceeding is finished. It would not lapse once the applicant had presented its case.

[52] Because the Defendant is facing penal sanctions in this case, it has the right to the protection of s.11(c) of the Charter. That is, all civil procedures that compel it to testify against itself in this contempt proceeding are suspended for purposes of the proceeding.

[193] Madam Justice Sinclair Prowse in *Denman Island* ultimately concluded, however, that the requirement under the Rules that a defendant make his or her election as to whether to call evidence was not tantamount to compelling a person to testify against him or herself:

[54] For the reasons which follow, I am satisfied that the requirement to make an election prior to the hearing does not contravene the Defendant's rights as protected by s.11(c) of the Charter.

[55] That is, the requirement to make an election does not compel the Defendant to testify against itself. Rather, the election pertains to the Defendant's opportunity to present evidence on its own behalf if it chooses to do so.

[56] For this reason, the requirement to make an election does not contravene the Defendant's rights under s.11(c) of the Charter.

[57] Further, because (as discussed in the preceding section) the Defendant is not required to make this election until after it has received all of the evidence on which the Plaintiff intends to rely in the contempt hearing (which pursuant to Rule 56(7) and (8) includes a description of the conduct alleged to be in contempt), the timing of the election is not contrary to the principles of fundamental justice. The Defendant is not required to make the election until after it knows specifically the case to be met.

Analysis and findings

[194] In the present case, there is no suggestion that the Defendant had new materials introduced into evidence other than those he sought to have placed before the Court to potentially assist him answer questions in cross-examination. He knew the nature of the alleged contempt and the facts upon which it rested from the outset based on materials served upon him and his counsel, and from his involvement in the family law proceedings that give rise to his unmet obligations.

[195] It is illogical for the Defendant to assert a violation of his s. 11(c) rights when the order to which he now objects facilitated production of the material that was comprised of documents he consented to disclose and to which he referred to as potentially of assistance to him in answering the questions being put to him in cross-examination. Neither he nor his counsel voiced an objection at the time. Furthermore, the Defendant confirmed on the record that he would cooperate fully in making the documents available to the Plaintiff's counsel.

[196] Rather, the precise reason that an order for document production was pronounced on April 2, 2013 was in order to assist the Defendant in mounting a defence to the claims against him. Had the Court declined to permit him to disclose and refer to these documents in his defence, a Charter violation of a different sort would have likely been alleged: that he had been denied a fair hearing contrary to s. 11(d) of the Charter; or that he had been prevented from making full answer and defence as protected by s. 7 of the Charter.

[197] Further, in terms of the Defendant not receiving sufficient notice or disclosure of the materials, the hearing was adjourned until January 22, 2015, in part, for that very reason, providing ample time for the Defendant's counsel to conduct a thorough review.

[198] For these reasons I decline to find that a violation of the Defendant's s. 11(c) rights occurred.

Notice to the Defendant of the alleged contempt

Notice in the present case

[199] On December 28, 2011 at 8 pm, the Defendant was personally served with the Plaintiff's Original Notice, filed on December 20, 2011. The Original Notice reads as follows:

1. Pursuant to Rule 21-7 of the Supreme Court Family Rules, an order that the Respondent be found in contempt of court for failing to pay spousal and child maintenance as ordered pursuant to the Order made by Madam Justice Arnold-Bailey on Tuesday, December 1, 2009 and clarified on Tuesday, September 14, 2010 and Wednesday, November 24, 2010;
2. Pursuant to Rule 21-7 of the Supreme Court Family Rules, an order that the Respondent pay the sum of \$103,568.00 for her interest in the family assets as ordered pursuant to the Order made by Madam Justice Arnold-Bailey on Tuesday, December 1, 2009 and clarified on Tuesday, September 14, 2010 and Wednesday, November 24, 2010;
3. Pursuant to Rule 21-7 of the Supreme Court Family Rules, an order that the Respondent be found in contempt of court for failing to pay costs as ordered and determined by Registrar Sainty in the amount of \$109,394.00 plus interest accruing thereon;
4. Pursuant to Rule 21-7 of the Supreme Court Family Rules, an order that the Respondent be found in contempt for cashing out RRSPs as opposed to rolling over RRSPs as ordered by Madam Justice Arnold-Bailey on Tuesday, December 1, 2009 and clarified on Tuesday, September 14, 2010 and Wednesday, November 24, 2010;
5. Pursuant to Rule 21-7 of the Supreme Court Family Rules, an order that the Plaintiff be imprisoned or fined or both on account of his contempt;
6. Costs, and
7. Such further and other relief as to this court seems appropriate.

[200] On January 12, 2012, the Plaintiff's counsel served the Defendant's counsel, Mr. Goodwin, by fax with the Amended Notice, filed on January 11, 2012. The amendment inserted the phrase "be found in contempt for failing to" pay the sum of \$103,568.00 into Paragraph 2 of the Original Notice.

[201] The Court notes that the Original Notice, the Amended Notice and the Defendant's Response refer to affidavits in support that reference the parties' current personal circumstances, including health and financial matters. As time passed, both parties filed additional affidavits. For example, the Defendant swore a financial statement dated September 7, 2012 and the Plaintiff swore a financial statement dated March 24, 2013.

[202] More than three years later, in March 2015, the Defendant provided the Plaintiff with written submissions taking issue with the fact that the Defendant had not been personally served with the Amended Notice, which included in Paragraph 2 that the Plaintiff sought the Defendant "be found in contempt for failing" to pay the judgment amount. As a result, on March 13, 2015, the Plaintiff's counsel arranged for personal service of the Defendant with the Amended Notice.

- [203] The Defendant submits that all the materials on which the Plaintiff was relying upon for the contempt proceedings ought to have been served upon him at the time he was served with the Original Notice, affording him the opportunity to make the election as to provide evidence in response. Accordingly, he submits that the additional ground of contempt for failing to pay the money judgment as referenced in Paragraph 2 of the Amended Notice does not comply with the rules of strictissimi juris under Rule 21-7(11).
- [204] The Plaintiff noted that prior to receiving the Defendant's written submissions raising this point, no issue was ever taken by the Defendant in regards to the non-service of the Amended Notice upon him personally (as opposed to his counsel). The Defendant had over 39 months to raise this objection while the contempt proceedings have been before the Court. By remaining silent for over three years while these proceedings developed, the Plaintiff submits that the Defendant is trying to capitalize on a minor technical deficiency that he condoned by his silence.
- [205] The Plaintiff submits that regardless of the technical deficiency in regards to the Amended Notice, the Original Notice was sufficiently clear insofar as a fulsome reading would indicate to the Defendant that the Plaintiff sought to find him in contempt for non-payment of the judgment amounts. Paragraph 2 of the Original Notice cited the contempt provision of the Rules, and the usual contempt remedies were referenced. The Plaintiff submits that the Defendant could not possibly have failed to appreciate what was involved in his alleged contempt.
- [206] Additionally, the Plaintiff submits that the Defendant has been fully examined by both his own counsel and the Plaintiff's counsel as to the amounts he owed the Plaintiff pursuant to the Summary Trial Reasons and ensuing Order, and he has had full opportunity to respond to the allegations made against him.
- [207] For example, the Defendant acknowledged on cross-examination that the Plaintiff had brought her application to find him in contempt in relation to the judgment for family assets. This line of questioning (April 2, 2013 Transcript at p. 30), which pre-dates the Defendant's objection to the manner of service of the Amended Notice by almost two years is as follows:

Q: Okay. Now, in response to this application, Ms. Potratz on December 20th, 2011, filed an application to have you found in contempt of court, correct?

A: Correct.

Q: And her application maintained that you were in contempt of court for failing to pay child support and spousal support arrears.

A: That's correct.

Q: For failing to pay her, her interest in family assets, at that time valued at \$103,568, not including post-judgment interest.

A: Correct.

[Emphasis added.]

[208] Lastly, the Plaintiff submits that the Court should be forgiving of the oversight of failing to personally serve the Defendant with the Amended Notice under Rule 1-3(1) of the Rules, which maintain that the object of the Rules is to secure the just, speedy and inexpensive determination of every family law case on its merits. Further, Rule 1-3(2) states that this includes, so far as practicable, conducting a family law case in ways that are proportionate to the importance of the issues in dispute and the complexity of the case. Given that the contempt Rule 21-7 is contained within the Rules, its application is to be guided by these overall objectives. Allowing the Defendant to raise this technicality so late in these proceedings after days in court and after the Plaintiff has expended substantial resources to pursue that which she is properly owed, would only serve to reward the Defendant's wrongdoing and perpetuate it, leading to further delay and expense in the event that new proceedings are required.

The Law

- [209] Under Rule 21-7(11) of the Rules, a party applying for an order for contempt must serve the alleged contemnor with a copy of the filed notice of application and all filed affidavits in support of it at least seven days prior to the hearing.
- [210] Given the facts in this particular case, it is necessary to review the law with regards to notice in civil contempt cases. However, as previously noted, the objection raised by the Defendant in the present case goes to the form of the Original Notice, as opposed to the fact that both the Plaintiff and the Defendant chose to rely on additional materials generated after the Original Notice and the Amended Notice had been provided in early 2012.
- [211] In *Denman Island, Sinclair Prowse J.* considered whether the applicant was required to serve all materials that it intended to rely upon prior to an alleged contemnor making a decision as to what, if any, evidence to present in opposition to the application. The court concluded the following at paras. 28 and 33-34:
- [28] That an alleged contemnor has the right to know the case that he/she/it has to meet in the contempt proceeding before he/she/it is required to make an election as to whether to call evidence is necessary to ensure fundamental justice. That is, in fairness, an alleged contemnor cannot be expected to make a decision as to whether to call evidence before they know the evidence that they have to rebut.
- [33] The issue in the present case is whether the Rules in British Columbia ensure that the Defendant as the alleged contemnor is provided with the entire case of the Plaintiff before the Defendant is required to make its election to call evidence.

[34] As was set out earlier in these Reasons, the Plaintiff is required, pursuant to Rule 56(7) and 56(8) to provide the Defendant with the Notice of Motion and all of the affidavit materials on which it intends to rely in the contempt hearing. That is, the Plaintiff is required to provide the Defendant with all of the evidence that it will rely upon to prove the contempt before the Defendant is required to make its election. The purpose of these Rules is to ensure that the Defendant knows the exact case that it has to meet before it is required to make its election to call evidence.

[Emphasis added.]

[212] There is one line of jurisprudence suggesting that civil contempt proceedings require strict compliance with the procedures outlined under the Rules, and that any non-compliance is fatal: *Claggett v. Claggett* (1945), 61 B.C.R. 238 (C.A.); and *Glazer v. Union Contractors Ltd.* (1960), 33 W.W.R. 145 (B.C.S.C.); *aff'd* (1960), 34 W.W.R. 689 (B.C.C.A.) at p. 151.

[213] However, certain criminal contempt decisions have allowed a more flexible approach to contempt procedures to be followed, relying on the inherent jurisdiction of the courts to proceed in a summary manner: *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; and *Everywoman's Health Center Society (1988) v. Bridges*, (7 September, 1989) Vancouver Registry No. C914008 (B.C.S.C., Lysyk J.).

[214] However, Wilson J. concluded in *Takla Track & Timber Ltd. v. Patrick* (1996), 20 B.C.L.R. (3d) 175 (S.C.) that despite the fact the stricter approach in the civil context was surprising, the court was bound by the authorities relating to civil contempt, which embraced strict compliance with the Rules.

[215] In *Superior Poultry Processors Ltd. v. United Food and Commercial Workers International Union, Local 1518*, [2000] B.C.J. No. 2018 (S.C.) [*Superior Poultry*], Bennett J. applied the strict compliance approach and declined to grant the application for the plaintiffs to amend the notice of motion to include the proper date. In making that conclusion, Bennett J. noted at paras. 15-16:

[15] A finding of contempt of court has far-reaching implications. There is good reason for requiring strict compliance with the rules necessary in such applications. I find, although it was simply an oversight by counsel, that without an amendment of the date, the Company cannot rely on any activity after August 15, 2000 to constitute contempt of court. That does not mean the evidence after August 15 is irrelevant. It is very relevant to the issue of whether the Union can control its membership on the picket line, as argued by the Union. I will consider the evidence in that context.

[16] Further, the company is not estopped from bringing a contempt of court application based on the conduct after August 15 utilizing the proper process.

[Emphasis added.]

[216] Similarly, Burnyeat J. in *Telus Communications Re: Ruling No. 1*, 2006 BCSC 12 [Telus Communications] declined the application to include an affidavit that was not originally listed in the motion, based on the fact that the contemnor must know the case against him or her prior to making the decision as to give evidence. Justice Burnyeat noted that although the court retains the discretion to reference late affidavits in contempt applications, "the discretion should only be exercised if the party already had 'reasonable notice' of what would be set out in the additional affidavit, or if the alleged contemnor consents to the affidavit being read in support of the application" (at para. 20). Otherwise, plaintiffs should not be allowed to "split their case" after the contemnor has decided whether to bring evidence.

[217] Burnyeat J. went on to discuss other cases dealing with failure to adhere with service requirements at paras. 12-13:

[12] *Afton Operating Corp. v. United Steelworkers of America, Local 8637*, [1982] B.C.J. (Q.L.) No. 285 (B.C.S.C.) dealt with the question of whether to consider an affidavit that was listed in a motion but had not been served upon the defendants. After being advised by counsel for the plaintiff that the plaintiff would not be relying on the affidavit in question, Wallace J., as he then was, concluded: "... there can be no prejudice to the Defendants" (at para. 11). In dealing with the decision in *Carrie*, supra, Wallace J. concluded:

In this instance, since the affidavit to which objection is taken will not be referred to or used in support of the application, the purpose of the law in requiring service of the affidavit material upon the defendants has been satisfied in every respect. Accordingly, I must decline to apply the decision of *Carrie & Hoskins v. Carpenter & Joiners Local 452 United Brotherhood of America* to the circumstances in the instant case. The failure to serve the affidavit now that is withdrawn and no longer forms the material to be relied on in support of the application is, in my view, an irregularity only and not a reason for dismissing these proceedings. (at para. 14)

[13] *Charco Water Distribution Ltd. v. British Columbia (Comptroller of Water Rights)*, [1985] B.C.J. (Q.L.) No. 1346 (B.C.S.C.) dealt with a motion for contempt of Court when the *ex parte* order had been served on the respondents but the affidavit referred to in the order had not. In determining that the motion for contempt should be dismissed as the affidavit referred to in the order was not served, Trainor J. concluded:

The other case to which I wish to refer is the decision of His Honour Judge Melvin sitting as a local judge of this court in *Saunders vs. Saunders* on the 23rd of May, 1981, and as far as I know this is not reported. I refer to this particularly because there is a reference in one of the works on procedure, *Fraser and Horn*, which suggests that there has been a change over the years with respect to the interpretation of the Rules and their application, and that the *strictissimi juris* principle or doctrine does no longer apply to the same extent or with the same weight as was previously the case.

He said at p. 3:

"I disagree with the authors of Fraser and Horne. In my view, what is required is strict compliance with the Rules, and there must be strict proof that the Rules have been complied with in order that this court should embark upon a hearing involving contempt. I say that for one fundamental reason, that this may be categorized as civil contempt but still and all it has the overtones to it whereby the liberty of the subject is placed in jeopardy."

And then he went on to say there is the right to send someone to jail in the event they are found to be guilty of contempt of a court order, and in those circumstances the doctrine of strictissimi juris applies. In that particular case as I read the reasons there was a question of the length of service, whether or not there was compliance with the seven days requirement to which I referred in one of the Rules, and he found that they had missed service by I think one day and therefore it was no good. It does not matter whether he had knowledge or notice prior to that time or not. It seems to me that is the effect of that judgment and of the other judgments to which I have referred as well. The doctrine is there and it is to be observed insofar as contempt motions are concerned.

(at paras. 27-30)

Analysis and findings

[218] Given the history and substance of these proceedings, I am compelled to conclude that the omission of seven words in Paragraph 2 of the Original Notice that was personally served on the Defendant (the words "be found in contempt for failing to") is, in the overall context of the Original Notice, a mere technical defect of no import.

[219] The Amended Notice that corrected the omission was served on the Defendant's long-time counsel within several weeks. The item that was the subject of the original omission pertains to the unpaid judgment outstanding against the Defendant, of which he is, no doubt, painfully aware. No objection was taken to this initial defect at the outset of these protracted proceedings or at any time thereafter, until just prior to final submissions. In addition, in his evidence on April 2, 2013, the Defendant acknowledged that the outstanding judgment in the amount of \$103,568 owed to the Plaintiff for her share of family assets was an aspect of the contempt alleged against him.

[220] Also relevant is that the Defendant participated in the summary trial proceedings giving rise to judgment against him in that amount and underwent a lengthy cross-examination in proceedings that occupied nine hearing days between June 17, 2008 and July 3, 2009. His direct and cross-examination included the value of Flagship and the claim of the Plaintiff to an interest in it as a family asset, in addition to other amounts due to her for his sale of other assets or unauthorized expenditures of funds.

[221] It is worthy of note that of the \$103,568 referenced at Paragraph 4 of the Order arising from the summary trial proceedings, to which the contempt alleged in Paragraph 2 of the Original and Amended Notice pertains, states:

4. The Defendant is ordered to pay the Plaintiff's \$103,568 determined as follows:
 - a. \$58,272.00 for the Plaintiff's interest in Flagship Fisheries Ltd.; plus
 - b. \$7,500.00 for the Plaintiff's interest in monies cashed out of the business Flagship Fisheries Ltd; plus
 - c. \$700.00 for the Plaintiff's interest in the proceeds of sale of the family horse; plus
 - d. \$15,000.00 in the form of a compensation order in relation to money withdrawn by the Defendant from the Defendant's RRSP; plus
 - e. \$18,500.00 for the Plaintiff's interest in the 1957 GMC pick up truck that was sold; plus
 - f. \$6,096.00 for the Plaintiff's interest in the Defendant's savings account; less
 - g. \$2,500.00 for the Defendant's interest in the African Grey parrot business.

[222] Additionally, Paragraph 2 of the Original Notice specifically cited the civil contempt provision of the Rules when outlining the relief sought in relation to the outstanding judgment amount.

[223] While I appreciate the need for strict adherence to the Rules in relation to family law contempt matters, as per Rule 21-7(11), there is absolutely no ambiguity here as to the nature of the contempt alleged in Paragraph 2 of the Original Notice. This is not an instance where the initial omission and re-service of the Amended Notice on the Defendant's counsel only, created any uncertainty as to what was or is at issue in these proceedings.

[224] Unlike many other civil contempt decisions, including *Superior Poultry* referred to above, this alleged contempt does not arise in the context of a fast-emerging labour dispute involving many persons and many actions occurring in a specific time period. This is not an instance where the party alleging contempt is attempting to split his or her case. Here, the parties have been before the Court just less than seven years in relation to a family law case where there are no surprises as to what is outstanding in terms of monetary judgments and no uncertainty as to who and what is involved. Here, the Defendant elected to testify after he was well apprised of the nature of the contempt proceedings and after the Amended Notice was served on his counsel. There is no prejudice to him in relation to the omission in the Original Notice and then service of the Amended Notice on his counsel only, a mere few weeks later. This is also not a situation where the Defendant elected to testify based on the Original Notice and then was subject to additional allegations or information brought forward against him at a later date.

[225] Lastly, as discussed in *Superior Poultry*, I find that the Court is justified in exercising its discretion in relation to the omission at Paragraph 2 of the Original Notice, as the Defendant did have reasonable notice of the Plaintiff's allegations relating to the judgement amount by virtue of service of the Amended Notice on his counsel. Additionally, I find that the Plaintiff's inaction in bringing this issue to the Court's attention until the conclusion of

these protracted proceedings serves as implied consent that the Amended Notice could be validly relied upon.

[226] For these reasons, I am of the view that notice provided to the Defendant is sufficient in all the circumstances of this case.

Contempt as alleged against the Defendant

[227] In the Amended Notice, the Plaintiff alleges that the Defendant be found in contempt pursuant to Rule 21-7 of the Rules for the following reasons:

1. for failing to pay her the spousal and child support as ordered;
2. for failing to pay her the sum of \$103,568 for her interest in family assets as ordered;
3. for failing to pay her costs in the amount of \$109,394 as ordered; and
4. for cashing out RRSPs, as opposed to rolling them over as ordered.

Nature of civil contempt

[228] In dealing with the present alleged civil contempt, I am mindful of the following legal authorities and the principles they articulate.

[229] Contempt is the intentional doing of some act which is prohibited by the order of the court. The Supreme Court of Canada recently considered the test in civil contempt proceedings in *Carey v. Laiken*, 2015 SCC 17 [Carey], and reviewed the three elements which must be proven beyond a reasonable doubt, summarized as follows:

1. The order alleged to have been breached "must state clearly and unequivocally what should and should not be done" (at para. 33);
2. The party alleged to have breached the order must have had actual knowledge of it. An alleged contemnor may attract liability on the basis of willful blindness, or the court may infer knowledge in the circumstances (at para. 34); and
3. The party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels (at para. 35).

[230] Cromwell J. noted that these three elements, coupled with the heightened standard of proof, are in place to ensure that the "potential penal consequences of a contempt finding ensue only in appropriate cases" (at para. 32).

[231] In *Swann v. Swann*, 2009 BCCA 335 [Swann] at para. 10, Groberman J.A. cited four elements that a plaintiff or applicant must prove beyond a reasonable doubt when the subject matter of the contempt is an order for payment of money, summarized as follows:

- (1) the debtor had notice of the order;

- (2) that he or she did not comply with the order;
- (3) that the non-compliance was "willful" (i.e. deliberate, as opposed to accidental or unintentional); and
- (4) the debtor was, in fact, capable of complying with the order (i.e. that he or she had the means to make the required payments).

[232] Impecuniosity is an excuse for non-compliance with an order for payment of money: *Kawana v. Shemal*, 2013 BCSC 1630 [Kawana] at paras. 23 and 27; *Swann* at paras. 10-11.

[233] *Cromwell J.* also notes at para. 27 of *Carey* that the law does not require that a person breach a court order contumaciously or with intent to interfere with the administration of justice. Rather, all that is required to establish civil contempt beyond a reasonable doubt is an intentional act or omission that is in breach of a clear order of which the alleged contemnor has notice.

[234] The Court of Appeal summarized the principles governing contempt proceedings in *Peel Financial Holdings Ltd. v. Western Delta Lands Partnership*, 2003 BCCA 551 at para. 18 as follows:

[18] The principles governing a motion of contempt are uncontroversial. I would summarize the principles relevant to this case in this way:

1. The proceedings are quasi-criminal in nature and the rules of *strictissimi juris* apply, meaning for example that the evidence supporting the motion must conform to the rules of admissibility at a trial; so no hearsay, opinion, conclusions and the like are receivable: *Glazer v. Union Contractors Ltd. and Thornton* (1960), 33 W.W.R. 145 (B.C.S.C.) at 151.
2. The applicants bear the onus of proving the elements of contempt on the criminal standard, viz. beyond a reasonable doubt: *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1990] 2 S.C.R. 217 at 229.
3. If the order said to be breached is ambiguous, the alleged contemnor is entitled to the most favourable construction: *Melville v. Beauregard*, [1996] O.J. No. 1085 (Gen. Div.) at para. 13; see also *Berge v. Hughes Properties Ltd.* (1988), 24 B.C.L.R. (2d) 1 (C.A.) at p. 8, cited in *Hama v. Werbes* (2000), 76 B.C.L.R. (3d) 271 (C.A.) at para. 8 where the need for clarity and precision in the order to be enforced was discussed.

[235] Although contempt proceedings are quasi-criminal in nature, and thus attract the standard of proof of beyond a reasonable doubt, civil contempt differs from criminal contempt. The distinction rests on "the element of public defiance accompanying criminal contempt", whereas in civil contempt the matter is seen as primarily coercive rather than punitive. Nonetheless, punishment is one purpose of sentencing for civil contempt: *Carey* at para. 31; *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 at p. 931; *Chiang (Trustee of) v. Chiang*, 2009 ONCA 3 at para. 117.

- [236] Given the higher standard of proof in contempt proceedings, the court must not blindly rely on findings made at earlier proceedings when considering evidence of an alleged contemnor's inability to pay. Although it is open to the court to draw inferences based on evidence submitted in earlier proceedings, it must engage in an independent analysis of the financial information, rather than simply relying on the fact that the order was made: Swann at para. 15; Palleson-Stallan v. Stallan, 2014 BCCA 474 at paras. 6-7.
- [237] Contempt may be found if the defendant decides to incur other debt obligations and pay the related creditors rather than comply with a court order to pay money, such as a support order. Additionally, a parent is "not entitled to choose to deprive his or her children of support in order to pursue a matter in litigation": Heisler v. Heisler, 2012 BCSC 753 [Heisler] at paras. 135, and 139-142.
- [238] Rule 21-7(1) of the Rules authorizes the court to punish contempt of court with "an order of committal or by imposition of a fine or both".

Analysis and findings

Notice and Knowledge of the Order

- [239] As noted, the test for civil contempt as outlined in Carey requires the Plaintiff to prove both that the order alleged to have been breached was clear and unequivocal, and that the party alleged to have breached the order had either actual or inferred knowledge of the order. I will discuss both of these criteria in tandem for ease of reference.

1. Failure to pay spousal and child support orders

- [240] Pursuant to the Summary Trial Reasons and the Order settled and entered on November 24, 2010, retroactive spousal support is specifically referenced at para. 11 of the Order as follows:

The Defendant shall pay the Plaintiff retroactive spousal support in the amount of \$113,709 for the period of June, 2003 to and including November, 2009;

- [241] Regarding ongoing spousal support payable by the Defendant to the Plaintiff, at para. 13 the Order states:

Commencing December 1, 2009 and continuing thereafter on the first day of each and every month until further order of the court, the Defendant shall pay spousal support to the Plaintiff pursuant to the Divorce Act (Canada) in the amount of \$700.00 per month.

- [242] Regarding retroactive child support for C., the Order states at para. 15:

The Defendant shall pay the Plaintiff retroactive child support for [C's] support in the amount of \$19,523.67 for the period June, 2003 to and including June 1, 2009 as follows which takes into consideration section 7 expense contributions made by the Defendant for this period of time [followed by a list of specific amounts paid by the Defendant during certain periods as offset amounts];

[243] The Order then sets out the child support obligations of both parties based on a shared custody order that was subsequently varied.

[244] Although I find that the orders relating to retroactive and ongoing spousal and child support as stated in the Order are clear and unequivocal, the precise amounts owed by the Defendant to the Plaintiff have changed over the years due to various payments made by him and credits applied by virtue of C. moving to reside primarily with the Defendant. A brief overview of the circumstances relating to the shift in these amounts is necessary to establish what the Defendant knew he owed in relation to child and spousal arrears and support at various times.

[245] Specifically, on January 13, 2012, the Order was varied to vacate the child support order based on C.'s primary residence being with the Defendant as opposed to shared, and a sum of \$7,686 was credited to his child support arrears, reducing them from \$19,523.67 to \$11,837.67. Due to this change, an order was made that the Plaintiff owed retroactive child support to the Defendant in the amount of \$271 per month, commencing December 1, 2010 until December 31, 2011, creating a further credit for \$3,252 against his child support arrears. This reduced the amount the Defendant owed for retroactive child support arrears to \$8,585.67.

[246] Also, commencing January 2012, the Plaintiff was ordered to pay \$271 per month as child support to the Defendant, which was to be set-off against the child support arrears owing to her until further order of the court (order made after Application, January 13, 2012).

[247] According to the Plaintiff's submissions some further adjustments are still required in relation to on-going child support. For the period of January 1, 2012 to and including February 1, 2014 when C. ceased to be a child of the marriage, the Plaintiff's child support obligations (the offset amount she was required to pay to the Defendant regarding C.) totalled \$7,046 (26 months at \$271 per month). After this amount is applied to the child support arrears owed by the Defendant, he will owe the Plaintiff \$1,539.67 in retroactive child support arrears.

[248] Also, as was pointed out by counsel for the Plaintiff, FMEP continues to credit the Plaintiff's payment of \$271 per month to the Defendant's arrears, given that the Plaintiff's child support order has not yet been terminated. This is despite the fact that C. has no longer been a child of the marriage entitled to support since February, 2014, and the Plaintiff's obligation should have ended March 1, 2014.

- [249] The Court finds that the subsequent credits to the amount of arrears owed by the Defendant for retroactive child support, as reflected in the Order, have occurred by virtue of C. moving to reside primarily with the Defendant (as opposed to maintaining the shared custody arrangement that existed prior to the Summary Trial Reasons issued in 2009), and by virtue of the set-off credits based on child support owed by the Plaintiff. These have served to substantially eradicate child support arrears owed to the Plaintiff by the Defendant at this time.
- [250] Specifically, in terms of notice and knowledge of the nature of the orders relating to child and spousal support, the Defendant submits that the notice of application is unclear as to whether it is seeking to find the Defendant in contempt for failing to have paid the full amount of child and spousal support arrears.
- [251] I find that I am unable to accept the Defendant's arguments that the Notice he was given regarding his alleged contempt for non-payment of the spousal and child support amounts owing pursuant to the Order are insufficiently precise or unclear. The Notice makes clear reference to his alleged contempt (in Paragraph 1) to be for failing to pay spousal and child maintenance as ordered pursuant to the Summary Trial Reasons, which are clear and unequivocal, as are the terms in the subsequent Order drawn up and ultimately settled by the Court.
- [252] I find that the Notice could not reasonably have referred to the particular amounts of spousal and child maintenance that the Defendant had allegedly failed to pay in accordance with the Order given that those amounts were in constant flux over time, by virtue of either payments made or credits applied. Rather, in my view, it makes sense that the Notice alleging contempt referred to the Defendant's failure to comply with his child and spousal support obligations more generally, with specific reference to the Order itself.
- [253] The Defendant further submits that the Order in relation to his spousal and child support obligations is unclear, as it does not specify a time frame for the payment of retroactive support (Defendant's submissions at para. 41). I find that this submission has no merit given that the Order reflects a judgment. The Court Order Enforcement Act, R.S.B.C. 1996, c. 78 [COEA], states at s. 48(1): "If an order has been obtained for a sum of money, the sum is payable immediately unless the court orders otherwise". Given that a time period for payment of the arrears is not stipulated in the Summary Trial Reasons and the Order, the payment of the child and spousal support arrears as stated in the Order was due forthwith.
- [254] Accordingly, I find that the orders outlining the Defendant's obligations to pay ongoing child and spousal support to the Plaintiff, as well as arrears, was both clear and unequivocal, and the Defendant had actual knowledge of these obligations.
2. Failure to pay \$103,568 for the Plaintiff's interest in family assets

[255] Having previously found in the reasons stated above that the Defendant had clear and sufficient notice and knowledge of the \$103,568 he owes the Plaintiff in relation to various family assets, as stipulated in the Order, his conduct and circumstances in terms of the complete non-payment of any amount in relation to this judgment debt is to be assessed as possible contempt.

3. Failure to pay costs to the Plaintiff as ordered in the amount of \$109,394

[256] As noted above, the Defendant was ordered to pay costs in the amount of \$109,394 on January 13, 2011 by Registrar Sainty. There is nothing unclear about this amount or how it arose.

[257] Again, the Defendant submits that the Certificate of Costs was not clear and precise in that it failed to provide a time period for repayment. Given the application of s. 48(1) of the COEA, silence as to the time period for payment of the costs' order means that it was payable immediately. Thus, I reject this submission.

4. Cashing out RRSPs, as opposed to rolling them over as ordered

[258] The Summary Trial Reasons were filed December 1, 2009. They stated the following regarding the Defendant's RRSPs:

[183] The defendant is hereby ordered to pay to the plaintiff the following amounts:

- \$36,110 as the plaintiff's share of the defendant's current RRSP value;
- \$15,000 in the form of a compensation order in relation to money withdrawn from the defendant's RRSP immediately prior to separation;

[259] The Defendant argues that the Summary Trial Reasons were not clear and precise in directing that the Defendant was obliged to roll-over one half of his RRSPs, in the amount of \$36,110.

[260] In September 2010, discussions commenced between counsel in order to settle discrepancies in terms of the method of paying the RRSP amount, as well as whether it would be measured in pre- or after-tax dollars. The terms of the order were settled during an appearance on September 14, 2010.

[261] The Order as clarified and settled, entered on November 24, 2010, stated as follows (at para. 2):

- c. The Plaintiff is entitled to a roll-over of \$36,110 as half of the Defendant's RRSPs most recently valued at \$72,220.00 and a compensation order in the amount of \$15,000.00 representing half of the \$30,000.00 withdrawn from the Defendant's RRSPs in March, 2003.

- [262] The Defendant submits that the entered order does not completely follow the language of the Summary Trial Reasons, which stated that the Defendant was to keep his RRSPs but pay the Plaintiff a lump sum amount for monies due on the asset division. He raises the principle in *Melville v. Beauregard*, [1996] O.J. No. 1085 (Gen. Div.), which states "where there is ambiguity in an order, the alleged contemnor is entitled to the most favourable construction".
- [263] The Plaintiff submits that while the initial order as set out in the Summary Trial Reasons may have been unclear, once the Order was settled and entered in 2010, it clearly stated that the Defendant was required to roll-over half his RRSPs, which he failed to do.
- [264] The Plaintiff submits that although the Defendant is entitled to the most favorable construction of the order made in relation to the RRSPs, even the most favorable construction does not circumvent the fact that the Defendant failed to pay the Plaintiff with monies he received from the cashed out RRSPs. The Defendant clearly had notice of this obligation. I accept these submissions.
- [265] In fact, the evidence establishes that in the 30 days following the Summary Trial Reasons, rendered December 1, 2009, long before the terms of the Order had been settled in court, the Defendant withdrew \$88,591.41 from his RRSPs without paying any amount to the Plaintiff. He has yet to pay her any amount relating to her share of his RRSPs. This action by the Defendant occurred despite a s. 67 order having been put in place to prevent the dissipation of assets that ran until the Summary Trial Reasons were rendered, and in the face of the findings of the Court contained in the Summary Trial Reasons regarding the Plaintiff's being entitled to a share of the Defendant's RRSPs and a compensation order regarding the Defendant's earlier cashing out of a portion of his RRSPs.
- [266] When counsel were speaking to the terms of the Order regarding the RRSPs and the mechanism of "roll over" in court on September 14, 2010, the Defendant had already cashed in and apparently lost the funds. The Plaintiff and her counsel did not learn about this until they reviewed the Defendant's 2009 tax return attached to his Form F8 Financial Statement, filed in support of his August 29, 2011 application.
- [267] As previously set out, the Defendant testified that he cashed out the RRSPs after the decision was rendered in order to gamble the money in hope of making a sufficient return. He then claimed this money, in the amount of \$88,591.41, as income on his 2009 income tax return. The Defendant submits that his action of cashing out the RRSPs and gambling them away was not willful, as it was fueled by depression. He has however, not supported this suggestion with any other evidence (despite his reference to presenting medical evidence in this proceeding) and has not taken any steps to repay the Plaintiff her share of the amounts pertaining to his dissipation of his RRSPs.
- [268] The fact that the Order required him to "rollover" the Plaintiff's share of his RRSPs was made at a time when, unbeknownst to the Court or Plaintiff's counsel, the Defendant had already cashed them out can hardly now be relied upon by him in the face of his deceit. I

find that the Defendant clearly knew on any reasonable interpretation of the Summary Trial Reasons or the ensuing Order that the Plaintiff was entitled to the specified share of his RRSPs to be achieved by way of "roll over" and to compensation for funds already cashed in. Accordingly, I find that he had both notice and knowledge of his obligations relating to the RRSPs under the Order.

The Defendant did not comply with the orders

[269] Both the test for civil contempt outlined in *Carey* and the criteria for finding contempt for a money judgement, outlined in *Swann*, require the Plaintiff to show beyond a reasonable doubt that the Defendant did not comply with the terms of the Order.

[270] In the Defendant's testimony on April 2, 2013, the Defendant acknowledged that he had failed to fulfill his obligations to the Plaintiff and not complied with the Order in terms of the judgment relating to family assets, the costs award and his obligation to roll over his RRSPs, as evidenced at p. 31-32 of the Transcript:

Q: You hadn't paid anything in regards to the family asset order.

A: That is correct.

Q: You hadn't paid anything towards costs.

A: That is correct.

Q: And you hadn't rolled over RRSPs.

A: That is correct.

Q: In fact, at some point in time you cashed in RRSPs that you previous held.

A: That is correct.

[271] The Defendant's alleged non-compliance in relation to the child and spousal support arrears require a more detailed analysis.

[272] In terms of the Defendant's compliance with the spousal and child support orders, the Defendant submits that as at the time of the Notice of Application, he was complying with the Order in that he was making payments of \$700 per month (ongoing monthly spousal support payments), as noted in the FMEP records.

[273] I find the fact that the Defendant was paying the on-going amount of spousal support has no bearing on contempt proceedings relating to non-payment of amounts of child and spousal support arrears that he was found to owe in the Summary Trial Reasons and as were reflected in the Order.

[274] In terms of spousal support arrears, once the Summary Trial Reasons were released, although the Defendant commenced paying the monthly amount of \$700 towards on-going spousal support, it was not until the Plaintiff filed her contempt application that the

Defendant increased his payments by \$250. Further, in June 2012, the Defendant increased his payments by an additional \$250 (totalling an additional \$500 per month on top of the ongoing amount of \$700) to comply with FMEP's demands, and in order that his passport be released.

- [275] When these additional monies are accounted for, the Plaintiff received an additional \$1,500 from the Defendant between January and June 2012, and an additional \$15,500 between July 2012 and January 2015. If this amount is first applied towards child support arrears, and secondly applied to spousal support arrears as at January 2015, his child support arrears would likely be paid in full.
- [276] Insofar as the Defendant was entitled to certain further credits thereafter to ongoing arrears, they have obviously been taken into account, but the starting point for amount owed by the Defendant for retroactive spousal or child support is the Order that reflects the Summary Trial Reasons.
- [277] The Plaintiff points out that over the five years and two months since the Summary Trial Reasons were rendered, while the Defendant has reduced his child and spousal support arrears by \$34,984, only \$17,000 of this was as a result of payments made by the Defendant.
- [278] However, in light of all that has transpired, and given that there is now only a small amount of child support arrears owing, the exact amount of which will be determined when an order is made terminating the Plaintiff's child support obligation now that C. is no longer a child requiring support, I decline to consider further the allegation that the Defendant is in contempt for the non-payment of the child support arrears ordered in the Order. Those arrears have been or will be substantially satisfied when the correct up-to-date calculations are completed.
- [279] The Court finds it noteworthy that the substantial satisfaction of this debt occurred due to the effluxion of time and a change in C's living arrangements, as opposed to the Defendant taking any direct steps to reduce it in a timely way. The evolution of this issue also clearly shows that additional specificity as to the exact amount owing other than referencing the Order would have been a pointless and potentially misleading exercise in the circumstances of the present case.
- [280] The record is clear that the Defendant has not fully complied with the order in terms of his obligation to pay the Plaintiff spousal support arrears in accordance with the Summary Trial Reasons and the Order. Accepting that the amount owing has been reduced based on the events described above from the Summary Trial Reasons amount of \$113,709 to \$98,248.47, due in part to payments by the Defendant in excess of his ongoing monthly spousal support obligation of \$700, there is still a substantial amount outstanding from December 1, 2009 when the Summary Trial Reasons were rendered. His continuing non-payment of this amount, just in excess of \$98,000, may amount to contempt. Accordingly, I find that the Defendant has not complied with the terms of the Order in relation to his obligation to pay the spousal support arrears owed to the Plaintiff.

[281] In summary, given that the Defendant has not rolled over his RRSPs or paid the Plaintiff the sums owed to her pursuant to the Order in relation to the judgment relating to property division, the costs' award and spousal support arrears, I find that he has not complied with the terms of the Order giving rise to these contempt proceedings. I find the only exception to the Defendant's non-compliance is the order relating to child support arrears.

Willful, as opposed to accidental

[282] The third criteria for a finding of civil contempt, as outlined in both Carey and Swann, is a finding that the alleged contemnor's noncompliance was willful, as opposed to accidental or unintentional.

[283] The Plaintiff submits that she has demonstrated that the Defendant's non-payment was willful and deliberate beyond a reasonable doubt.

[284] More generally, the Defendant's testimony on January 22, 2015 suggests his full awareness of his obligations and his decision to prioritize his other commitments (business or family) ahead of his debt obligations to the plaintiff. For example, the Defendant stated the following when questioned as to why he decided to expand his business by paying cash, as opposed to financing, rather than satisfy his debt obligations (p. 10-11):

Q: Do you think you are not required to pay those judgements or that you can put them off indefinitely.

A: I'm required to pay those judgments, and I understand that. Will they ever get paid? That's up to somebody else to decide. That's not up to me. My -- if I win the lottery, they'll get paid. If I come into a large amount of money, they will get paid. But as things are going, they will not get paid. I cannot afford to pay them.

[285] As outlined above, the Defendant testified that he cashed out the RRSPs after the decision was rendered in order to gamble the money in hope of making a sufficient return.

[286] The Defendant submits that his action of cashing out the RRSPs in the amount of \$88,591.41 and gambling the money away was not willful, as it was fueled by depression. Given his concealment of his conduct, no medical or other independent evidence to support his claim of depression and no subsequent effort to provide any form of redress to the Plaintiff with regards to the RRSP funds, I find that his conduct regarding the dissipation of the Plaintiff's share in his RRSP after the Summary Trial Reasons was a willful act to deprive her of those assets.

[287] In any event, the Defendant's conduct still meets the definition of "willful" as set out in para. 10 of Swann as "deliberate as opposed to accidental or unintentional". This is an objective test. The Defendant deliberately withdrew his RRSPs and deliberately chose not to pay the Plaintiff. I find that there is nothing "accidental" at all about his actions.

- [288] I reject the Defendant's submission that to the extent that the order to transfer RRSPs became clear and precise following the November 24, 2010 Order, the RRSPs had already been cashed and that accordingly, he did not willfully or deliberately disobey the order as it was impossible for him to have complied with it, given that they were no longer in existence.
- [289] Crucially, when the difficulties relating to the RRSPs were being addressed in court, the Defendant did not advise the Court that he had already cashed out his RRSPs without paying the Plaintiff. As a result, as the Order was drafted and the sum the Defendant is required to pay is less than the amount of the RRSPs he is to roll-over, depriving the Plaintiff of a judgment in this amount. I cannot accept that by virtue of cashing out the RRSPs prior to gaining clarity as to the exact mechanism with which to transfer the Plaintiff her due share, the Defendant has preserved himself from being found in contempt.
- [290] I agree with the submissions on behalf of the Plaintiff that the Defendant is a sophisticated litigant who is regularly involved in complex business dealings and has been involved in several other law suits in Canada and the United States. Paragraph 77 of the Plaintiff's submissions accurately capture how the Defendant approaches his financial affairs:

[The Defendant] does not make decisions on the basis of emotion or whim but rather to maximize a benefit or return His actions in cashing out his RRSPs and not paying the [Plaintiff] anything from the amount received and then filing his claim to revisit child support obligation and seek section 7 expenses, while at the same time revealing his flagrant disregard of the Decision, is all geared to wear the [Plaintiff] down emotionally and financially.

- [291] Accordingly, I find beyond a reasonable doubt that the Defendant's actions in failing to comply with the terms of the Order were done willfully, rather than accidentally or unintentionally.

Ability to pay

- [292] A fourth criteria for the court to consider when making a finding of civil contempt in relation to a money judgment is whether the debtor was, in fact, capable of complying with the orders sought in terms of having the ability to pay: Swann.
- [293] The total amount owed by the Defendant to the Plaintiff by virtue of the various court orders is \$336,437.67, not including interest. The Defendant has had almost five years and three months to pay the judgment owing.
- [294] The Plaintiff submits that the evidence establishes beyond a reasonable doubt that the Defendant has the ability to pay the various judgment amounts owed to the Plaintiff. Instead, the Defendant has continually prioritized his business interests and new family in the Philippines by virtue of the expenses he chose to incur, the debt obligations he chose to finance and the business choices he made. The Court accepts this submission.

RRSPs and Home Equity

- [295] Generally, the sheer passage of time since the rendering of the Summary Trial Reasons suggests the Defendant had the capacity to pay. It has been five years and three months since the orders were in place.
- [296] The Plaintiff submits that in its previous orders, the Court has determined that the Defendant had the capacity to pay the amounts he was ordered to pay. In the Summary Trial Reasons, the Defendant's annual income was set at \$123,203.56 (at para. 135). Although it was open to the Defendant to provide evidence of circumstances that have developed subsequent to the Summary Trial Reasons to show the Court that the Order was beyond his capacity to fulfill, he has not discharged this burden.
- [297] Since the release of the Summary Trial Reasons, the Defendant left his position with Grand Hale, which paid him an income of \$78,000 annually, and resumed his work as a fish broker with Flagship. He further expanded this business through the fish processing plant in order to generate greater profit. Despite his profitability increasing from 10% to 22% while operating the fish processing plant, the Defendant shut down the operation when he could have continued to generate additional income with which to pay the Plaintiff. This coincided with the start of his relationship with his new partner, now wife in the Philippines.
- [298] There is also clear evidence that the Defendant had access to various funds during this time. The Defendant cashed the \$88,591.41 of RRSPs, which could have been used to meet his debt obligation to the Plaintiff. Even if the Defendant withdrew the entire amount of RRSPs in one withdrawal, which would trigger a higher tax obligation, he would still have netted \$66,013.99 with which he could have used to pay the Plaintiff.
- [299] Additionally, the Defendant could have satisfied the orders through the equity in his home. The 2014 BC Assessment indicated that the Defendant's home was valued at \$559,000. The Defendant owed \$160,034.20 on his mortgage as of December 31, 2013 (Defendant's Financial Statements sworn January 14, 2015). The Defendant also paid an additional \$9,030.81 down on his mortgage in 2013. Although there is a line of credit worth \$187,056.14 secured by way of a second mortgage as of December 15, 2014, there remains \$221,943.86 in equity available to the Defendant to satisfy his debt obligations to the Plaintiff.
- [300] The Defendant argues that there is also a judgment registered as against his property by the CRA in priority to the Plaintiff, such that refinancing his home with cause him to pay \$79,349.49 to the CRA. Even if this was accepted, \$142,594.37 in equity would still be available to the Plaintiff. Given that the Defendant would need a minimum down-payment amount in order to qualify for mortgage refinancing, as well as other costs, the Defendant conceded in his "with prejudice" settlement offer that he had approximately \$88,000 in equity in his home.

[301] The Court accepts that if the Defendant had used the monies available to him by virtue of the RRSPs and home equity, he could have substantially reduced the balance owed by him to the Plaintiff.

Prioritization of business expenditures

[302] There is also clear evidence that the Defendant spent his monies on business expenditures and high risk investments as opposed to satisfying his obligations to the Plaintiff. The Defendant has purchased various items in order to expand his business, such as leasehold improvements (\$71,373.52), the purchase of a truck and fish totes and containers (\$38,420.45). The Plaintiff submits that if these monies had been used to pay his debt obligation to the Plaintiff, the amount owed could have been reduced by a further \$109,793.97. I accept these submissions. Authorities such as Heisler clearly state that contempt may be found if the defendant decides to incur other debt obligations or pay related creditors, rather than comply with a court order to pay money.

[303] I also find that the Defendant's choice to finance these business expenditures in cash, rather than obtaining financing, is clear evidence that he had access to funds with which to pay the Plaintiff. His actions showed that he preferred to deprive the Plaintiff rather than finance his capital expenditures. It is of note that although the Defendant stated he would have had to pay interest on the borrowed monies, he likewise has to pay interest on the judgment amounts owed to the Plaintiff (January 22, 2015 Transcript at pp. 3, 11, 19).

[304] The Defendant also could have satisfied his obligations to the Plaintiff by using the monies that he used as high risk loans, both personally and through his company, to NCL Trading Company and MT Processor in 2011. These totalled \$92,000. The Plaintiff submits that as the Defendant was willing to make these high risk loans, without registering a security interest, and potentially losing this money, he clearly had access to significant liquid funds with which to pay the Plaintiff. I accept these submissions, as the Defendant's actions show that either he was capable personally or via his company, Flagship, of using these funds towards satisfying the judgment amounts.

[305] Additionally, the evidence shows that the Defendant had sufficient funds to pay Shiny Mag Usura, his new wife, \$9,041.48 under the auspices of a loan. This shows his preference to providing funds to his then girlfriend as opposed to paying his judgment obligations.

[306] The Defendant has also spent approximately \$46,500 on rental accommodations and support for his new family in the Philippines since June 2012. The Plaintiff submits that it is "noteworthy that the defendant is paying more to his new wife than he is paying to the plaintiff to satisfy the judgment amounts provided for in the Decision".

[307] Although I am mindful that the Defendant has separate obligations to support his new wife and family in the Philippines, I find that some of these funds provided were in excess of what is necessary. The mere fact that the Defendant has chosen to establish a new family does not subordinate or diminish his pre-existing obligations to the Plaintiff.

Liquidity of Flagship's business assets

[308] The Defendant also acknowledged his receipt of \$342,700 from Flagship during July 1, 2011 to June 30, 2012. After adjustments were made for notional payroll and credit card expenses (many of which were not legitimate company expenditures), the Defendant only owed \$10,960.37 on his shareholder's loan account. The Plaintiff submits that all of this money could have been used to satisfy the judgment amounts provided for in the Summary Trial Reasons.

[309] The Plaintiff also submits that the Flagship's bank account contained as much as \$446,272.29 on deposit as of May 30, 2012. The Defendant also testified that he left between \$10,000 to \$20,000 in Flagship each year after paying expenses, operating costs and his wage. Nonetheless, the Defendant denied that he could have taken out a loan using Flagship's liquidity as security, or structured Flagship's business affairs in any way, in order to satisfy the judgments owed to the Plaintiff, without providing any clear evidence as to why this would not be viable. (January 22, 2015 Transcript pp. 28-29).

[310] I accept the Plaintiff's submission, as the Defendant could have used some of Flagship's resources to pay amounts towards the debt owed to the Plaintiff. Over time the Defendant has shown himself to be very financially astute when it comes to making funds available to himself or his business, but has declined to use those same talents to pay any amount to the Plaintiff on the debts owed, other than the modest payment amounts made through FMEP.

Lifestyle and personal expenditures

[311] As noted above, the Defendant's credit card statements also showed a number of unnecessary lifestyle expenditures made by the Defendant at the expense of him paying the monies towards the debts owed to the Plaintiff. For example, instead of purchasing a new, high-end truck for himself, he could have sold his 2005 Corvette and downsized, using the additional funds to pay the Plaintiff. Instead, he spent an additional \$25,418.40. Additionally, the amount spent on trips to the Philippines could have been decreased in order for him to meet his obligation. Other personal expenditures written off through Flagship include \$4,698.15 for Corvette repairs and \$3,272.50 to ICBC to avoid premium increases. I find that all of these lifestyle and personal expenditures could have been reasonably reduced in order to take steps to satisfy his debt obligations in relation to the Plaintiff.

Summary and Conclusion

[312] For ease of reference, the following is a summary of the evidentiary findings I have made that prove beyond a reasonable doubt that the Defendant had the ability to pay the Plaintiff the funds owed to her by virtue of the Summary Trial Reasons and the Order:

- The Defendant's general ledgers show he undertook significant leasehold improvements and purchased substantial equipment in relation to Richmond fish plant, including leaseholds of \$71,373.52, five-ton reefer truck valued at \$13,000 and fish totes/containers totalling \$25,420. These business expenditures totalled \$109,793.51; all of which were made in cash, without financing;
- The Defendant stated that he financed these business expenditures in cash because he did not wish to accrue interest, while acknowledging that interest was accruing on his judgment debt to the Plaintiff;
- Despite his profitability increasing from 10% to 22% while operating the fish processing plant, the Defendant shut down the operation at a time that coincided with the start of his relationship with his wife in the Philippines;
- The Defendant testified that he leaves \$10,000 to \$20,000 in Flagship each year after paying expenses, operating costs and his wage;
- The Defendant has expended significant funds in relation to his new family in the Philippines in the approximate amount of \$46,500 for their living expenses;
- The Defendant cashed out RRSPs (\$88,591.41) and gambled the money away rather than rolling over half to the Plaintiff, and has paid her nothing since with regards to her interest in the RRSPs;
- The Defendant concealed this conduct from the Plaintiff and her counsel, such that the Order consented to and entered referred to rolling over a portion of the RRSPs instead of a judgment amount owing to the Plaintiff for that portion, made at time when the RRSPs had already been cashed in, gambled and lost;
- The combined effect of crystalizing shareholder's loan and cashing in his RRSPs resulted in the Defendant having a taxable income of \$430,966.41 in 2009 (with \$77,619.71 owed in taxes);
- Despite Flagship having \$446,282.20 in its account as of May 30, 2012, the Defendant did not take steps to use Flagship's liquidity and bank account as security in order to pay any amount to the Plaintiff;
- Flagship was sufficiently liquid during the Defendant's indebtedness to the Plaintiff to make high risk loans and other substantial payments, including:
 - o March 15, 2011: the unsecured \$30,000 cash loan to NCL Trading Company;
 - o February 1, 2011: the unsecured \$62,000 loan to MT Processor;

- o January 22, 2015: the loan of \$9,041.48 to his new wife, expensed through Flagship;
 - o July 2010 to June 2011: cheques payable to the Defendant totalling \$116,600 through the shareholder's loan account;
 - o July 2011 to June 2012: cheques from Flagship to the Defendant totalling \$342,700; and
 - o June 1, 2012: the Defendant issued himself two \$50,000 bank drafts without evidence of repayment; and
- The Defendant wrote off various personal expenditures through Flagship which could have been reasonably reduced, including: \$4,698.15 for Corvette repairs, \$6,770.93 for trips to Philippines, \$3,272.50 to ICBC to avoid premium increases and \$25,418.40 to purchase his 2012 Ford 150 Truck after trading in his 2005 Corvette.

[313] For all of these reasons, I find beyond a reasonable doubt that the Defendant had the ability to pay the amounts as set out in the Order.

Conclusion on contempt

- [314] For the reasons stated above, I find that the Plaintiff has proven beyond a reasonable doubt that the Defendant is in civil contempt in relation to the Summary Trial Reasons and the Order for failing to pay the required amounts pertaining to retroactive spousal support, the money judgment relating to the division of property, the costs' award made by Registrar Sainty and an order that the Defendant roll over half of his RRSPs.
- [315] The Plaintiff has satisfied the criteria for civil contempt, as outlined in *Carey and Swann*, as she has proven beyond a reasonable doubt that the Defendant had sufficient notice of the orders, which were clear and unequivocal, that he had actual or inferred knowledge of his obligations, and that he intentionally breached the orders in the sense that his noncompliance was willful, as opposed to deliberate, and he had the ability to pay.
- [316] I find that the Plaintiff has not established that the Defendant is in contempt of the order relating to child support, as his obligations have been substantially satisfied with a final accounting to be done in this regard.

Sentencing for contempt and submissions on costs

- [317] The Court will hear submissions as to a fit sentence to be imposed upon the Defendant in relation to this finding of contempt at the first reasonable date to be arranged with Supreme Court Scheduling in New Westminster, BC.
- [318] The Court will also hear submissions as to costs in relation to these proceedings at that time.

Orders made pending sentencing

- [319] Pending sentencing and until further order of the Court, the Court orders that the Defendant surrender his current Canadian passport to the Supreme Court Registry at the New Westminster Court House by 4 p.m. on the second working day after being apprised of the outcome of this proceeding.
- [320] The Court further orders that the Defendant is hereby constrained from making any applications to replace or have reissued a Canadian passport in his name pending further order of the Court.
- [321] Counsel for the Plaintiff is at liberty to provide a copy of these reasons pending the completion and filing of a formal order, to staff at the Canadian Border Services Agency and FMEP, and then to provide an entered order to those agencies thereafter.
- [322] I make these orders pursuant to the FLA, which allows the court the discretion to make orders pertaining to a party's conduct in order to prevent the misuse of the court process or to ensure that the resolution of a matter is not frustrated.
- [323] In particular, Part 10 of the FLA provides for judicial remedies for situations in which a person's conduct in the litigation is contributing to the ongoing conflict. At any time in a family law proceeding, the court may make a conduct order to facilitate settlement of a family law dispute, manage behaviours that might frustrate resolution of the dispute, prevent misuse of the court process or facilitate arrangements pending final resolution of the family law dispute: Family Law Sourcebook, Injunctive Relief, 8.42.
- [324] Under s. 218 of the FLA, titled "Terms and conditions of orders", the court is given the general authority to make orders it deems appropriate:
- 218 Subject to section 183 (3) (e) [orders respecting protection], a court may include in an order any terms or conditions the court considers appropriate in the circumstances.
- [325] More specifically, s. 227 of the FLA outlines the authority of the court to make an order in relation to a party's conduct:

227 A court may make an order requiring a party to do one or more of the following:

- (a) give security in any form the court directs;
- (b) report to the court, or to a person named by the court, at the time and in the manner specified by the court;
- (c) do or not do anything, as the court considers appropriate, in relation to a purpose referred to in section 222 [purposes for which orders respecting conduct may be made].

[Emphasis added.]

- [326] The purposes referred to under s. 227 are outlined under s. 222, which reads as follows:

222 At any time during a proceeding or on the making of an order under this Act, the court may make an order under this Division for one or more of the following purposes:

- (a) to facilitate the settlement of a family law dispute or of an issue that may become the subject of a family law dispute;
- (b) to manage behaviours that might frustrate the resolution of a family law dispute by an agreement or order;
- (c) to prevent misuse of the court process;
- (d) to facilitate arrangements pending final determination of a family law dispute.

[Emphasis added.]

[327] There are no prior cases decided under the FLA of which the Court is aware where orders of this precise nature have been made, although the matter of a child's passport was dealt with in *V.E.A. v. A.R.G.*, 2013 BCPC 325, where Gouge P.C.J. ordered a non-custodial parent to sign the child's passport application under s. 227 and s. 222(b) of the FLA. The learned Provincial Court judge concluded at para. 24 that "resolution" meant the imposition by the court of a set of rights and obligations which will govern the parties' future conduct in relation to one or more of the issues in the proceeding."

[328] I also note the decision of *G.A.C. v. I.C.*, 2006 BCPC 0380 [G.A.C.], in which the court found a mother to be in contempt of court for failing to comply with an order that she surrender her passports. The initial order was made in order prevent the removal of the child of the marriage to Russia. Although no specific provision of the Family Relations Act, R.S.B.C. 1996, c. 128 gave the court jurisdiction to seize a parent's passport in these circumstances, the current FLA does permit a court to order the surrender of a passport when it concerns the removal of a child under s. 64.

[329] The purposes listed under s. 222 that the Court finds to apply in the present case are listed at subsections (b), (c) and (d). Under subsection (b), seizing the Defendant's passport assists the Court in managing his behaviour (a significant risk that he will abscond to the Philippines) that could frustrate the resolution of the contempt dispute. This behaviour has been threatened by him in the past. Further, under (c), seizing the Defendant's passport serves to prevent misuse of the court process. Lastly, under (d), seizing the Defendant's passport and preventing international travel, at present on an interim basis, will likely facilitate arrangements regarding his attendance before the Court for sentencing in relation to the finding of contempt made against him, which in the context of this family law dispute, is a final determination.

[330] Taking these steps will ensure, insofar as possible, that the Defendant will not abscond from his sentencing hearing and that the lengthy contempt proceedings commenced by the Plaintiff for judgment amounts properly owing were not held in vain. It is on this basis that the above orders are made.

"The Honourable Madam Justice E.A. Arnold-Bailey"

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