Date: 20080429

Docket: T-1456-05

T-1457-05

Citation: 2008 FC 452

BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Applicant

and

WILLIAM ROBERT KERBY

Respondent

AND BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Applicant

and

JACQUELINE JEANNE KERBY

Respondent

AMENDED REASONS FOR ORDERS

(Date amended on this page, amendments and deletions on page 8 and one amendment on page 9)

GIBSON J.

INTRODUCTION

[1] By Orders dated the 2nd of October, 2007, the Respondents on the above files were each found guilty of contempt of Court for having disobeyed Orders of this Court, each dated the 31st of

October, 2005. By the same Orders, the Respondents were ordered to attend a sentencing hearing before this Court at the premises of the Court in Vancouver, British Columbia, commencing at 9:30 a.m. on the 15th of February, 2008. Once again by the same Orders, the parties were required to file written submissions on sentencing, together with affidavit evidence in support of the written submissions. The affidavit or affidavits were described as "the equivalent of 'will say' statements". Each Order concluded with the following paragraph:

> Counsel for the Applicant and the Respondent should attend the hearing contemplated by this Order prepared to speak to the question of costs on this contempt proceeding. In the event that either the Applicant or Respondent proposes that costs should be fixed at the hearing, an appropriate draft Bill of Costs should be included with any materials served and filed in accordance with this order.

Counsel for the Applicant included a draft Bill of Costs with the materials served and filed.

[2] For ease of reference, a copy of the Order of the 2nd of October, 2007 on file T-1456-05 is attached as a Schedule to these reasons. The Order on file T-1457-05 is essentially identical in substance.

[3] By letter dated the 8th of February, 2008, following the service and filing of the materials directed to be served and filed by the Orders of the 2nd of October, 2007, counsel for both parties communicated with the Court as follows:

> Counsel for the Applicant and the Respondents in the above-captioned matters have now filed their respective affidavits and written submission with respect to the sentencing hearing currently scheduled to be heard on February 15, 2008. The Applicant is not seeking an order for further compliance from the Respondents. Both counsel are agreed that the sole issue remaining for the Court's determination is the amount of the fine and award of costs. In order to save time and costs for all parties and the Court, counsel propose that the remaining issue of the quantum of any fine and award of costs be dealt with by way of written submissions.

> The parties propose that the February 15, 2008 hearing be cancelled and that the following procedure be adopted:
>
> 1. The Respondents shall be entitled to file and serve, on or before February 15, 2008, a book of authorities and written submissions in reply to the Applicant's sentencing submissions dated February 7, 2008.
>
> 2. Both parties waive their right to adduce additional oral evidence and their right to cross-examine on the affidavits.
>
> 3. The Court would render its Order with respect to the quantum of any fine and award of costs based on all of the oral and affidavit evidence before the Court, the Respondents' written sentencing submissions dated January 24, 2008, the Applicant's written sentencing submissions dated February 7, 2008 and the Respondents' written submissions in reply (if any) filed on or before February 15, 2008.
>
> …

[4] The Court accepted the proposal of counsel by Orders dated the 11th of February, 2008. The Respondents filed no written submissions in reply. Accordingly, the remaining issues of the amount of fines, if any, and the award of costs have been dealt with solely on the basis of the written materials submitted to the Court and will be disposed of by separate orders on each file that will be issued concurrently with these reasons. This single set of reasons applies to both matters.

BACKGROUND

[5] William Robert Kerby and Jacqueline Jeanne Kerby (individually, "Mr. Kerby" and "Mrs. Kerby", and collectively, the "Respondents") are husband and wife. At the time of the contempt hearing before the Court in September, 2007, they lived in Florida.

[6] For some time, the Minister of National Revenue (the "Applicant"), through the Canada Revenue Agency, has been auditing the Respondents' affairs to determine their tax liability under

the *Income Tax Act*[1] and the *Excise Tax Act*[2] for the years 1999 to 2003. On the 4th of February, 2005, the Applicant issued Notices of Requirement for Information and Documents ("RFIs") to the Respondents under subsections 231.2 (1) of the *Income Tax Act* and 289(1) of the *Excise Tax Act*. On the 3rd of March, 2005, Mr. Kerby responded by letter, on behalf of himself and his wife, providing information and a number of documents as attachments to the letter. On the 24th of March, 2005, an officer on behalf of the Canada Revenue Agency informed Mr. Kerby by letter that the response "…did not substantially comply with the RFIs." The officer provided Mr. Kerby with notes detailing where the officer alleged the Applicants had failed to substantially comply.

[7] On the 31st of October, 2005, this Court, upon being satisfied that the requirements had been met for granting an order against each of the Respondents under section 231.7 of the *Income Tax Act* and section 289.1 of the *Excise Tax Act* to provide information and documents sought by the Applicant, such requirements being: first, that a Requirement for Information and Documents had been issued by the Applicant to each of the Respondents; secondly, that each of the Respondents had failed to provide the information and documents so sought, and finally, that the information and documents sought by the Applicant are not protected from disclosure by solicitor-client privilege, ordered each of the Respondents to fully comply with the outstanding Requirements to Provide Information and Documents as detailed in each of the Orders. Each of the Respondents was given thirty (30) days from the date of the Order to comply. Counsel for the Applicant, on behalf of the

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[1] R.S.C. 1985, c. 1 (5th Supp.).
[2] R.S.C. 1985, c. E-15.

Applicant, and without consulting the Court, agreed to a brief extension of the thirty (30) day period for compliance.

[8] In January, 2006, Mr. Kerby, once again on behalf of both Respondents, submitted substantial additional material in response to the Court's Orders. The Applicant determined that the Respondents had not substantially complied with the Court's Orders. In the result, the Applicant brought motions on each of the above-captioned files pursuant to Rules 466 and 467 of the *Federal Courts Rules*.[3] *Rules* 466 and 467 read as follows:

466. Subject to rule 467, a person is guilty of contempt of Court who	466. Sous réserve de la règle 467, est coupable d'outrage au tribunal quiconque :
(*a*) at a hearing fails to maintain a respectful attitude, remain silent or refrain from showing approval or disapproval of the proceeding;	*a*) étant présent à une audience de la Cour, ne se comporte pas avec respect, ne garde pas le silence ou manifeste son approbation ou sa désapprobation du déroulement de l'instance;
(*b*) disobeys a process or order of the Court;	*b*) désobéit à un moyen de contrainte ou à une ordonnance de la Cour;
(*c*) acts in such a way as to interfere with the orderly administration of justice, or to impair the authority or dignity of the Court;	*c*) agit de façon à entraver la bonne administration de la justice ou à porter atteinte à l'autorité ou à la dignité de la Cour;
(*d*) is an officer of the Court and fails to perform his or her duty; or	*d*) étant un fonctionnaire de la Cour, n'accomplit pas ses fonctions;
(*e*) is a sheriff or bailiff and does not execute a writ forthwith or does not make a return thereof or, in executing it, infringes a rule the contravention of which renders the sheriff or bailiff liable to a penalty.	*e*) étant un shérif ou un huissier, n'exécute pas immédiatement un bref ou ne dresse pas le procès-verbal d'exécution, ou enfreint une règle dont la violation le rend passible d'une peine.
467. (1) Subject to rule 468, before a person may be found in contempt of Court, the person alleged to be in	467. (1) Sous réserve de la règle 468, avant qu'une personne puisse être reconnue coupable d'outrage au

[3] SOR/98-106.

contempt shall be served with an order, made on the motion of a person who has an interest in the proceeding or at the Court's own initiative, requiring the person alleged to be in contempt	tribunal, une ordonnance, rendue sur requête d'une personne ayant un intérêt dans l'instance ou sur l'initiative de la Cour, doit lui être signifiée. Cette ordonnance lui enjoint:
(*a*) to appear before a judge at a time and place stipulated in the order;	*a*) de comparaître devant un juge aux date, heure et lieu précisés;
(*b*) to be prepared to hear proof of the act with which the person is charged, which shall be described in the order with sufficient particularity to enable the person to know the nature of the case against the person; and	*b*) d'être prête à entendre la preuve de l'acte qui lui est reproché, dont une description suffisamment détaillée est donnée pour lui permettre de connaître la nature des accusations portées contre elle;
(*c*) to be prepared to present any defence that the person may have.	*c*) d'être prête à présenter une défense.
(2) A motion for an order under subsection (1) may be made *ex parte*.	(2) Une requête peut être présentée *ex parte* pour obtenir l'ordonnance visée au paragraphe (1).
(3) An order may be made under subsection (1) if the Court is satisfied that there is a *prima facie* case that contempt has been committed.	(3) La Cour peut rendre l'ordonnance visée au paragraphe (1) si elle est d'avis qu'il existe une preuve *prima facie* de l'outrage reproché.
(4) An order under subsection (1) shall be personally served, together with any supporting documents, unless otherwise ordered by the Court.	(4) Sauf ordonnance contraire de la Cour, l'ordonnance visée au paragraphe (1) et les documents à l'appui sont signifiés à personne.

Rule 468 referred to in *Rule* 467(1) is irrelevant for the purposes of this matter.

[9] By Orders granted by my colleague Justice de Montigny, dated the 22nd of November, 2006, the Respondents were ordered: first, to appear before a judge of this Court at a time and place stipulated in the Order; secondly, to be prepared on such appearance to hear proof of the act of contempt with which each of them was charged, with such acts being described in the Order with

sufficient particularity to enable each of the Respondents to know the nature of the case against him and her; and thirdly, to be prepared to present any defence that the Respondents might have.

[10] The "contempt" hearings came on before me at the premises of the Court in Vancouver, British Columbia on the 18th of September, 2007. The hearings were scheduled for two (2) days. They continued for two (2) full days and briefly into a third day, and might have gone much longer. Mr. Kerby appeared and testified. Mrs. Kerby did not appear. No objection to the failure of Mrs. Kerby to appear was taken, given Mr. Kerby's acceptance of full responsibility for her business and tax affairs, the remoteness of the Respondents' residence from the place of hearing, and her parental responsibilities.

THE HEARING ON THE ISSUE OF THE GUILT OF THE RESPONDENTS

[11] Hearings under *Rules* 466 and 467 take place in two stages. This was most recently mandated by the Federal Court of Appeal in *Winnicki v. Canadian Human Rights Commission*[4] where Justice Sexton, on behalf of the Court, wrote at paragraph [13] of his reasons:

> It seems to me that the appellant has not lost this right [the right to make submissions as to sentence]. It would be very difficult indeed and perhaps impossible in many cases for counsel to make submissions on sentence before knowing the findings of the trial judge on the issue of the guilt of the accused. Submissions as to sentence might well vary depending on the severity of the findings of the trial judge. Additionally, counsel might wish to lead evidence as to facts to be taken into account which would suggest a more lenient sentence. Such facts in and of themselves might implicate the accused in the offence and therefore counsel could not be expected to lead such evidence prior to a finding that the accused was guilty of the contempt alleged. Quite possibly such evidence might be construed as an admission of guilt. One of the mitigating factors to be taken into account in sentencing is whether there has been an apology. Obviously an apology by an accused would constitute an admission. Therefore, such evidence could not safely be adduced prior to a finding of guilt on the part of the accused.

[4] 2007 FCA 52, January 17, 2007.

Thus, the hearing that took place at Vancouver on the 18th, 19th and 21st of September, 2007, concerned itself only with the issue of the guilt or innocence of the Respondents.

[12] In the course of the hearing, I expressed concern that the hearing was unduly protracted. On the first day and at the opening of the second day of the hearing, counsel for the Applicant raised the issue of withdrawal of an admission. Counsel for the Respondents advised the Court that: "This is the very first time the issue has been raised. It's never been raised before the court prior to this."[5] Certainly, no formal notice of motion was filed and served raising the issue.

[13] At pages 228 and 229 of the transcript, I intervened:

> Mr. Gill [should read Mr. Grewal, counsel for the Applicant], this is the second time in the context - - at least the second time before me, in the context of a very formal process with potentially very significant results, that you have sought a relief in a very informal manner. In the first of those requests, Mr. Gill [Deletion] responded urging that the matter be dealt with by motion, and the court put Mr. Gill's [Deletion] response to you and you never replied. You simply dropped the issue at, I might say, potentially considerable, not very considerable but considerable, cost in time yesterday and inconvenience, in circumstances where it was a high likelihood if a motion had been brought, you would have been successful. In fact, you ignored Mr. Gill's [Deletion] response and you filed two affidavits on consent, effectively ignoring advice from the court, at your peril.
>
> You now bring a second, informal request, oral motion at best, seeking relief in circumstances where I can find no explanation for not having proceeded with a motion.
>
> That being said, based on the submissions of Mr. Gill [Deletion] today, I find no prejudice in the granting of the motion, informal motion, and I conclude that all of the allegations, including the allegation here at issue of failure to comply with an order of this court, to be serious issues worthy of hearing.
>
> So I will grant the withdrawal,…

[14] The essence of the Court's concern was that time was taken, without notice to the Respondents, in the consideration of preliminary matters that should have been dealt with by motion heard in advance of a hearing specifically dedicated to the hearing of witnesses and argument on the fundamental issue of the guilt or otherwise of contempt on the part of the Respondents.

[15] The afternoon of the second day of the hearing commenced at 2:00 p.m. with the opening of the examination of Mr. Kerby.[6]

[16] By mid afternoon, I again intervened and the following exchange took place between the Court and counsel for the Respondents:

> Justice: Mr. Gill, this witness [Mr. Kerby] is, in effect, testifying to three things, as I understand what he has said as you've begun to go through the various paragraphs of Madam Justice Simpson's order. One, there are circumstances where he never had any supporting documentation, but he didn't tell Canada Revenue Agency that; two, there are circumstances where he did provide additional documentation but he failed to explain its relevance, and he's now doing that before the court; and three, there are circumstances where he failed to provide documentation and he is now, within the last week, long after the extension to comply with the order has expired, providing it to the Crown and to the Court. Am I wrong?
>
> Mr. Gill: No, I think that's an accurate summary.
>
> Justice: If that's an accurate summary, doesn't this constitute an admission of failure to comply?
>
> Mr. Gill: I don't - - I think there are additional defenses that are available to - -
>
> Justice: There may well be. There may well be. But I haven't heard any defence to this point. None of what is being submitted here this afternoon is a defence. It's an admission. Now, if there are defences, lets focus on them.
>
> Do you want to think about that? Shall we take a break?
>
> Mr. Gill: There are two - - well, yes, please.

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[5] Transcript, September 19, 2007, p. 225.
[6] Transcript, September 19, 2007, p. 325.

> Justice: Okay. I'm concerned quite frankly. I mean, this is not an unsophisticated businessman but he is disclosing, with great respect, some of the most unsophisticated business practices I have ever heard of in my life. And unless you can convince me differently, he is admitting to failing to comply with the order. Let's take ten minutes.[7]

[17] After a brief recess, the following exchange took place between counsel for the Respondents and the Court:

> Justice: Mr. Gill.
>
> Mr. Gill: Mr. Justice, the main defence that we intend to put forward, and to argue, is that waiver of the time limits for complying by the Crown is effective to eliminate the time limit for the purposes of compliance, and that with that waiver that there is effectively no time limit to bind Mr. Kerby. And in the absence of a time limit, there is no contempt. And absent that argument succeeding, then, yes, we agree that there will be contempt of the particular order.
>
> Justice: of both orders?
>
> Mr. Gill: Yes.
>
> Justice: Okay.[8]

[18] Examination of Mr. Kerby was very quickly completed. Once again, the Court intervened and the following exchange took place between the Court and counsel for the Respondents:

> Justice: …I would like you to speak to the question of whether counsel for the Minister can effectively waive the terms of an order of this court in favour of your client.
>
> I have heard to this point that counsel for the applicant purported to do that but I have real doubt as to whether that was of any effect. If it was of no effect, then your argument that the waiver effectively extended the time forever becomes moot.
>
> Mr. Gill: I have not come prepared to make that argument today because of the previous discussion of setting argument potentially for Friday morning.
>
> Justice: Yes. And that's fair.[9]

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[7] Transcript, September 19, 2007, pp. 366 and 367.
[8] Transcript, September 19, 2007, pp. 367 and 368.

The foregoing exchange related to the fact that an agreement was reached between counsel, shortly after the making of Justice Snider's Orders in the autumn of 2006, extending the time provided in those Orders for compliance with the Orders by the Respondents. The Court was never made a party to the agreed upon extension.

[19] There followed a brief continuation of examination-in-chief and cross-examination of Mr. Kerby and a further exchange between the Court and counsel regarding the forthcoming third-day of the hearing.

[20] Proceedings on the third day of hearing were brief. Following the opening of Court, counsel for the Respondents is recorded as saying:

> …As we noted before we left off last time, the sole defence that the respondents were going to put forward had to do with a waiver of the time period. After that time, I've had some discussions with my friend, whose recollection of - - and file memos with respect to the facts underlying that waiver had a slightly different complexion than what we understood previously.
>
> In light of those facts, we are not going to be proceeding with the arguing of that defence, and simply be admitting [sic] the contempt for both respondents, and dealing with the - - I understand that we'll be dealing with the extent and the seriousness of the deficiencies at the following hearing, at the sentencing hearing.[10]

[21] There followed an exchange between the Court and counsel regarding the form of the Orders to be issued, one of which is annexed as a Schedule to these reasons, the time for various filings, and the scheduling of the next hearing. In the event, a relatively long period was settled on

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[9] Transcript, September 19, 2007, pp. 369 and 370.
[10] Transcript, September 21, 2007, p. 2.

in advance of the second hearing by reason of the request from counsel for the Respondents to allow the Respondents sufficient time to “purge their contempt”.

THE EVIDENCE AND SUBMISSIONS BEFORE THE COURT REGARDING SENTENCING AND COSTS

a) The Affidavit of William Robert Kerby

[22] Mr. Kerby submitted a single affidavit, filed the 24th of January, 2008, on behalf of himself and his wife. At paragraph 6, he outlines a number of factors on the basis of which he concluded that compliance with the Compliance Orders issued by this Court against him and his wife was simply not possible. He outlines the factors in the following terms:

> (a) the information being sought was between three and sixteen years old at the time of the issuance of the Compliance Order;
>
> (b) many boxes of documents had been previously provided by me to the Canada Revenue Agency (“CRA”) in the course of their audit and much of the relevant documentation was either still in the possession of the CRA, had gone missing or otherwise misplaced in the course of passing between my accounting advisors and the CRA or had been returned to me by the CRA in a different and disorganized manner compared to when it had been first provided to them;
>
> (c) some of the relevant documentation was no longer available due to a variety of circumstances, including that it pertained to companies or individuals that I did not, or no longer controlled, and a large amount of documentation that had been stored at a storage location in the United States had been disposed of by the storage company due to unpaid storage bills;
>
> (d) I was experiencing financial difficulty, my accountants had ceased working for me because of unpaid bills and I did not, at that time, have the financial resources to hire new accountants; and
>
> (e) fifteen days was far short of the time reasonably required to complete the amount of document review, requests for documents from third parties and accounting work that was needed to comply with the Compliance Order.

[23] Mr. Kerby attests that, nonetheless, following the issuance of the contempt orders against him and his wife, he attempted to purge their contempt. At paragraph 10 of his affidavit, he attests:

> 10. I have attempted to remedy my breaches of the Compliance Orders by re-examining all of the information in my possession, making additional inquiries of relevant parties in [an] attempt to locate any additional relevant documentation and retaining new accountants to complete additional accounting work.

Mr. Kerby annexes to his affidavit as exhibits, substantial additional information and documentation which he describes in some detail in his affidavit.

[24] Mr. Kerby concludes his affidavit with the following paragraphs:

> 26. I have conducted a careful search of my records and where appropriate, made inquiries of financial institutions and other parties involved in transactions, and I have provided all of the information and documentation that I have been able to locate and that are related to the Respondent's allegations of breaches of the Compliance Orders.
>
> 27. I am primarily responsible for the business and financial dealings and records that are the subject of the Compliance Order.
>
> 28. Jacqueline has little involvement and knowledge of the business and financial dealings and records that are the subject of the Compliance Order.
>
> 29. Jacqueline at all times intended to comply with the Compliance Order, relied entirely upon me to assist her in complying with her Compliance Order and did not have the knowledge, expertise or documents in her possession to permit her to comply with the Compliance Order on her own;
>
> 30. My failure to comply with the Compliance Orders was due to a variety of factors, including:
>
> (a) emotional fatigue from an audit in which an enormous amount of documentation and information has been requested and provided by me, some of it repeatedly;
>
> (b) a history of animosity and hostile interactions between the CRA auditor George Boulos and me and my tax and accounting advisors;
>
> (c) a relatively short time period of fifteen days to comply with the Compliance Orders, due in part to a failure by the Respondent to serve the Compliance Orders in an expedited fashion;
>
> (d) a lack of financial capacity to retain the required accounting assistance; and
>
> (e) many documents being either missing or disorganized, particularly the records of companies that had failed financially and partly due to the state of the records after being transmitted back and forth between my accountants and the CRA.

> 31. I have attempted to purge any contempt and remedy any deficiencies in my answers to the Compliance Orders.
>
> 32. I apologize to the Court for my failure to comply with the Compliance Orders. In no way did I intend to undermine or defy the authority of this Court or the rule of law and I sincerely regret it if my actions or omissions in relation to the Compliance Orders has caused that to occur.

b) The Affidavit of Ron Kirkwood on behalf of the Applicant

[25] Mr. Kirkwood attests that he is employed as an auditor in the Verification and Enforcement Division of the Burnaby-Fraser Tax Service Office of the Canada Revenue Agency. He further attests that he is the auditor currently assigned to the audits of the Respondents and a company, K7 Holdings Ltd., a company related to Mr. Kerby.

[26] At paragraphs 32 and 33 of his Affidavit, Mr. Kirkwood attests:

> 32. I have undertaken a careful review of the material provided in the September 14, 2007 Submissions and the January 23, 2008 Submissions to determine whether the information and documents contained in those submissions satisfy the items in the Compliance Orders that remained outstanding as of the contempt hearing on September 18, 19 and 21, 2007.
>
> 33. Although the Compliance Orders required the Respondents to provide the information and documents set out in the Requirements for Information in late 2005, the Respondents have not satisfactorily responded to the Applicant in providing the majority of the required information per the Compliance Orders. In particular:
>
> a) Mr. Kerby has failed to address discrepancies within the various submissions and responses made to the Applicant, including the inconsistency between the loan amounts payable and receivable and Mr. Kerby's reported personal assets and liabilities; and
>
> b) there is still insufficient supporting documentation provided with respect to many claimed loan transactions.

[27] Mr. Kirkwood concludes his affidavit with the following submissions regarding Mr. Kerby's affidavit summarized above and related submissions in the following paragraphs:

> 42. At every stage of the Applicant's proceeding against the Respondents, the inadequacy of the Respondents' submissions and responses to the

Requirements for Information and the Compliance Orders have required the CRA to pursue further compliance in these proceedings.

43. Except for subparagraphs 1(b) and (c) of Compliance Order issued against Mr. Kerby, the material submitted by Mr. Kerby in the January 31, 2006 Submissions following the issuance of the Compliance Orders was identical to the information provided in the March 3, 2005 Responses.

44. I am informed and do believe from a search of the records of the CRA and verily believe that neither of the Respondents, or any of their representatives, advised the Applicant of the following in the January 31, 2006 Submissions:

a) the age of the information being sought pursuant to the Compliance Orders would create difficulties for the Respondents to comply with the Compliance Orders;
b) that the Respondents had financial issues which would create difficulties for the Respondents to comply with the Compliance Orders;
c) that the CRA had misplaced or failed to return any of the records or documents previously provided by the Respondents;
d) that the CRA had returned any of the records or documents to the Respondents in a disorganized manner; and
e) except for subparagraphs 1(f), (i) and (k) with respect to the Compliance Order issued against Mr. Kerby, that the Respondents had no further documentation or information available to provide the CRA in response to the Compliance Orders.

45. Following the March 3, 2005 Responses and January 31, 2006 Submissions, although certain items in the Compliance Orders have remained outstanding since October 31, 2005, the Respondents only provided submissions to the Applicant immediately prior to the contempt hearings in April 2007 and September 2007.

46. Further, and despite the fact that the Respondents were also found in contempt of court in September 2007, the Respondents only provided additional submissions to the CRA in response to the Compliance Orders in the January 23, 2008 Submissions.

47. Only in the January 23, 2008 Submissions does Mr. Kerby make any attempt to provide an explanation for certain transactions, such as for the loan transactions involving Mr. Kerby as required under subparagraph 1(b) of the Compliance Order issued against Mr. Kerby.

48. With reference to subparagraphs 1(d), (e), (g), (h), (i), (j) and (l) of the Compliance Order issued against Mr. Kerby, Mr. Kerby did not provide any new material to the Applicant between the March 3, 2005 and the September 14, 2007 Submissions.

c) The Respondents' Submissions

[28] Counsel for the Respondents briefly summarizes the background to this proceeding commencing with the issuance of the RFIs to the Respondents "on our about February 4, 2005". He then notes Mr. Kerby's apology to the Court contained in paragraph 32 of Mr. Kerby's affidavit as quoted earlier in these reasons. Counsel then summarizes "sentencing principles and guidelines" in matters such as this. He cites *Canada (Minister of National Revenue v. Marshall*[11] where Justice Kelen of this Court wrote at paragraph [16]:

> To summarize, the factors relevant to determining a sentence in contempt proceedings are:
>
> i. The primary purpose of imposing sanctions is to ensure compliance with orders of the court. Specific and general deterrence are important to ensure continued public confidence in the administration of justice;
>
> ii. Proportionality of sentencing requires striking a balance between enforcing the law and what the Court has called "temperance of justice";
>
> iii. Aggravating factors include the objective gravity of the contemptuous conduct, the subjective gravity of the conduct (i.e., whether the conduct was a technical breach or a flagrant act with full knowledge of its unlawfulness), and whether the offender has repeatedly breached orders of the Court; and
>
> iv. Mitigating factors might include good faith attempts to comply (even after the breach), apologize or accept responsibility, or whether the breach is a first offence.

Against the above factors, counsel then refers to a range of cases of contempt of compliance orders in tax matters where fines have ranged between $1,000 and $4,000 and costs have been ordered payable by the Respondent to the Applicant in a range from $500 to slightly over $4000.

[29] Counsel for the Respondents then cites mitigating factors he urges arise on the facts of these matters and concludes that a fine in the aggregate amount of $1,000 would be appropriate divided as between the Respondents with $900 payable by Mr. Kerby and $100 payable by Mrs. Kerby. He urges that fixed costs in the range of $2400 would be appropriate. He concludes:

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[11] 2006 DTC 6466, June 20, 2006.

> 23. The Respondents have now attempted to remedy any breaches of the Compliance Order[s] by submitting additional information and documents to the Applicant and Bill [Mr. Kerby] has stated in his sworn affidavit that all relevant information in his possession has been provided. Subject to any additional concerns identified by the Applicant, and the right of the Respondents to address or refute any such concerns through testimony at the sentencing hearing, the Respondents take the position that the contempt has now been purged and that no further order of compliance is required.

d) The Applicant's Sentencing Submissions

[30] Counsel for the Applicant notes that Rule 472 of the *Federal Courts Rules*[12] establishes the range of penalties for contempt that may be ordered by the Court. Rule 472 reads as follows:

472. Where a person is found to be in contempt, a judge may order that	**472.** Lorsqu'une personne est reconnue coupable d'outrage au tribunal, le juge peut ordonner :
(*a*) the person be imprisoned for a period of less than five years or until the person complies with the order;	*a*) qu'elle soit incarcérée pour une période de moins de cinq ans ou jusqu'à ce qu'elle se conforme à l'ordonnance;
(*b*) the person be imprisoned for a period of less than five years if the person fails to comply with the order;	*b*) qu'elle soit incarcérée pour une période de moins de cinq ans si elle ne se conforme pas à l'ordonnance;
(*c*) the person pay a fine;	*c*) qu'elle paie une amende;
(*d*) the person do or refrain from doing any act;	*d*) qu'elle accomplisse un acte ou s'abstienne de l'accomplir;
(*e*) in respect of a person referred to in rule 429, the person's property be sequestered; and	*e*) que les biens de la personne soient mis sous séquestre, dans le cas visé à la règle 429;
(*f*) the person pay costs.	*f*) qu'elle soit condamnée aux dépens.

[31] After citing a number of cases parallel in nature to this matter, and annexing a bill of costs, later revised, proposing solicitor-client costs of $6,360 for counsel fees and $7,123.33 for disbursements and thus for a total of $13,483.33, counsel concludes in the following terms:

> 66. The Respondents are in contempt of court as a result of their failure to comply with the Compliance Orders.
>
> 67. The Applicant submits that a fine in the amount of $4,000 should be ordered against Mr. Kerby, and that a fine in the amount of $1,000 should be ordered against Mrs. Kerby, each payable within 30 days of the orders.

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[12] *Supra*, note 3.

> 68. The Applicant further seeks an award of solicitor-client costs against the Respondents in the amount of $14,203.33, [later revised as noted above] such award to be made payable jointly and severally by the Respondents to the Applicant (via the Receiver General for Canada) within 60 days of the orders.
>
> 69. The Applicant does not seek any order for further compliance with any items listed in the Compliance Orders.

e) Reply Submissions

[32] As earlier noted in these reasons, counsel for the Respondents filed no reply submissions.

ANALYSIS

a) Sentencing Principles

[33] Counsel for both the Applicant and the Respondents cited *M.N.R. v. Marshall*, *supra*, and in particular, paragraph 16 from that decision, earlier quoted in these reasons.

[34] With regard to severity of sentence, my colleague Justice Snider, in *Wanderingspirit v. Marie*[13] wrote at paragraph 4 of her reasons:

> Overall the penalty should reflect the severity of the law and yet be sufficiently moderate to show the temperance of justice. Other elements to be considered are the following:
>
> a. the fine must not be a mere token amount, but must reflect the ability of the person found in contempt to pay the fine;
> b. whether the contempt defence is a first offence;
> c. whether the contemnor has a prior record of ignoring Court process;
> d. the presence of any mitigating factors such as good faith or apology;
> e. any apology and whether it was timely given;
> f. deterrence, to ensure that subsequent orders will not be breached;
> g. any intention to wilfully ignore or disregard the order(s) of the Court; and
> h. whether the order has subsequently been found to be invalid.

[13] 2006 FC 1420 [not cited by counsel].

[35] With regard to the award of costs, in *Canada (Minister of National Revenue) v. Bjornstad*,[14] my colleague Justice Dawson wrote at paragraph 4 of her reasons:

> … The award of costs on a solicitor-client basis reflects the policy of the Court that a party who assists the Court in the enforcement of its orders and in ensuring respect for its orders should not be put out of pocket…

[36] Against the foregoing principles, I will examine the factors at play in this particular matter.

b) Application of the *Marshall* Principles

[37] There can be no doubt on the facts of this matter that sanctions are warranted against the Respondents to ensure compliance with orders of this Court. The Respondents, acting throughout through Mr. Kerby, procrastinated and did not take seriously this Court's Compliance Orders. It was only after the Respondents, once again through Mr. Kerby, admitted their contempt, that they made a final desperate effort to purge that contempt. There is nothing before the Court to indicate that their efforts between early October, 2007 and late January, 2008 could not have earlier been undertaken. They still failed to fulfil the requirements issued to them on behalf of the Applicant. I am satisfied that they unduly protracted the contempt proceedings before this Court, only to collapse into an admission of contempt at the beginning of the third day of the contempt hearing. That being said, I am satisfied that a sanction in the nature of fines is appropriate against the range of sanctions open to the Court under *Rule* 472, quoted earlier in these reasons.

[38] While I am satisfied that it is appropriate to strike a balance between enforcing the law and what this Court has called "temperance of justice", on the facts of this matter, that balance should

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[14] 2006 DTC 6492.

tend towards enforcement of the law. I am satisfied that very little "temperance" is warranted on the facts of this matter.

[39] Once again on the facts of this matter, the gravity of the contemptuous conduct warrants a significant fine. While this set of facts appears on the evidence before the Court to represent the first breach of Court Orders by these Respondents, it is a serious and flagrant breach.

[40] By contrast, I find no "good faith" attempts to comply with the Court's Orders until after the findings of contempt. Even then, I find that the attempts were less than wholehearted. Further, the apology tendered by Mr. Kerby in his affidavit earlier referred to was simply "too little, too late".

c) The *Wanderingspirit* Specific Penalty Principles.

[41] Once again on the facts of this matter, the appropriate fine will be more than a "mere token amount". No hard evidence was advanced on behalf of the Respondents that would reflect an inability to pay an appropriate fine.

[42] While I would assume that the Respondents' contempt offences here at issue are first offences, and I have no evidence before me regarding a prior record on behalf of these Respondents of ignoring Court process, the mitigating factors applicable are not strong. The good faith of the Respondents, in the Court's observation, was very suspect. Equally, as I have earlier noted, the apology tendered by Mr. Kerby was both hollow and late or, put another way, it was not "timely given".

[43] Finally in this regard, given the current residence of the Applicants in the United States, I have no reason to conclude that these Applicants might subsequently be faced with the temptation to breach subsequent orders of a Canadian court or to wilfully ignore or disregard orders of a Canadian court. Certainly, the Court Orders underlying the Orders now to issue have not been found to be invalid and are not now likely to be found to be invalid.

d) The *Bjornstad* Principle Regarding Costs

[44] The solicitor-client bill of costs filed in this matter on behalf of the Applicant reflects a claim for costs far in excess of the norm in respect of contempt proceedings such as that here before the Court. That being said, I am satisfied that an award of costs on a solicitor-client basis is appropriate in this matter and that the Respondents are largely responsible for the fact that the bill of costs put forward on behalf of the Applicant reflects the reality that the Respondents prolonged the contempt hearing and the processes in preparation for the hearing substantially beyond what was justified, given their ultimate collapse and acknowledgement that they were in contempt. In the circumstances, I am prepared to contemplate, on the facts of this matter, an award of costs on a solicitor-client basis that is in excess of earlier awards by this Court in equivalent matters.

e) Application of the foregoing "principles analyses" to the submissions of the parties

[45] To reiterate, counsel for the Respondents, in submissions filed before the filing of submissions on behalf of the Applicant urges that a fine in the total amount of $1,000 is appropriate

on the facts of this matter with $900 to be payable by Mr. Kerby and $100 to be payable by Mrs. Kerby. No submissions on behalf of the Respondents relate to the time for payment of the fine. As to costs, counsel for the Respondents urged that fixed costs in the range of $2,400 would be appropriate.

[46] By contrast, counsel for the Applicant urges that a fine in the amount of $4,000 payable by Mr. Kerby and in the amount of $1,000 payable by Mrs. Kerby would be appropriate and that both such fines should be payable within the thirty (30) days of the date of the Court's Orders. As to costs, counsel for the Applicant urges that solicitor-client costs in the amount of $13,483.33 inclusive of fees and disbursements, and based upon the bill of costs submitted, should be ordered and made payable jointly and severally by the Respondents to the Applicant within sixty (60) days of the date of the Court's Orders.

[47] Based upon the foregoing brief analysis under the applicable general principles, I adopt the submissions of counsel for the Applicant as appropriate. Orders will go providing for a fine in the amount of $4,000 against Mr. Kerby, payable within thirty (30) days of the date of the Order made against him, and in the amount of $1,000 as against Mrs. Kerby, once again payable within thirty (30) days of the date of the Order made against her.

[48] The issue of an appropriate award of solicitor-client costs is somewhat more problematic. Costs in the amount of $13,483.33, even on a solicitor-client basis, far exceed costs awards in similar matters that have been ordered by this Court. While I am satisfied, as earlier indicated, that

the Respondents unduly prolonged these proceedings, and, in particular, the hearing before me, I am not satisfied that counsel fees in the amount of $6,360 have been fully justified. That being said, I am satisfied that counsel fees above amounts previously ordered by this Court are, indeed, justified. In the exercise of my discretion under *Rule* 400 of the *Federal Courts Rules*,[15] I will fix counsel fees herein at $4000.

[49] Similarly, disbursements in the amount of $7,123.33 are not well documented. Witness fees in the amount of $550.25 are not fully justified. Photocopying charges of $5,108.49 are not supported by any particulars whatsoever. In the absence of much more substantial justification, I would reduce the Applicant's claim for disbursements to $2,500. In the result, the Orders issued herein will provide an award of solicitor-client costs against the Respondents in the amount of $6,5000, such award being made payable jointly and severally by the Respondents to the Applicant, within sixty (60) days of the date of the Orders herein.

[50] In the event that the Court's Orders regarding fines and costs are not fully complied with within the times provided in the Orders, the Applicant may reapply to this Court for further and other penalties provided for in *Rule* 472.

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[15] *Supra*, note 3.

CONCLUSION

[51] Orders will go reflecting the Court's conclusions contained in paragraphs [47] to [50] above.

A copy of these reasons should be placed on each of Court files T-1456-05 and T-1457-05.

"Frederick E. Gibson"

JUDGE

Ottawa, Ontario
April 10, 2008

SCHEDULE

Date: 20071002

Docket: T-1456-05

Ottawa, Ontario, October 2, 2007

PRESENT: The Honourable Mr. Justice Gibson

BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Applicant

and

WILLIAM ROBERT KERBY

Respondent

ORDER

UPON the Respondent appearing with counsel at the premises of the Court in Vancouver, British Columbia, to hear proof that he is guilty of contempt of this Court and be prepared to present any defence that he may have to the charge that he is guilty of contempt of this Court for being in breach of the Compliance Order issued by the Court to him, all in accordance with the Order of the Honourable Mr. Justice de Montigny dated November 22, 2006;

AND NOTING that neither the Respondent nor his counsel raised any question with regard to the service of the Order of Justice de Montigny on the Respondent;

AND UPON hearing the testimony of witnesses on behalf of the Applicant and on behalf of the Respondent, including the testimony of the Respondent himself;

AND UPON noting that Rule 466(b) of the *Federal Courts Rules*, SOR/98-106 (the "Rules") states that a person is guilty of contempt of court when he or she disobeys an order of the Court;

AND UPON further noting that in determining whether a person is in contempt of Court, the Court must apply the following principles:

a) the burden of proving contempt falls upon the party alleging such contempt, and that the person alleged to be in contempt (the "contemnor") need not present any evidence to the Court;

b) the constituent elements of contempt must be proven beyond a reasonable doubt;

c) the disobedience of an order of the Court must be established by demonstrating the existence of the Court order, knowledge of the order by the alleged contemnor, and knowledge by the alleged contemnor of disobedience of the order;

d) the evidence to establish contempt is to be provided orally, unless the parties are instructed otherwise by the Court; and

e) to establish liability for disobeying an injunctive order, it is sufficient to show that the alleged contemnor has knowledge of the order, as proof of intent is not a required element for the finding of contempt (see: Rules 469 and 470, and *Tele-Direct (Publications) Inc. v. Canadian Business Online Inc.* (1998), 151 F.T.R. 271);

AND UPON further noting the underlying rationale justifying the Court's contempt power is to ensure the orderly administration of justice and respect for judicial process, the disobedience of a Court order constituting an attack on its authority and dignity, and that therefore, compliance with Court orders is imperative if the rule of law is to be maintained;

AND UPON the completion of presentation of evidence on behalf of the Applicant and the Respondent, the Court adjourning for two days and then reconvening to hear representations of

counsel for and against a finding of contempt on the part of the Respondent for failing to comply with an order of Madam Justice Snider dated October 31, 2005, requiring the Respondent to fully comply with the requirement to provide information and documents dated February 4, 2005, issued by the Canada Revenue Agency to the Respondent;

AND UPON reconvening to hear representations of counsel, counsel for the Respondent advising the Court and counsel for the Applicant that the Respondent then admitted that he was guilty of the contempt alleged and the Court itself being satisfied beyond a reasonable doubt that, on the basis of the evidence presented before it, but without hearing representations of counsel, the Respondent was indeed guilty of the contempt alleged;

IT IS ORDERED that:

1) The Respondent is guilty of contempt of Court for having disobeyed this Court's order of October 31, 2005.

2) The Respondent shall serve and file written submissions on sentencing together with any affidavit or affidavits that he considers appropriate in support of the written submissions (the equivalent of "will say" statements), on or before January 24, 2008.

3) The Respondent shall, through counsel and in person only if he intends to testify as hereinafter provided, attend a sentencing hearing before this Court at the premises of the Court in Vancouver, British Columbia, commencing at 9:30 a.m. on February 15, 2008, and, together with any affiants to affidavits filed on his behalf, he and they may testify at that hearing within the scope of the evidence provided in any affidavit or affidavits as above referred to and may be subjected to cross-examination on any such affidavits and testimony. He or his counsel may there and then make representations as to the appropriate sentence.

4) The Applicant shall serve and file written submissions on sentencing together with any affidavit or affidavits that the Applicant considers appropriate in support of the

written submissions (the equivalent of "will say" statements), on or before February 7, 2008.

5) The Applicant shall, by counsel, attend the sentencing hearing before this Court at the premises of the Court in Vancouver, British Columbia, commencing at 9:30 a.m. on February 15, 2008, and may, through agents or employees attesting to any such affidavit or affidavits, testify at that hearing within the scope of the evidence provided in any such affidavit or affidavits and may be subjected to cross-examination on any such affidavits and testimony. Counsel for the Applicant may then and there make representations as to the appropriate sentence.

6) Provision by the Court of a copy of this order to counsel for the Applicant and counsel for the Respondent shall constitute service on the Applicant and Respondent respectively.

7) Counsel for the Applicant and the Respondent should attend the hearing contemplated by this order prepared to speak to the question of costs on this contempt proceeding. In the event that either the Applicant or Respondent proposes that costs should be fixed at the hearing, an appropriate draft Bill of Costs should be included with any materials served and filed in accordance with this order.

"Frederick E. Gibson"

JUDGE

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1456-05 T-1457-05
STYLE OF CAUSE:	THE MINISTER OF NATIONAL REVENUE and WILLIAM ROBERT KERBY AND JACQUELINE JEANNE KERBY

MATTER DEALT WITH ON THE BASIS OF AFFIDAVIT EVIDENCE AND WRITTEN SUBMISSIONS ONLY

REASONS FOR ORDER:	GIBSON J.
DATED:	April 10, 2008

APPEARANCES:

Raj Grewal and David Everett	FOR THE APPLICANT
Terry S. Gill	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

John H. Sims, Q.C. Deputy Attorney General of Canada Vancouver, B.C.	FOR THE APPLICANT
Thorsteinssons LLP Vancouver, B.C.	FOR THE RESPONDENTS