

Federal Court



Cour fédérale

**Date: 20191025**

**Docket: T-1498-16**

**Citation: 2019 FC 1341**

**Ottawa, Ontario, October 25, 2019**

**PRESENT: The Honourable Madam Justice Roussel**

**BETWEEN:**

**BOWDY'S TREE SERVICE LTD.**

**Plaintiff**

**and**

**THERIAULT INTERNATIONAL LTD.**

**Defendant**

**ORDER AND REASONS**

[1] Before the Court is a motion brought by the Plaintiff, Bowdy's Tree Service Ltd, for an order finding Theriault International Ltd [the Defendant], Craig Theriault, Theriault International Marine and TI Marine 2018 Ltd in contempt of Court for failing to comply with the order of Mr. Justice Barnes, dated January 11, 2019.

[2] That order [Production Order] required Mr. Theriault, on behalf of the Defendant, Theriault International Marine and TI Marine 2018 Ltd [together the “Theriault Entities”], to produce for inspection, at an examination in aid of execution, certain documents falling into seventeen (17) categories of information. The Plaintiff is seeking to enforce a judgment granted by default against the Defendant on June 28, 2017.

[3] The Production Order further provided that, in the event the Defendant or Mr. Theriault (being the person to be examined on behalf of the Defendant) wished to seek relief from the requirement to produce the documents sought, they could bring a motion for such relief within fourteen (14) days of being served the Production Order.

[4] The Production Order also permitted substitutional service by mail and by email of the Production Order and a Direction to Attend on Mr. Theriault, who is the sole director, officer and agent of each of the Theriault Entities.

[5] In accordance with the terms of the Production Order, the Plaintiff sent the following original documents, or copies thereof, to Mr. Theriault and the Theriault Entities on January 20, 2019, variously by email, mail or registered mail:

- (i) a Direction to Attend an examination in aid of execution on February 18, 2019;
- (ii) the Production Order; and
- (iii) a cheque representing conduct money.

[6] No motion for relief from production was filed by either Mr. Theriault or the Defendant.

[7] On February 18, 2019, Mr. Theriault appeared at the examination in aid of execution. He produced three (3) documents consisting of four (4) pages in total. Mr. Theriault also showed the Plaintiff's agent a form of what he said were public records relating to the incorporation of TI Marine 2018 Ltd, but he refused to leave a copy with the Plaintiff's agent.

[8] On March 29, 2019, upon an *ex parte* motion made in writing, Case Management Judge Kathleen M. Ring found that the Plaintiff had established a *prima facie* case of contempt. She issued an order [Show Cause Order] that required Mr. Theriault, on behalf of the Theriault Entities, to appear before a judge at a special sitting of this Court in Fredericton, New Brunswick on May 6, 2019, and be prepared to: (a) hear proof of the acts of contempt with which he is charged; (b) present any defence that he may have to that charge; and (c) speak to the Plaintiff's submissions on an appropriate sentence if he is found to be in contempt.

[9] Case Management Judge Ring defined the acts of alleged contempt as follows:

The acts with which Mr. Theriault, on behalf of the [Theriault Entities], is charged is that he, by his conduct described below, breached the Order of the Honourable Mr. Justice Barnes dated January 11, 2019 [Production Order]:

- (a) By the Production Order, Mr. Theriault was ordered to produce for inspection, on behalf of the [Theriault Entities], the documents defined in the Production Order at the examination in aid of execution; and
- (b) Mr. Theriault did not produce the documents as defined and required by the Production Order at the examination in aid of execution.

[10] Case Management Judge Ring authorized substitutional service of three (3) documents in support of the *ex parte* motion on Mr. Theriault and each of the Theriault Entities: the Show Cause Order; the affidavit of Robert Jette, Q.C., sworn February 20, 2019 (being the Plaintiff's agent who attended the examination in aid of execution on February 18, 2019); and the affidavit of the Plaintiff's counsel, sworn March 12, 2019. In addition, she allowed the Plaintiff to tender the affidavit evidence of Mr. Jette at the contempt hearing, provided that Mr. Jette attend the hearing for cross-examination if requested to do so in writing at least ten (10) days before the hearing by any of the persons subject to the Show Cause Order. Under section 82 of the *Federal Courts Rules*, SOR/98-106 [Rules], she also granted the Plaintiff leave to file the affidavit sworn by his counsel on March 12, 2019, and to present argument to the Court based, in part, on the said affidavit. Costs relating to the *ex parte* motion were reserved for the judge presiding at the contempt hearing.

[11] On April 3, 2019, the Plaintiff's counsel filed an affidavit stating he had sent the Show Cause Order and the two (2) affidavits to Mr. Theriault and the Theriault Entities by mail and by email on March 30, 2019.

[12] Neither Mr. Theriault nor the Theriault Entities requested Mr. Jette's attendance at the hearing for cross-examination.

[13] Mr. Theriault did not appear at the contempt hearing to respond to the allegation of contempt set out in the Show Cause Order. At the contempt hearing, I questioned counsel for the Plaintiff regarding whether there was any reason to be concerned that Mr. Theriault had not

received notice of the Show Cause Order advising him that his conduct would be examined at this hearing. Counsel for the Plaintiff argued that Mr. Theriault was aware that the contempt hearing was scheduled on May 6, 2019. To support his statement, counsel for the Plaintiff submitted an affidavit that he had sworn the previous day, to which he attached a series of emails sent by Mr. Theriault between April 2019 and May 2, 2019 from one of the email addresses identified for substitutional service in the Production and Show Cause Orders. Among these emails, several include a reference to “Contempt Hearing May 6, 2019” in the subject line. On this basis, I am satisfied that Mr. Theriault was aware that the contempt hearing was scheduled to proceed on May 6, 2019.

[14] In the spirit of candour, counsel for the Plaintiff referred the Court to an email Mr. Theriault sent on May 1, 2019 that suggested he might have been out of the country. While I considered such possibility, I nevertheless decided to proceed in Mr. Theriault’s absence. If Mr. Theriault was unavailable to appear on the date scheduled, it was his responsibility to request an adjournment from the Court. Mr. Theriault did not request such an adjournment, nor did he advise the Court that he could not attend. Moreover, I note that had Mr. Theriault been present, he would have had the right to remain silent, and he would have been under no duty to file evidence in his defence. Subsection 470(2) of the Rules stipulates that a person alleged to be in contempt may not be compelled to testify. The burden of demonstrating contempt rests with the party alleging the breach. In this case, the onus is on the Plaintiff.

[15] Before examining the principles of contempt, I note that the Plaintiff is asking the Court to find several entities guilty of contempt, namely the Theriault Entities and Mr. Theriault

himself. However, upon review of the record, I am not satisfied that it is open to this Court to find any of the Theriault Entities in contempt. One of the Theriault Entities, Theriault International Marine, is the registered business name for the Defendant in Nova Scotia and TI Marine 2018 Ltd in New Brunswick. Given that business names do not have a separate legal personality, I do not see how Theriault International Marine can be found in contempt. Also, pursuant to paragraph 467(1)(b) of the Rules, show cause orders must describe the alleged acts of contempt with “sufficient particularity to enable the person to know the nature of the case against the person”. Here, the Show Cause Order charges Mr. Theriault for his failure to produce the documents required by the Production Order. It does not charge the Theriault Entities with sufficient clarity. I am not persuaded that this Court can go beyond the confines of the charge set out in the Show Cause Order to find the other entities in contempt.

[16] For these reasons, I am of the view that the only issue to be determined is whether Mr. Theriault is in contempt of Court for failing to comply with the Production Order dated January 11, 2019.

[17] Under subsection 466(b) of the Rules, a person who disobeys a process or order of the Court is guilty of contempt of Court.

[18] It is well established that contempt proceedings are a very serious matter. The general purpose of the Court’s contempt power is to ensure the smooth functioning of the judicial process and to uphold the Court’s dignity and process (*Carey v Laiken*, 2015 SCC 17 at para 30

[*Carey*]; *Canada (National Revenue) v Chi*, 2018 FC 897 at para 12 [*Chi*]; *Joly v Gadwa*, 2018 FC 746 at para 31 [*Joly*]; *Louis Vuitton Malletier SA v Bags O'Fun Inc*, 2003 FC 1335 at para 8).

[19] The burden of proof in civil contempt proceedings lies upon the party alleging the breach of a court order. Pursuant to section 469 of the Rules, a finding of contempt shall be based on proof beyond a reasonable doubt (*Carey* at para 32; *Bhatnager v Canada (Minister of Employment and Immigration)*, [1990] 2 SCR 217 at 224 [*Bhatnager*]; *Chi* at para 14; *Joly* at para 32; *Canada (National Revenue) v Gray*, 2018 FC 549 at para 28).

[20] To establish civil contempt, the party alleging the breach of a court order must satisfy a three-part test confirmed by the Supreme Court of Canada in *Carey* at paragraphs 32-35:

- (a) The order alleged to have been breached must state clearly and unequivocally what should and should not be done;
- (b) The party alleged to have breached the order must have had actual knowledge of the order; and
- (c) The party allegedly in breach must have intentionally done the act the order prohibits or intentionally failed to do the act the order compels.

A. *Does the Production Order state clearly and unequivocally what should be done?*

[21] The requirement of clarity ensures that a party will not be found in contempt where an order is unclear (*Carey* at para 33). For example, an order may be found to be unclear if it is missing an essential detail about where, when or to whom it applies. It will also be found to be unclear if it incorporates overly broad language (*Carey* at para 33).

[22] In this case, I am satisfied beyond a reasonable doubt that the Production Order clearly and unequivocally compelled Mr. Theriault to perform a specific act on behalf of the Theriault Entities. The Production Order required him to produce for inspection, at the examination in aid of execution, documents that fall into seventeen (17) categories of information. The Production Order lists the required documents as follows:

- (a) all corporate, partnership or business name filings from January 1, 2015 to date;
- (b) records setting forth the names of each shareholder/partner and directors/officers from January 1, 2015 to date, along with specifics on the shares held in the corporations or the interest in partnerships;
- (c) the annual financial statements for each corporation or business name from January 1, 2015 to date;
- (d) documents showing the indebtedness of each along with amounts and copies of any security agreements;
- (e) documents showing the particulars of any shareholder or partnership loans;
- (f) documents indicating the number of persons/directors/officers/partners employed or otherwise engaged from January 1, 2015 to date;
- (g) banking or other financial documents from January 1, 2015 to date (including account details for each);
- (h) all inter-company/partnership and/or inter-shareholder/partnership/company/ partnership financial or other interest transactions from January 1, 2015 to date;
- (i) documents showing the names of each “Recognized Agent” for each corporation, their dates of appointment and, if applicable, the dates ceased to be such;
- (j) documents relating to real property owned or rented/leased by each and any security agreements concerning same;
- (k) documents with respect to any other property in which each has a legal or equitable interest;



- (l) documents related to financial investments of each;
- (m) documents respecting all dispositions of personal or real property of each, whether by sale/transfer or disposal, from January 1, 2015;
- (n) accounts receivable documents for each corporation beginning in May 2017 until date of production;
- (o) income tax returns for each corporation and Mr. Theriault from January 1, 2015 to date of production;
- (p) documents showing all payments made to shareholders/directors/officers/partners from January 1, 2015 to date by each and reason for payments; and
- (q) documents showing all website revisions by sites referencing each of the entities from January 1, 2015, save and except changes to merchandise offered for sale to third parties.

[23] While the totality of the documents required may seem extensive at first blush, I do not consider the language to be overly broad or unclear. Moreover, the Production Order permitted Mr. Theriault to seek relief from the requirement of producing any of the documents set forth in the Production Order. If he had wanted to challenge the requirement to produce certain documents, the Production Order specified that he could do so by bringing a motion within fourteen (14) days of being served. No such motion was filed.

B. *Knowledge of the Production Order*

[24] The second element which must be established is that the party alleged to have breached the order must have had actual knowledge of it (*Carey* at para 34; *Bhatnager* at 224-226).

[25] On February 14, 2019, the Plaintiff's counsel filed an affidavit of service sworn the same day. In the affidavit, the Plaintiff's counsel indicates that, on January 20, 2019, he sent the Direction to Attend, the Production Order and the original or copy of a cheque for conduct money to Mr. Theriault and the Theriault Entities, by email, ordinary mail and registered mail. He further indicates that he received no indication that the emails were not delivered, and he attaches a copy of the tracking notices, along with a signature confirming receipt, for each of the registered letters.

[26] Having reviewed the Production Order and the affidavit of service along with its attachments, I am satisfied beyond a reasonable doubt that the Direction to Attend and the Production Order were served in accordance with the terms set out in the Production Order, and that proof of service of the Production Order has been established.

[27] I further find that Mr. Theriault's actual knowledge of the Production Order is evidenced by his attendance at the examination in aid of execution on February 18, 2019, where he indeed produced four (4) pages of documents. Although the documents are redacted in part, they appear to contain information relating to bank account details and activity, which falls under the category of "banking or other financial documents from January 1, 2015 to date", found in paragraph 3(g) of the Production Order. Mr. Theriault also showed the Plaintiff's agent what he said were public records relating to the incorporation of TI Marine 2018 Ltd. Had Mr. Theriault not received the Direction to Attend and the Production Order, he would not have attended the examination, nor would he have brought these documents with him. For these reasons, I am

satisfied beyond a reasonable doubt that Mr. Theriault had actual knowledge of the Production Order.

C. *Was the Production Order intentionally breached?*

[28] The last of the three (3) elements to be established for a finding of contempt of Court is that 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 (*Carey* at para 35). In this case, the issue is whether Mr. Theriault intentionally breached the Production Order.

[29] I have already found that Mr. Theriault had knowledge of the Direction to Attend and the Production Order. Although the Production Order required that he produce seventeen (17) categories of documents for inspection, Mr. Theriault only produced the four (4) partially redacted pages of bank records, plus the documents he claimed were the incorporation documents of TI Marine 2018 Ltd – though he refused to leave the latter with the Plaintiff’s agent. When the Plaintiff’s agent, Mr. Jette, advised him that the Production Order required seventeen (17) categories of documents, Mr. Theriault responded that he had no further documents. Given the nature and the scope of the documents required by the Production Order, and in the absence of a reasonable explanation, I find it highly unlikely that Mr. Theriault had no other documents meeting the terms of the Production Order.

[30] The Production Order explicitly provided that if Mr. Theriault wished to seek relief from the requirement to produce any of the existing original or copies of the documents listed, he

could do so by bringing a motion for such relief within fourteen (14) days of the service of the Production Order. No such motion was filed.

[31] In addition, despite a letter from the Plaintiff's counsel dated February 20, 2019 reminding him of his failure to comply with the terms of the Production Order, on the date of the contempt hearing, Mr. Theriault had yet to make available the documents identified in the Production Order to the Plaintiff's counsel.

[32] For these reasons, I find beyond a reasonable doubt that Mr. Theriault intentionally breached the Production Order.

[33] To conclude, I am satisfied that the Plaintiff has discharged its burden of proof by establishing beyond a reasonable doubt that Mr. Theriault is in contempt of this Court's Production Order dated January 11, 2019.

[34] Section 472 of the Rules addresses the penalties, including fines and imprisonment, which may be imposed after a finding of contempt. It provides as follows:

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| <p><b>472</b> Where a person is found to be in contempt, a judge may order that</p> <p><b>(a)</b> the person be imprisoned for a period of less than five years or until the person complies with the order;</p> <p><b>(b)</b> the person be imprisoned for a period of less than five years if the person fails to</p> | <p><b>472</b> Lorsqu'une personne est reconnue coupable d'outrage au tribunal, le juge peut ordonner :</p> <p><b>a)</b> qu'elle soit incarcérée pour une période de moins de cinq ans ou jusqu'à ce qu'elle se conforme à l'ordonnance;</p> <p><b>b)</b> qu'elle soit incarcérée pour une période de moins de cinq ans si elle ne se conforme pas à</p> |
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comply with the order;	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.

[35] In *Winnicki v Canada (Human Rights Commission)*, 2007 FCA 52 [*Winnicki*], the Federal Court of Appeal instructed that a person found in contempt should be given the opportunity to make submissions on the appropriate penalty before the Court determines the sentence (*Winnicki* at paras 12-16). Accordingly, I direct that a further hearing to address the penalty and costs be held in Fredericton, New Brunswick on January 9, 2020 at 1:30 p.m. local time.

[36] Finally, as was the case with the Production and Show Cause Orders, a certified copy of this Order may be served upon Mr. Theriault and the Defendant by substituted service, as follows:

- (a) by mail to the following addresses:
  - (i) Post Office Box 561, Florenceville-Bristol, NB E2J 2C3;
  - (ii) 337 Rothesay Avenue, Suite 168, Saint John, NB E7L 1Y8;
- (b) by email to the following addresses:
  - (i) captaintheriault@icloud.com;
  - (ii) mail@timarine.com; and
  - (iii) craig@timarine.com.

**ORDER in T-1498-16**

**THIS COURT ORDERS that:**

1. Craig Theriault is guilty of contempt for failure to comply with the Order of this Court dated January 11, 2019;
2. The Plaintiff shall serve Craig Theriault and the Defendant with a certified copy of this Order no later than November 8, 2019 by substitutional service as follows:
  - (a) by mail to the following addresses:
    - (i) Post Office Box 561, Florenceville-Bristol, NB E2J 2C3;
    - (ii) 337 Rothesay Avenue, Suite 168, Saint John, NB E7L 1Y8;
  - (b) by email to the following addresses:
    - (i) captaintheriault@icloud.com;
    - (ii) mail@timarine.com; and
    - (iii) craig@timarine.com;
3. The Plaintiff shall file proof of this substitutional service with the Registry of this Court no later than November 22, 2019;
4. The sentencing hearing shall be conducted on January 9, 2020 by means of a videoconference, as follows:
  - (a) at 9:30 a.m. Pacific Standard Time, counsel for the Plaintiff will appear at the Federal Court at 701 West Georgia Street, Vancouver, British Columbia; and

- (b) at 1:30 p.m. Atlantic Standard Time, Mr. Theriault will appear at a special sitting of the Court in Fredericton at 82 Westmoreland Street, Suite 100, Fredericton, New Brunswick;
5. Costs of the Show Cause Order and this Order are to be addressed at the sentencing hearing, along with the costs for the sentencing hearing itself.

“Sylvie E. Roussel”

Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1498-16

**STYLE OF CAUSE:** BOWDY'S TREE SERVICE LTD. v THERIAULT  
INTERNATIONAL LTD.

**PLACE OF HEARING:** FREDERICTON, NEW BRUNSWICK

**DATE OF HEARING:** MAY 6, 2019 (in person and by videoconference)

**ORDER AND REASONS:** ROUSSEL J.

**DATED:** OCTOBER 25, 2019

**APPEARANCES:**

J. William Perrett

FOR THE PLAINTIFF

**SOLICITORS OF RECORD:**

J. William Perrett Law Corp  
Barrister(s) & Solicitor(s)  
Vancouver, British Columbia

FOR THE PLAINTIFF