

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Power v. Power*, 2020 NSSC 379

Date: 20201222

Docket: 1201-059120; SFH-D 035445

Registry: Halifax

Between:

Joseph Patrick Power

Petitioner

v.

Angela Rose Power

Respondent

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Judge: The Honourable Justice Elizabeth Jollimore

Heard: December 21, 2020

Summary: Father found in contempt of order relating to retroactive and prospective child support. Mother wanted imprisonment, fine, interest, costs, and orders compelling MEP to take certain enforcement steps. Father left Canada and didn't attend first scheduled penalty hearing. Contempt not purged over 5 years. A proportionate penalty, designed to coerce compliance, of 4.5 years' imprisonment is imposed.

Key words: contempt of court – civil, compliance, denunciation, deterrence,

Legislation: Civil Procedure Rule 89.13(1) and 89.13(2)

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Counsel: Brian F. Bailey for Joseph Power
Igor S. Yushchenko and Tyler Chiasson, Article Clerk, for
Angela Power

By the Court:

Introduction

[1] Joseph Power was found in contempt of court¹ because he failed to follow a court order requiring him to pay child support.² Over a period of 2.5 years, he failed to pay approximately a quarter million dollars to Angela Power to support their 2 children. Specifically, between January 2007 and October 2015, Mr. Power accumulated a child support debt of \$247,125 because he paid only \$21,921 of the \$269,046 he owed in child support.

[2] The focus of a contempt proceeding is far greater than the impact of Mr. Power's failure to pay support for the children in Ms. Power's custody because obeying the law and following court orders are the foundation of social order.

¹ *Power*, 2015 NSSC 258

² *Power*, 2013 NSSC 99

[3] I must determine Joseph Power's penalty.

[4] The children's mother, Angela Power, asks me to order Joseph Power to:

- serve 5 years' imprisonment and
- pay a fine of \$276,000.

[5] Ms. Power has 6 other requests. She wants me to:

- order Mr. Power to pay her \$55,438 in costs
- award yearly interest of 5% on previous orders for costs and child support, so that Mr. Power would owe another \$123,152.48
- end child support for the couple's son in April 2022 regardless of whether the child has completed his university program
- restrain Mr. Power from making further court applications
- direct the Maintenance Enforcement Program to seize and sell his matrimonial home, with the net proceeds from its sale to be equally divided between Angela Power and Mr. Power's current wife, Tara Power, and
- direct MEP to attach half of the rental income from Mr. Power's matrimonial home.

[6] Mr. Power argues that he shouldn't be imprisoned for more than 2.5 years and he shouldn't be fined more than \$128,000. More importantly, he says these penalties should be suspended, with a review date in 6 months to examine his efforts to purge the contempt. He offers sureties from his parents and his wife, but I heard no consent from either that they agreed to do this.

[7] Mr. Power didn't offer evidence at the penalty hearing. He is not required to. His wife provided an affidavit and testified. Her affidavit contained many statements made by others which she offered for their truth. I have not considered these hearsay statements in making my decision.

[8] I have the inherent authority to impose penalties for civil contempt. The *Civil Procedure Rules* are supplementary to my authority.³

How did the contempt arise?

³ *McLean v. Sleight*, 2019 NSCA 71 at paragraph 42

[9] Mr. Power's child support debt of \$247,125 accumulated between January 2007 and September 2015.

[10] In May 2013 Mr. Power was ordered to pay retroactive child support of \$171,786 by September 8, 2013. This amount was based on his historic underpayment of child support between January 2007 and March 2013. Mr. Power was also ordered to pay monthly child support of \$3,242 beginning on April 1, 2013.

[11] Mr. Power appealed this decision. He discontinued this appeal early in 2014.

[12] The contempt application was filed 9 months after the May 2013 order.

[13] After the contempt application was filed, Mr. Power applied to vary his child support, prospectively and retroactively. He failed to prove that there was either a material change in his circumstances or that his circumstances had changed in the past in ways that were longstanding and beyond his control. So, his variation application was dismissed.⁴ Mr. Power didn't appeal my dismissal of his variation application.

[14] I found Mr. Power in contempt. He didn't appeal this decision either, though he could do so without waiting for the penalty stage to be completed.⁵

[15] Mr. Power was aware of the penalty hearing scheduled in October 2015. He decided not to attend.

What are the considerations when imposing a penalty?

[16] A penalty is to ensure respect for court orders, by Mr. Power and by everyone who comes to court. If there's no respect for court orders, the judicial system and social order are undermined.

[17] The focus of a penalty is coercing compliance with the order: making Mr. Power pay the child support he was ordered to pay.

[18] As well as coercing Mr. Power's compliance, the penalty should denounce his conduct and deter both Mr. Power, specifically, and others, generally, from defying court orders. This is particularly so when the order is for child support.

[19] The penalty must reflect the offence and be in proportion to the gravity of the offence and Mr. Power's degree of responsibility, recognizing any aggravating and mitigating factors.

What's the appropriate penalty for Mr. Power's contempt?

General considerations

⁴ *Power*, 2015 NSSC 234

⁵ *Lamb v. Hoffman*, 2001 NSCA 150

[20] Respect for court orders means following them. If they are thought to be wrong, they are to be appealed. If the circumstances on which they are based have changed, they are to be varied. Until stayed, varied, or overturned, court orders are to be followed. Mr. Power did none of these. The order was made, and he decided not to follow it.

[21] It was easy for Mr. Power to not follow the order because he, his wife and their son moved to Denmark in August 2015. Regardless of their move, Mr. Power filed a Notice of Intention to Act on One's Own dated August 31, 2015 which designated his local address in Nova Scotia for litigation communication.

[22] Mr. Power knew he'd been found in contempt and decided not to attend the penalty phase of the contempt hearing in October 2015. In her affidavit, Tara Power said

In October 2015, we learned the disappointing news that the contempt trial [. . .] had not gone in his favour. Although, he realized that not returning to Halifax for the court date was not ideal, Joseph decided to stay where he was at his job [in Denmark] and to continue to contribute financially to all three of his children as much as he could.

[23] Elsewhere in her affidavit, Tara Power said that her husband was “paying some [child support] at that point.”

[24] But Joseph Power wasn't paying support when he decided not to attend the penalty hearing. According to Angela Power's evidence and MEP records, Joseph Power hadn't paid support since May 2015 and he wouldn't make another support payment again until March 2016.

[25] Mr. Power stayed in Denmark until he was deported in February 2019. It wasn't possible to complete this contempt hearing until he was arrested in Montreal on November 20, 2020 under a Canada-wide arrest warrant and returned to Nova Scotia.

[26] It's important to denounce Mr. Power's conduct.

[27] Mr. Power referred me to Justice Huddart's 1991 decision in *Manolescu*,⁶ where His Lordship said that many Canadians think the judicial system's failure to ensure the payment of child support is “one of the great travesties of justice in Canada”.

[28] Children have a right to receive support from their parents. Even when their parents' relationships end, children are still entitled to their parents' support. The

⁶ *Manolescu*, 1991 CanLII 802 (BCSC) at page 24

Supreme Court of Canada has made this clear again and again: in the 1980s in *Richardson*⁷, in the 1990s, in *Willick*⁸, in the early 2000s in *DBS v. SRG*⁹, and again this year in *Michel v. Graydon*¹⁰. No parent can reasonably believe that they aren't required to support their children. People must be deterred from ignoring their child support obligations and those who ignore them must be denounced.

[29] Mr. Power's penalty must be proportionate to the gravity of his actions and the degree of his responsibility.

[30] Mr. Power's contempt breaks down like this:

- During the 9 months between the May 2013 order and Ms. Power filing her contempt application, Mr. Power made 6 partial child support payments: he paid \$10,980 instead of \$29,178.
- Between the filing of the contempt application and my decision, Mr. Power made 9 payments totaling \$10,941. His payments were equal to about 3.5 months' worth of child support during that 32-month period.

[31] These amounts show that Mr. Power made only token efforts to support his children. He foisted his obligation onto his former wife and made his children dependent on the charity of his parents. His father was in his 70s and his mother was retired. His children were school-aged. From the time they were 6 and 12 until they were 15 and 19, these children did without proper financial support from their father, an IT professional, while they were supported only by their mother who had no professional qualifications.

Are there mitigating factors?

[32] In mitigation, Tara Power said that in 2016 she and Joseph Power agreed to attempt settlement by selling their home and paying Angela Power ½ the net proceeds from the sale. If I accept Tara Power's evidence about the value of the home and the amount of its mortgage, and I consider likely real estate commission and legal fees, ½ the net proceeds would amount to about \$91,000. Mr. Power wasn't trying to purge his contempt – he was trying to cut a deal that would give him a discount of about 63% on his child support debt.

[33] Mr. Power argues that MEP has prevented him from selling his home. The evidence in support of this is an email exchange between Joseph and Angela Power.

⁷ *Richardson*, 1987 CanLII 58 (S.C.C.)

⁸ *Willick*, 1994 CanLII 28 (S.C.C.)

⁹ *DBS v. SRG*, 2006 SCC 37

¹⁰ *Michel v. Graydon*, 2020 SCC 24

There is no direct evidence from MEP that Mr. Power may not or cannot sell his home.

[34] In August 2017, Mr. Power was in direct email communication with MEP's Director. He complained that the suspension of his passport and the seizure of his Canadian bank accounts meant he couldn't pay child support. Notably, he didn't say that the MEP was preventing him from selling his home.

[35] I don't accept that Mr. Power is prevented from selling his home.

[36] After MEP seized his bank accounts in the spring of 2016, Joseph Power emailed MEP's Director, claiming the seizure prevented him "from getting funds to Canada" for support.

[37] There's no evidence that Mr. Power tried to pay his child support by money order, by wire transfer, by certified cheque. These methods didn't require him to have a Canadian bank account. He had previously paid Angela Power money by e-transfer and she was willing to resume that practice. There was no explanation why this option was no longer possible. Joseph and Tara Power didn't even discuss the possibility of using her bank account to pay the support. There was no mention of assigning any rent from their Nova Scotian home to Angela Power.

[38] I don't accept that the seizure of Mr. Power's Canadian bank account prevented him from purging his contempt or paying his regularly due child support.

[39] As the hearing yesterday ended, Mr. Power spoke. An apology is a mitigating factor. He was clearly emotional. He said he had regrets and had made lots of mistakes. He said his biggest regret was "not fighting harder" for the children he has with Angela Power. He didn't say that he regretted not paying support for them, denying them their right to his support.

[40] To Angela Power, he said that he couldn't imagine what her life has been like. He didn't say that he regretted burdening her with his responsibility for their children's support. There was no apology for putting her in that situation. He said that "we can do better. I can do better."

[41] To the court, Mr. Power said this "shouldn't have gotten here" and that he was sorry for wasting the court's time. There was no direct apology for defying Justice Lynch's order.

[42] There was no evidence that Joseph Power had ever expressed any regrets until yesterday afternoon – after he had spent a month in jail.

[43] Mr. Power's comments ("we can do better", "we need help", "there must be a better way") may well be true; but they also demonstrate that he doesn't see that he

is the author of these circumstances. This is not the better way, but it is the way that Mr. Power chose.

[44] A penalty should reflect Mr. Power's degree of responsibility. He has blamed MEP for his failure to pay support. He has blamed Angela Power for his failure to pay support. In his comments at the end of the hearing, he didn't directly accept responsibility for breaching the court order.

[45] Mr. Power's remorse is genuine. But it's not clear that his remorse is for defying the court order.

Are there aggravating factors?

[46] In the 5 years since he was found in contempt, Mr. Power has made 4 support payments, totalling \$3,237: this is less than 1 month's child support. He has not paid his ongoing child support.

[47] Tara Power said that "MEP has done thorough investigations and audits that have demonstrated beyond any doubt that neither Joseph, nor I have assets except the matrimonial home." She said she had reviewed MEP's running record and a court decision that described MEP's activity. She couldn't remember if any investigation or audit extended outside Canada. This is particularly relevant given my finding that Mr. Power had moved his financial affairs offshore¹¹ and Mr. Power's employment in Denmark.

[48] I don't accept Tara Power's assertion that her husband has no assets other than the matrimonial home. This is not supported by MEP materials described to me or by any comments Mr. Power has made to Tara Power. The evidence provides examples of comments Mr. Power has made to her which are demonstrably false (that he was paying child support in the fall of 2015, for example).

[49] *If* I accept that Mr. Power's only asset is the home, that means that Mr. Power *has* benefitted from his breach of the court order because the money that was meant for child support is gone.

[50] If Mr. Power has no money now it's because in all those months when he wasn't paying child support, the money was being spent. It wasn't put aside or saved until Mr. Power could make the payments, as would be done *if* he intended to pay.

[51] Too often when a parent disagrees with the amount of child support ordered, the parent pays nothing rather than paying what they think is appropriate. This

¹¹ *Power*, 2015 NSSC 234 at paragraph 60

prejudices the child, benefits the parent, and displays the parent's disregard for the child and disdain for the other parent.

[52] Mr. Power's son and daughter haven't received the support Justice Lynch ordered for more than 7 years. He's paid nothing since January 2018 and precious little since May 2013.

Term of imprisonment

[53] I can impose a term of imprisonment as a penalty.¹²

[54] Mr. Power says that there must be clear and compelling evidence of his ability to purge his contempt before I can imprison him. He says there is no such evidence. In effect, he continues to challenge Justice Lynch's findings.

[55] For 3 reasons the evidence doesn't satisfy me that Mr. Power is without the means to purge his contempt:

- He and Tara Power valued their home at \$300,000 in 2016. There is no evidence of its current value.
- In 2015, I made a finding that Mr. Power had moved his affairs offshore. There was no evidence to challenge this.
- Mr. Power has been employed at various times in the past 5 years, including while he was in Denmark between August 2015 and February 2019. During this time, he paid only \$3,237 in child support (inclusive of payments directly for the children's expenses). Not paying child support should have resulted in savings for him.

[56] The parties disagree about the guidance I should take from *Armoyan*¹³ where 4 years' imprisonment was ordered. *Armoyan*¹⁴ is the only contemporary benchmark provided to me.

[57] Differences between Mr. Power's conduct and Mr. Armoyan's, show Mr. Power's behaviour to be worse:

- Mr. Armoyan's contempt was unpurged for 11 days when his penalty was imposed. Mr. Power's contempt has been unpurged for 64 months.
- Mr. Armoyan paid about 1/3 of the monthly support due, never paying the full monthly amount. He gave his children additional money

¹² Civil Procedure Rule 89.13(1)(e), *MacNeil*, 1975 CanLII 1164 (NSCA)

¹³ *Armoyan*, 2015 NSSC 188

¹⁴ *Armoyan*, 2015 NSSC 188

directly. Inclusive of the amounts he paid for his children, Mr. Power has paid a far lower percentage of his child support.

[58] Like Canada, Florida uses income-based charts for determining child support. In absolute numbers, Mr. Armoyan owed far more support than Mr. Power, but this simply reflects Mr. Armoyan's greater means. The fact Mr. Armoyan owed more support than Mr. Power owed doesn't make this case less serious.

[59] Mr. Power has not accepted responsibility for his actions, though he has come to understand the consequences of them. He has not attempted to purge his contempt. He continues to blame his situation on the efforts of Angela Power and MEP to collect the children's support, rather than his own failure to pay it.

[60] I don't need to use adjectives like "shameful", "egregious", or "flagrant" to describe Mr. Power's behaviour. The dullest description of his actions doesn't disguise the depths of his disregard for the court and his children.

[61] Mr. Power has already been incarcerated for 31 days. To compel his respect for court orders, to recognize the gravity of his actions and his responsibility, to denounce his conduct and to deter him, and others, from breaching court orders, I order Mr. Power to remain imprisoned for a further period of 4.5 years.

Should there be a fine, interest or costs?

[62] Angela Power asks for a significant fine, for interest to accrue on previous child support and costs orders, and for costs. These would add \$454,590.48 to the \$247,125 that Joseph Power already owes.

[63] Since I found Mr. Power was in contempt for his failure to pay the \$247,125, further child support arrears have accumulated. The penalty, interest and costs that Angela Power seeks are disproportionate and won't add to the coercive force of imprisonment. I decline to order these amounts.

What if Mr. Power purges his contempt?

[64] If Mr. Power purges his contempt, the penalty ceases to be in effect.¹⁵

Elizabeth Jollimore, JSC(FD)

¹⁵ Civil Procedure Rule 89.13(2)

Halifax, Nova Scotia