COURT OF APPEAL FOR ONTARIO

CITATION: Sutherland Estate v. Murphy, 2025 ONCA 227
DATE: 20250324
DOCKET: COA-24-CV-0249

Sossin, Madsen and Pomerance JJ.A.

BETWEEN

The Estate of Craig Sutherland and Low-Ride Pro-Vac Inc.

Plaintiff (Respondents)

and

Colin Patrick Murphy*, Darien Armstrong-Kitchen, Kristopher Candiano, Kevin Patrick Murphy, John Does, Jane Does, and Doe Corporations

Defendants (Appellant*)

Andrew Wray and Juan Echavarria, for the appellant

Norman Groot, Erin Stoik and Chris Leafloor, for the respondents

Heard: December 17, 2024

On appeal from the order of Justice Hugh K. O'Connell of the Superior Court of Justice, dated February 2, 2024.

Pomerance J.A.:

INTRODUCTION

[1] Section 11(c) of the *Canadian Charter of Rights and Freedoms* protects persons "charged with an offence" from being compelled to testify against themselves. Section 11(c) operates in tandem with other *Charter* provisions that, individually and collectively, protect individuals against self-incrimination. The

overarching principle is that persons must not be compelled to testify and thereby create evidence that can be used against them in a penal proceeding. While often raised in the context of criminal proceedings, this case considers the application of s. 11(c) in the context of civil contempt.

[2] The motion judge found the appellant to be in contempt of an Anton Piller order and sentenced him to five months in jail. The appellant challenges the proceedings below on various grounds.[1] Among them is the complaint that the proceedings infringed his rights under s. 11(c). The motion judge required the appellant to attend examinations and answer questions posed by the respondents, while he was facing allegations of contempt. The compelled testimony was then used by the respondents (and the motion judge) to support a finding of contempt, and to justify the sentence imposed.

[3] The issue of compellability was not raised in the court below. But the appellant was self-represented for much of the time. It was for the court to recognize the potential *Charter* issue, and to consider whether the evidence compelled from the appellant was admissible, and if so, for what purpose. Now represented by counsel, the appellant argues that the sentence cannot stand.

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[1] The appellant was self-represented for much of the process, and he argues that the hearing was procedurally unfair. He complains that the respondents often filed material on short notice, leaving him ill-prepared to respond. He says that the motion judge did not provide him with the necessary assistance to properly represent himself. And he argues that the motion judge erred in considering his non-compliance with other orders as aggravating factors on sentence.

[4] For their part, the respondents argue that s. 11(c) of the *Charter* does not apply to civil contempt proceedings and, in any event, does not apply to sentencing hearings, even in the traditional criminal context.

[5] I would allow the appeal. By compelling him to testify during his own contempt proceedings, the motion judge breached the appellant's rights under s. 11(c). He further erred in relying on the compelled testimony to find the appellant guilty of a contempt that was neither admitted nor proved on the requisite standard. Because this error requires a new sentencing hearing, it is unnecessary to address the other grounds of appeal.

OVERVIEW OF THE ISSUE

[6] The respondents alleged that the appellant ran a fraudulent cryptocurrency scheme. They brought an action for damages based on various theories of liability. The motion judge granted them several forms of injunctive relief, including an Anton Piller order, which authorized seizure of the appellant's cell phones. When the respondents executed the order, the appellant refused to turn over his iPhone, and by the next day, had deleted the data from the device.

[7] Before the motion judge, the appellant admitted that he was in contempt of the Anton Piller order in two respects: by refusing to turn over the phone, and by deleting the data from it. Those findings of contempt are non-controversial. But the motion judge implicitly found the appellant to be in contempt on a third basis; one

that was neither admitted nor proved on the requisite standard. The motion judge found the appellant to be in contempt for failing to produce the deleted data.

[8] This third allegation of contempt was never formally alleged as a separate delict. Nor was it independently proved. That was important. Failing to produce the deleted data could only be contemptuous if the respondents proved that the data existed and could be produced. Both the respondents and the motion judge seemed to assume that having deleted the data, the appellant could simply "undelete" it. Yet the evidence did not support that assumption.

[9] The appellant claimed that he could no longer access the data. In finding to the contrary, the motion judge relied on the testimony of a data analyst retained by the respondents, who surmised that the appellant would not have permanently destroyed the data and must have kept it somewhere.

[10] The data analyst's testimony was rooted more in supposition than fact. To the extent that any factual basis existed for his opinion, it was constitutionally precarious because it was based on the appellant's compelled testimony.

[11] The motion judge sentenced the appellant to five months in jail with no prospect of earned remission but ruled that the sentence could be reduced if the appellant purged his contempt, presumably by producing the deleted data. The motion judge also directed that the appellant attend before the court after his term of incarceration to determine if further sanction is warranted. This suggests that if

the appellant failed to produce the data, he might face further penalty. So, if the data is in fact permanently inaccessible, the appellant could face perpetual sanction for failing to do what cannot be done.

BACKGROUND AND EVIDENCE

[12] As noted above, the respondents brought an action against the appellant for his alleged involvement in a fraudulent cryptocurrency scheme. At the respondents' behest, the motion judge issued several forms of injunctive relief against the appellant: a Mareva injunction on January 3, 2023, an Anton Piller order on January 3, 2023, and a second Anton Piller order on January 10, 2023. The second Anton Piller order was the same as the first, but with a correction to the listed address. The central issue on this appeal arises from the execution of that order.

(1) Execution of the Anton Piller order and the appellant's refusal to surrender the phone

[13] Investigators executed the Anton Piller order on January 11, 2023. They attended at the appellant's girlfriend's mother's residence to search for and seize specified items. One of the investigators found a cell phone that the appellant had hidden in the bathroom. The appellant confirmed that it belonged to him, and then he took the phone and refused to hand it back to the investigator. He later deleted the data from the phone.

(2) Motion for declarations of contempt

[14] The next day, January 12, 2023, the parties appeared before the motion judge. The respondents moved to have the appellant declared in contempt of the Anton Piller order. They also asked the motion judge to order the appellant to attend examinations for discovery where he would be asked about the location of assets, including the data. The motion judge agreed, and ordered the appellant to attend examinations, the first two of which were held on January 16 and 19, 2023.

(3) Declarations of contempt

[15] The matter returned before the motion judge on January 20, 2023. That day, the appellant consented to declarations of contempt based on his refusal to provide the phone to investigators and his deletion of the data. The motion judge declared the appellant to be in contempt in the following terms:

> THIS COURT DECLARES that the defendant Colin Patrick Murphy in contempt of court, to wit that the defendant Murphy refused to surrender his iPhone 13 to the Independent Supervising Solicitor at the execution of the Anton Piller order on January 11, 2023, in breach of paragraphs 19, 20, 21, 23 and 26 of the Anton Piller Order dated January 10, 2023.
>
> THIS COURT FURTHER DECLARES that the defendant Colin Patrick Murphy in contempt of court, to wit that he engaged in destruction and deletion of data of data on his iPhone 13 subsequent to the execution of the Anton Piller order on January 11, 2023, in breach of paragraphs 19, 20, 21, 23 and 26 of the Anton Piller Order dated January 10, 2023.

[16] The motion judge ordered the appellant to attend further examinations. The respondents conducted these on February 1, March 3, and October 6, 2023.

(4) Questioning by the data analyst

[17] At the first of these examinations, the appellant was questioned not only by Mr. Groot, counsel for the respondent, but also by Mr. Warren, the data analyst proffered by the respondents as an expert witness. During this questioning, the appellant described how he had deleted the data from his phone. He explained that he "airdropped" the data from his phone to his girlfriend's phone, and then uploaded select data back onto his own.

(5) Evidence of the data analyst

[18] The motion judge relied substantially on Mr. Warren's testimony in finding the appellant liable for the third act of contempt. Mr. Warren swore his first affidavit on January 16, 2023, before any of the compelled examinations. Mr. Warren said that he had examined one of the devices seized from the appellant, a Google Pixel 7. Mr. Warren observed that the device was backed up to a folder stored on Google Cloud. That, he said, led him to believe that "the user has knowledge and understanding on how to back up data to Cloud Platforms". On that basis, he posited that the iPhone at issue "could have the data backed up to a cloud location", or that it could have been transferred to another device.

[19] In an affidavit sworn on February 15, 2023, Mr. Warren offered a more detailed opinion based on the testimony compelled from the appellant. Referring to the appellant's testimony about airdropping the data, Mr. Warren opined that the appellant "must have preserved some of the data from his iPhone 13 before he reset the device". He stated his belief that the appellant was not being honest about where he had transferred the data. And, once again, he noted that there was a backup folder in the cloud. Based on the appellant's testimony about airdropping data, and the existence of this backup folder, Mr. Warren concluded that the appellant "could have the data backed up to a cloud location" or "it could be transferred to another device".

[20] In an affidavit on March 13, 2023, Mr. Warren once again attested to a "suspicion" that the appellant, after uploading select information to the phone, uploaded the rest of the data to the cloud. Mr. Warren asked that he be permitted to examine the appellant's girlfriend's phone. After doing so, he said that he had "not found evidence" on either the appellant's or his girlfriend's phone to indicate that data had been airdropped.

[21] When testifying before the motion judge, Mr. Warren offered the following:

> MR. GROOT: Q. So, is it your evidence, Mr. Warren, that Mr. Murphy's explanation that data was AirDropped onto [the appellant's girlfriend's] phone is simply not true?
>
> A. It is not true.

Q. Now, at paragraph 13, you go on to talk about this AirDrop issue, and now, Mr. Murphy testified on February 1st, 2023, that you were present, that you asked Mr. Murphy directly various questions with respect to the transfer of his data from his iPhone 13 and he testified that he AirDropped the data to Ms. Armstrong's iPhone 14, and then transferred select data back onto the iPhone 13, and that you have examined iPhone 13, Mr. Murphy i-13 [*sic*], and that it does contain some data?

A. Correct.

Q. All right. So, when the phone -- in order for that to take place, if the phone had been wiped, how does the process work for removing data from a phone, wiping it, and then putting certain information back on?

A. Sure. So, commonly, this is the way it happens. Obviously, there could be other ways, but the most common way would be you would look through the data on your phone that you do not want to back up. You would delete that data. You would then back up your phone to a cloud location or you could AirDrop to another phone, but more likely to a cloud platform is where that would go. You would then reset your phone, which would then wipe all the other data, and then you would restore from the cloud your dataset that you've already backed up to the cloud. So, you've been able to, at that point in time, manipulate the data that you want to be on that phone.

Q. Okay. Did you, at any point, ask Mr. Murphy if you could access [his] iCloud?

A. I did.

Q. And were you provided access to his iCloud?

A. I was not.

Q. And just so it's clear, the data from his iPhone 13, would that have been backed up to his iCloud?

> A. Likely, yes, it would be. There are other locations you could back it up like Google Drive or another cloud platform, but what's most commonly and what's easiest to go right back to iCloud.
>
> Q. Okay. So, going back to your affidavit, paragraph 14, you indicate that it's your opinion that Murphy must have preserved some or all of his data from his iPhone 13 before he reset the device?
>
> A. That's the most common way, yes.
>
> Q. Okay. And you go on to say that – you provided an explanation for your opinion in the next sentence, so can you explain that to the court?
>
> A. As I was saying before, what would happen is, when you do that reset on the iPhone, it literally is setting it back to factory standard, which is -- it's called factory reset. One of the things that Apple has inside its operating system, especially with iPhone, is the ability to completely erase your data from a security standpoint.

(6) The appellant's assertions

[22] The appellant, unrepresented as of February 17, 2023, did not testify on the contempt hearing. However, during an exchange with the court on November 16, 2023, he told the motion judge that he could no longer access the data and therefore was not in a position to produce it:

> THE COURT: I still don't have any adequate explanation about that phone and why you did what you did to it by way of evidence, even if there were videos of intimate encounters on there.
>
> MR. C. MURPHY: I had --
>
> THE COURT: That's your real problem.

> MR. C. MURPHY: Yeah. I'm trying to provide an account and passwords, but I can't get into them. I tried to sign in and I could get in with the password, but I can't actually access without the authentication.
>
> THE COURT: Okay. What accounts are these again?
>
> MR. C. MURPHY: This one is called Binance, and one is called Prosperity Forex.
>
> THE COURT: And is that where you downloaded material to --
>
> MR. C. MURPHY: Download it?
>
> THE COURT: -- from the phone? I mean I -- I'm talking about --
>
> MR. C. MURPHY: Oh, no.
>
> THE COURT: -- the phone now.

(7) The respondents' position on sentence

[23] The respondents' written submissions on sentence argued that both a "coercive" and a "punitive" order were necessary. The "coercive" order would force the appellant to disclose the data and the missing assets, and the "punitive" order would punish him for his conduct.

THE MOTION JUDGE'S DECISION

[24] The motion judge found the appellant liable for contempt on three bases: the refusal to produce the phone; the deletion of the data from the phone; and the failure to produce the deleted data. As the motion judge put it, the appellant hid the

iPhone 13 in the bathroom, refused to surrender it, and then "clearly downloaded, uploaded, cross-loaded this data to avoid compliance with the Anton Piller order".

[25] The motion judge observed that the appellant had multiple opportunities to purge his contempt between the date of the contempt declarations (January 20, 2023) and the date of sentencing (February 2, 2024) but had not done so. He rejected the appellant's explanation that he did not understand the process. The motion judge also rejected the appellant's evidence that he could no longer access the data and therefore could not produce it. Rather, the motion judge found that the appellant "has decided to snub his nose at the court".

[26] The motion judge sentenced the appellant to serve a term of incarceration of five months, with no prospect of earned remission or early release. The order permitted the appellant to request a reduction or variation of his sentence by demonstrating that he had purged his contempt, if he produced the data that had been deleted from the phone. The order further provided that if the appellant did not purge the contempt, he was to attend before the court after being released from incarceration so that the court could determine if further sanctions were warranted.

[27] The motion judge concluded that "[t]his contempt is quite serious" and that the appellant's conduct required "a large wakeup call". He observed that "the incredible industry that has been spawned out there by sophisticated individuals

and less sophisticated individuals … with respect to crypto-currency fraud … is a big time problem". He viewed the appellant's actions as leaving him with little choice: "[h]e has put himself behind bars. I haven't done it, although I am enforcing it".

[28] In setting the sanction, the motion judge also noted the appellant's failure to comply with other court orders. These required him to surrender potential assets, including firearms and vehicles. The motion judge rejected the appellant's explanations for failing to do so and considered this an aggravating factor.

[29] Finally, the motion judge directed that the orders issued against the appellant, including the Mareva injunction and Anton Piller order, "continue indefinitely in force until further order of this Court".

ANALYSIS

(1) Section 11(c) applies to civil contempt proceedings

[30] The civil contempt power is a fundamental feature of the administration of justice. It is an important means by which courts maintain and enforce the rule of law. In this way, it is linked to the maintenance of peace and social order. The power to punish for contempt is steeped in a rich history, dating back to the 12th century. As McLachlin J. (as she then was) put it in *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, at p. 931:

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

[31] The civil contempt power recognizes that court orders are not suggestions. They are binding directives that must not be ignored or disobeyed: *Gordon v. Starr* (2007), 42 R.F.L. (6th) 366, at para. 23 (Ont. S.C.). The power to declare a person in contempt, and to impose a corresponding penal sanction, reflects the fact that "wilful disobedience of a court order is a serious matter that strikes at the heart of our system of justice": *Kassay v. Kassay* (2000), 11 R.F.L. (5th) 308 (Ont. S.C.), at para. 18.

[32] Civil contempt proceedings have many features in common with criminal proceedings. Indeed, the Supreme Court of Canada has stated that civil contempt "bear[s] the imprint of criminal law": *Pro Swing v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612, at para. 35. Although described as "civil", contempt proceedings can result in imprisonment and therefore have true penal consequences. Because of the public and penal dimensions of civil contempt, it attracts the constitutional protections in s. 11(c) of the *Charter*.

[33] Section 11(c) protects "[a]ny person charged with an offence" from being compelled to testify against themselves. This right not to be forced into assisting in one's own prosecution is a foundational constitutional principle. Lamer C.J.

described it as “[p]erhaps the single most important organizing principle in criminal law”: *R. v. P. (M.B.)*, [1994] 1 S.C.R. 555, at p. 577. Section 11(c) operates in tandem with other protections to serve the “overarching principle against self-incrimination, which is firmly rooted in the common law and is a fundamental principle of justice under s. 7 of the [*Charter*]*”: P. (M.B.)*, at p. 577.

[34] The Supreme Court has expressly recognized that s. 11(c) applies to civil contempt proceedings. In *Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, [1992] 2 S.C.R. 1065, at p. 1078, the court held that because of the sanctions attaching to civil contempt, “it would be inconsistent at the least if a respondent cited for contempt could be compelled to testify”. “[E]ven when it is used to enforce a purely private order”, Gonthier J. explained, the aim and the potential consequences of civil contempt “still involve[] an element of ‘public law’, in a sense, because respect for the role and authority of the courts, one of the foundations of the rule of law, is always at issue”: *Vidéotron*, at p. 1075. *Vidéotron* was based on Quebec law, but the court observed that the same principles would apply at common law and under the *Charter*: *Vidéotron*, at pp. 1078-79.

[35] The Supreme Court affirmed *Vidéotron* some years later, holding that not only is an alleged contemnor not compellable, “but he or she is not competent to act as a witness for the prosecution”: *Pro Swing*, at para. 35. This follows from the “gravity of a contempt order”, and the “criminal law protections afforded to the person against whom such an order is sought”: *Pro Swing*, at para. 35. Because

civil contempt orders are “quasi-criminal”, the court refused to enforce a contempt order issued by a foreign court, given the general rule against enforcing foreign penal orders: *Pro Swing*, at paras. 34, 36. The court reasoned in part that *Vidéotron* “opted for a unified approach to the nature of the contempt of court order, thus setting aside the distinction between the civil and criminal aspects that prevails in the United States”: *Pro Swing*, at para. 34.

[36] In civil contempt proceedings, the state is not the singular antagonist of the individual, as in the criminal context. But as *Vidéotron* and *Pro Swing* demonstrate, civil contempt goes beyond the vindication of purely private interests. It has a public dimension, intimately linked to the rule of law and the preservation of social order. It speaks to the integrity of the justice system, and the importance of recognizing and enforcing court orders. And as in the criminal context, the prospect of punishment for civil contempt serves an ancillary deterrence function, aimed at encouraging compliance with judicial directions.

[37] *Vidéotron* and *Pro Swing* show that the adjective “civil” does not reflect the breadth of the interests at stake in contempt hearings. Label aside, the contempt power is fundamentally about the court’s authority to enforce its own process. The litigant who seeks a contempt declaration may derive a benefit from a positive finding. It may prompt compliance with the court order in question. But a finding of contempt implicates and vindicates broader societal interests: those associated with the administration of justice and the rule of law. Given the public character of

the interests at stake, the objectives at issue, and the potential for penal sanction, civil contempt hearings are properly characterized as “quasi-criminal” for constitutional purposes.

[38] It follows that a person facing a contempt allegation is “charged with an offence” for purposes of s. 11 of the *Charter*. Section 11 extends its protection to “persons prosecuted by the State for public offences involving punitive sanctions”: *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, at p. 554.

[39] The Supreme Court recently clarified the two paths by which a proceeding may attract the protection offered by s. 11: *John Howard Society of Saskatchewan v. Saskatchewan (Attorney General)*, 2025 SCC 6, at paras. 27-30 [“*JHSS*”]. First, s. 11 applies when the proceedings at issue are “criminal in nature”. Proceedings of this kind are “intended to promote public order and welfare within a public sphere of activity” and stand in contrast to “private, domestic or disciplinary matters which are regulatory, protective or corrective”: *JHSS*, at para. 27, quoting *Wigglesworth*, at p. 560.

[40] Second, s. 11 applies when the proceedings may lead to the imposition of “true penal consequences”. These include “imprisonment” or a “fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than for the maintenance of internal discipline”: *JHSS*, at para. 27, quoting *Wigglesworth*, at p. 561.

[41] The “key distinction” between these two paths is that the “criminal in nature test focuses on the process while the [true] penal consequences test focuses on its potential impact on the person subject to the proceeding”: *JHSS*, at para. 28, quoting *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3, at para. 50.

[42] For present purposes, the relevant path is the “true penal consequences” test. A finding of contempt carries with it the threat of imprisonment. There can be no doubt that the prospect of imprisonment triggers the application of s. 11, particularly in the wake of *JHSS*. As Wagner C.J. explained, “[i]mprisonment always satisfies the true penal consequence test and thus triggers s. 11 protections because it is ‘the most severe deprivation of liberty known to our law’”: *JHSS*, at para. 55, quoting *Wigglesworth*, at p. 562.

[43] That explains why those facing allegations of contempt enjoy many of the protections afforded to those accused of crime. The alleged contemnor is presumed innocent. Contempt must be proved, not on the usual civil standard, but on the criminal standard of proof beyond a reasonable doubt: *Carey v. Laiken*, 2015 SCC 17, [2015] 2 S.C.R. 79, at para. 32. Procedural requirements, from pleadings to the presentation of evidence, are enforced rigorously: *Bassett v. Magee*, 2015 BCCA 422, at para. 35. And a person charged with contempt has a right to a fair hearing where he or she can make full answer and defence. That includes the right to the trial of an issue where affidavits disclose material facts in dispute: *Fischer v. Milo* (2007), 44 R.F.L. (6th) 134, at paras. 10-11.

[44] Finally, among the protections is that provided by s. 11(c) of the *Charter*: the right not to be compelled to testify against oneself.

[45] Of course, compulsion is not *per se* offensive in civil proceedings. Civil litigation imposes many compulsory obligations, including, but not restricted to, oral discoveries, affidavits of documents, and in some cases, medical examinations. All of this is appropriate and necessary, and nothing in this analysis suggests otherwise. But once a party to the litigation seeks a declaration of contempt against another, the character of the proceedings changes. What began as a private dispute becomes a juridical creature that is simultaneously civil and criminal; private and public; coercive and punitive. Contempt hearings straddle the distinction that normally separates civil and criminal proceedings.

[46] Because of its penal character, the civil contempt power is to be treated with respect and restraint. It should not be seen as a standard response to apparent intransigence. The contempt power is akin to a sledgehammer in that it brings the full force of penal justice to bear on a litigant. Sledgehammers have their place in the world of non-compliance, but they should not be wielded when a mallet or lesser instrument might do.

[47] Given the exceptional nature of the contempt power, courts have "consistently discouraged its routine use to obtain compliance with court orders", lest it be perceived "as just so much bluster that might ultimately cheapen the role

and authority of the very judicial power it seeks to protect": *Carey*, at para. 36, quoting in part *Centre commercial Les Rivières ltée v. Jean Bleu inc.*, 2012 QCCA 1663, at para. 7, *per* Kasirer J.A. (as he then was). Far from a routine tool, the power to hold a person in contempt "is exceptional, and exercised as a last resort, only after finding that the necessary elements are made out, and after affording the alleged contemnor procedural fairness": *Oliveira v. Oliveira*, 2022 ONCA 218, at para. 16.

(2) The scope of s. 11(c) is tailored

[48] Section 11(c) does not forbid any and all compulsion. It concerns itself only with testimonial compulsion—the compulsion to speak—as opposed to the compulsion to produce pre-existing, tangible items of evidence, or the compulsion to attend court. This is for good reason. It is compelled speech that does the greatest violence to *Charter* protections, because it results in the creation of evidence that did not previously exist.

[49] So, for example, a party may compel an alleged contemnor to attend court under r. 60.11(4) of the *Ontario Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, or r. 31(4) of the *Family Law Rules*, O. Reg. 114/99. A contemnor may be compelled to produce pre-existing documents or statements, because s. 11(c) only protects against the compulsion to speak as a witness: *Martineau v. M.N.R.*, 2004

SCC 81, [2004] 3 S.C.R. 737, at para. 68.[2] But an alleged contemnor cannot be compelled to speak at their own contempt proceedings.

[50] In a similar vein, s. 11(c) is prospective in its application. It prohibits testimonial compulsion once an allegation of contempt is before the court. That is the critical triggering event. Section 11(c) does not reach back in time to protect statements or testimony that were offered before the contempt proceedings began. Therefore, the use of testimony compelled before the commencement of contempt proceedings, through the normal operation of the *Rules of Civil Procedure*, does not offend s. 11(c).

[51] Section 11(c) is complemented by the residual protection against self-incrimination housed in s. 7 of the *Charter*. I do not propose to discuss the full scope of s. 7 in these reasons. The s. 7 protection against self-incrimination takes its colour from the context in which it applies: *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154, at paras. 30-31. In this case, s. 7 is engaged because the evidence used to prove contempt should not have been compelled in the first place. If the compulsion was unconstitutional, the fruits of the compulsion are similarly tainted. Therefore, in this case, the s. 11(c) issue and s. 7 issue are bound up with each another. The use of

[2] The residual protection against self-incrimination in s. 7 of the *Charter* is not squarely in issue here. But I note that the compelled production of pre-existing documents does not offend that provision either, because it does not "self-incriminate" as that term is constitutionally understood: *R. v. D'Amour* (2002), 166 C.C.C. (3d) 477 (Ont. C.A.), at para. 37.

the compelled testimony was, in effect, the manifestation of the harm caused by the breach of s. 11(c).

(3) Section 11(c) applies whether the purpose of the contempt hearing is coercive or penal

[52] The respondents argue that s. 11(c) does not apply where the predominant purpose of the contempt hearing is coercive rather than punitive. A coercive purpose is one aimed at securing compliance with a court order. For example, if someone is required to plant a tree, the threat of sanction upon a finding of contempt may incentivize them to plant it. But if someone cut down a tree in violation of a court order, there is nothing to coerce, because the act of contempt cannot be undone: *Sakab Saudi Holding Company v. Saad Khalid S Al Jabri*, 2023 ONSC 2488, 528 C.R.R. (2d) 187 (Div. Ct.) at para. 22. In that case, all that a contempt proceeding can achieve is punishment.

[53] The respondents say that when the primary purpose of the sanction is coercive, compulsion is entirely appropriate. They urge that if the purpose of the contempt proceeding is to locate missing assets rather than to punish the contemnor, it is acceptable to compel the contemnor to disclose their location. The respondents say that because the predominant objective in this case was coercion rather than punishment, compelling the appellant's testimony was not constitutionally offensive.

[54] This approach finds some support in the authorities, particularly *Sakab*, in which the Divisional Court unanimously endorsed this distinction. The Divisional Court quoted a trial court decision for the proposition that civil contempt motions "are not penal but are coercive proceedings with respect to orders and judgments of the [c]ourt to allow the [c]ourt to enforce its process": *Sakab*, at para. 42, quoting *McClure v. Backstein* (1987), 17 C.P.C. (2d) 242 (Ont. H.C.), at p. 248. It also relied, by analogy, on *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757, in which the Supreme Court drew a distinction between the Canada Customs and Revenue Agency's audit and investigative functions for purposes of ss. 7 and 8 of the *Charter*. In *Sakab*, the court held that where the predominant purpose of the contempt hearing is coercive rather than punitive, there is no constitutional impediment to compelling testimony.

[55] With great respect, I do not agree. It may be important to distinguish between the coercive and punitive aspects of contempt in other contexts and for other purposes. However, the distinction does not affect the application of s. 11(c) of the *Charter*. When it comes to the protection against testimonial compulsion, the distinction neither reflects the prevailing jurisprudence, nor serves the interests of justice. I say this for four reasons.

[56] First, the distinction flies in the face of *Pro Swing* and *Vidéotron*. As discussed earlier, *Pro Swing* interpreted *Vidéotron* as rejecting the American distinction between civil and criminal contempt. That distinction mirrors the putative

distinction between coercive and penal contempt. The effect of *Pro Swing* and *Vidéotron* is to declare that for purposes of s. 11(c), contempt is contempt, compulsion is compulsion, and the two should not co-exist.

[57] In *JHSS*, the majority recognized the distinction between civil and criminal contempt but affirmed the earlier holding in *Vidéotron* that civil contempt engages the "role and authority of the courts". In Wagner C.J.'s words, at para. 88:

> As this Court held in *Carey v. Laiken*, 2015 SCC 17, [2015] 2 S.C.R. 79, the distinction between criminal contempt and civil contempt is that only the former rests on "the element of public defiance", while the latter is focused on coercion and the protection of private interests (para. 31). Even so, proceedings for civil contempt involve an accusation of moral wrongdoing because such conduct shows disrespect "for the role and authority of the courts" (*Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, [1992] 2 S.C.R. 1065, at p. 1075).

[58] This passage appears to connect civil contempt with "coercion", but it must be construed in context. It forms part of a discussion about an earlier authority, *R. v. Pearson*, [1992] 3 S.C.R. 665. In Pearson, Lamer C.J. pointed to civil contempt as an example of a proceeding outside the criminal sphere that engages s. 7, and therefore requires proof beyond a reasonable doubt. As Wagner C.J. explained in *JHSS*, at para. 84:

> The features of these two types of proceedings cited in *Pearson* assist in discerning when s. 7's protection of the presumption of innocence will require proof beyond a reasonable doubt. Both circumstances involve proceedings where the state (a) accuses an individual of

> moral wrongdoing and (b) seeks to punish the individual with severe liberty-depriving consequences for such wrongdoing And importantly, as Lamer C.J.'s reference to the civil contempt proceedings exemplifies, proceedings that fall outside of the criminal process, strictly speaking, can have both of these features.

[59] Thus, while the majority in *JHSS* recognized the distinction between civil and criminal contempt, it affirmed that the distinction does not affect the application of s. 7 of the *Charter*. Similarly, by citing *Vidéotron* with approval, the court signalled its affirmation that the distinction does not affect the application of s. 11(c) of the *Charter*. Certainly, there is nothing in *JHSS* to suggest the contrary. If anything, its central holding—that s. 11 applies to all proceedings that carry a threat of imprisonment—compels the conclusion that s. 11(c) applies to all contempt hearings, be they characterized as "civil" or "criminal"; "coercive" or "penal".

[60] There are also sound practical reasons to reject the distinction as it relates to s. 11(c). This leads to my second point. The distinction is largely unworkable because there are few, if any, bright lines between the twin objectives of coercion and punishment. Many cases will involve a combination of both. So too here. The respondents argued in the court below, and on appeal, that the predominant purpose of the contempt hearing was coercive, and that the sentence was "for the purpose of coercing [the appellant] to disclose assets and evidence for preservation". Yet in the same proverbial breath, the respondents argued before the motion judge that the appellant must be punished. In their own words:

> The law's purpose for a contempt hearing being coercion has been undermined by Murphy's defiance. The administration of justice has been brought into disrepute. Punishment is necessary. [Emphasis added.]

[61] Third, even when the original animating objective is coercion, the potential for punishment remains. If the threat of sanction does not elicit compliance, all the court can do is punish the contemnor. Yet on the respondents' analysis, the initial classification as coercive will have allowed for testimonial compulsion that would be prohibited in a punitive setting.

[62] That is essentially what occurred in this case. The respondents argued that the contempt proceedings were coercive and, on that basis, were allowed to examine the appellant. The evidence from the examination was then used to argue that the appellant could produce the deleted data. In essence, the respondents relied upon the coercive nature of the proceedings to compel evidence that established the coercive nature of the proceedings. The circularity of this approach is self-evident.

[63] Fourth, it will not always be clear whether coerced compliance is possible. This is particularly so when dealing with the digital realm. Those seeking to conceal tangible assets may cause them to be transferred, concealed, or broken down into their constituent parts. As a general rule, however, matter does not tend to disappear. In contrast, digital evidence can be irretrievably destroyed or rendered inaccessible. The respondents, through their data analyst, assert that the data

"must" exist, that it "likely" exists, or that there is at least a "suspicion" that it exists. But absent proof beyond a reasonable doubt that it does, there is no basis for a coercive remedy. I will deal with this in more detail below. Suffice it to say for present purposes that the distinction between coercion and punishment, blurred in many cases, becomes even more elusive in the ephemeral world of electronic data.

[64] For all of these reasons, I conclude that s. 11(c) of the *Charter* applies to civil contempt hearings, whether the purported objective is coercing compliance or punishing non-compliance. In neither instance should the alleged contemnor be compelled to self-incriminate. The party looking for hidden assets may employ any number of investigative tools, but those tools stop short of compelling speech from the person who faces potential penal sanction.

(4) Section 11(c) applies to sentencing proceedings

[65] The respondents argue that even if s. 11(c) applies to the liability stage of a contempt hearing, it does not extend to sentencing. They claim that even within the traditional domain of criminal law, the *Charter* applies differently to sentencing than to the determination of guilt or innocence. So, the respondents suggest, compulsion during the sentencing phase of a contempt proceeding does not offend s. 11(c). As they put it in their factum, "the use of compelled evidence at sentencing

was not contrary to the [a]ppellant's right not to self-incriminate", because "he had already admitted his 'criminality' in the liability phase of the contempt proceeding".

[66] I note, at the outset, that this argument does not apply to the first two compelled examinations, because they occurred during the liability phase of the hearing. But the motion judge also ordered three further examinations following the findings of contempt. It could be said that those statements were compelled during the sentencing phase of the hearing. Therefore, it is necessary to explain why I disagree with the appellant's submission that s. 11(c) does not apply to sentencing.

(i) The respondents rely on *Jones* and *Lyons*

[67] In oral argument, the respondents relied on *R. v. Jones*, [1994] 2 S.C.R. 229. *Jones* addressed the admissibility of evidence at a dangerous offender hearing under what is now Part XXIV of the *Criminal Code*, R.S.C. 1985, c. C-46. The court held that the prosecution may rely on evidence obtained during a pretrial psychiatric examination, and that this does not violate the residual protection against self-incrimination under s. 7 of the *Charter*.

[68] On behalf of a five-judge majority, Gonthier J. reasoned that the dangerous offender regime does not "incriminate" the accused at all. Having been convicted of the charged offence, the accused has "already been 'criminated', transformed from 'accused' to 'offender'": *Jones*, at p. 279. Sentencing proceedings, he

explained, do not place the accused in jeopardy such that the *Charter*'s protection applies—only the adjudication of guilt or innocence does: *Jones*, at pp. 279-80.

[69] To make this point, Gonthier J. observed that the right to a jury trial under s. 11(f) of the *Charter* does not apply to dangerous offender proceedings, because "it would be quite inappropriate to conclude that a convicted person is charged with an offence" when faced with a dangerous offender application: *Jones*, at p. 280, quoting *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 353. Having already been convicted, that person is no longer "charged with an offence", so s. 11 does not apply. This, Gonthier J. said, shows that there is a "distinction between sentencing and culpability proceedings": *Jones*, at p. 280.

[70] The respondents say that *Jones* precludes the application of s. 11(c) to sentencing proceedings. If a person convicted of an offence is not "incriminated" during sentencing, and if that is in part because they are no longer "charged with an offence" once they have been convicted, it follows that s. 11(c)'s protections end once a proceeding moves from the liability phase to the sentencing phase.

(ii) More Recent Jurisprudence

[71] Since *Jones* was decided, the constitutional landscape has changed. The Supreme Court has more recently ruled that s. 11 applies post-verdict, and that it continues to apply until the end of the sentencing process. I refer here to *R. v. MacDougall*, [1998] 3 S.C.R. 45, and *R. v. J.F.*, 2022 SCC 17, [2022] 1 S.C.R. 330.

Both cases hold that the right to be tried within a reasonable time applies to sentencing. And both interpret the scope of s. 11 in far broader terms than did *Jones* and *Lyons*.

[72] In *MacDougall*, the court unanimously observed that the rights in s. 11 "provide different forms and levels of protection for each stage of proceedings", yet are united in application by their reference to a person "charged with an offence": *MacDougall*, at paras. 10-11. Reasoning that the meaning of "charged with an offence" must harmonize each of s. 11's subsections, the court held that the appropriate interpretation must be "an expansive one which includes both the pre-conviction and post-conviction periods": *MacDougall*, at para. 11. The court expressly rejected a contrary argument rooted in *Lyons*, because denying convicted persons access to s. 11 would "rob other subsections like [ss. 11(h) and (i)] of any force": *MacDougall*, at para. 15. *Lyons*, the court concluded, therefore does not preclude the application of s. 11 to post-conviction proceedings.

[73] The court went on to hold that the s. 11(b) right "to be tried within a reasonable time" extends to sentencing, because "sentencing is part of the process of being 'tried'", as evidenced by the application of the criminal standard of proof at sentencing hearings: *MacDougall*, at para. 20, citing *R. v. Gardiner*, [1982] 2 S.C.R. 368. The court noted that extending s. 11(b) to the sentencing phase also supports the interests it protects, namely avoiding prejudice to the accused's liberty and security of the person caused by delay, and holding

proceedings while evidence remains available and fresh: *MacDougall*, at paras. 33-35.

[74] *MacDougall* specifically mentioned *Jones*, observing that it "was concerned not with ordinary sentencing proceeding, but with the 'unique' Part XXI [now Part XXIV] dangerous offender proceedings at issue in *Lyons*": at para. 25. The court explained that "Gonthier J.'s point"—that dangerous offender proceedings do not constitute a separate charge or offence triggering s. 11's protections—was made "only to argue that a lower standard of evidence is appropriate at the sentencing stage": *MacDougall*, at para. 25. Finally, the court pointed out that *Jones* was concerned with ss. 7 and 10(b) of the *Charter* and did not purport to address the application of s. 11(b). The approach taken in *Jones* did not prevent the court in *MacDougall* from concluding that "the process of being tried includes sentencing", at para. 25, from which it follows that s. 11 of the *Charter* applies through the end of the sentencing process.

[75] In *J.F.*, the court seemed to agree, and affirmed *MacDougall* in broad terms. "The term 'person charged with an offence'", Wagner C.J. explained, "has been interpreted broadly by [the Supreme Court] and refers to a person who is the subject of criminal proceedings. A person is charged with an offence from the time the charge is laid until the final resolution of the matter and the end of the sentencing process": *J.F.*, at para. 23 (internal citations omitted). The court in *J.F.*

did not refer to *Jones* at all, perhaps because it had been so clearly distinguished in *MacDougall*.

[76] In light of these authorities, *Jones* and *Lyons* should not be read as barring the application of s. 11 to the sentencing process. *MacDougall* and *J.F.* chart a more expansive path for s. 11 than *Jones* contemplated. Of similar import is the expansive, purposive, and generous approach to s. 11 recently adopted in *JHSS*. It is not clear that *Jones* ever presented a barrier to the application of s. 11 to the sentencing process. If it did, that aspect of the decision must be read in light of the "significant legal change" effected by more recent Supreme Court authority: *JHSS*, at paras. 33-37.

[77] While *MacDougall* and *J.F.* were concerned with s. 11(b), I suggest that the same reasoning must logically extend to s. 11(c). To be sure, different subsections of s. 11 have different spheres of application. For example, s. 11(d) focuses on trial issues: the presumption of innocence, the right to a fair trial, and the right to full answer and defence. Those interests are spent by the time of the sentencing. Not so for s. 11(c). The right not to be compelled to testify against oneself is as vital at sentencing as at trial. It is true that sentencing hearings are not about the ultimate issues of guilt or innocence. It is also true that the rules of evidence are relaxed in this context, such that otherwise inadmissible evidence may be introduced so long as it is "credible and trustworthy": *Gardiner*, at p. 414. But just

as individuals cannot be forced to convict themselves with their own words, nor should they be required to assist the moving party in seeking a harsher penalty.

[78] All of this flows from a purposive approach to s. 11 of the *Charter*. The Supreme Court has endorsed a purposive approach to *Charter* interpretation for decades. Most recently, in *JHSS*, Wagner C.J. reminded readers of the court's "consistent direction that judges must interpret the *Charter* in a generous, rather than a formalistic, manner that gives effect to the purpose of the right in question": at para. 7.

[79] The proposition that s. 11(c) applies at the sentencing stage of proceedings—be they criminal or quasi-criminal—makes good sense from the perspective of principle, policy, and practice. Some might say that this frustrates the investigation of crime and recovery of illicit proceeds. There is a public interest in locating assets tainted by fraud for purposes of restitution. However, those seeking to find hidden assets can avail themselves of the full arsenal of investigative tools—be they search warrants, production orders, Anton Piller orders, witness interviews, or other methods of gathering information. What the prosecuting body cannot do is compel the offender to answer questions. This is so whether the sentencing hearing is part of the criminal process, or arises from a finding of civil contempt.

[80] In sum, the *Charter* does apply differently at the time of sentence than it does at the time of trial. But the sentencing process is not a "*Charter*-free zone". Constitutional provisions must be interpreted purposively, whatever the context. Provisions like ss. 11(b) and 11(c) have a purpose that continues to manifest until the very end of penal proceedings. I reject the argument that s. 11(c)'s work is done once liability is established. Testimonial compulsion in the sentencing context undermines dignity and autonomy as readily as it does in the trial context. Applying the analysis in *MacDougall* and *J.F.*, I conclude that s. 11(c), like s. 11(b), continues to apply for the duration of criminal or quasi-criminal proceedings, until the final order or sentence is imposed.

APPLICATION TO THIS CASE

[81] The appellant was compelled to attend examinations while facing allegations of contempt. Once the respondents launched contempt proceedings, the appellant was "charged with an offence" and, until those proceedings concluded, enjoyed immunity from testimonial compulsion. The appellant was compelled to attend five separate examinations. Each time, his rights under s. 11(c) were infringed.

[82] This error was compounded by other troubling aspects of the proceedings. Formalities were in relatively short supply in the court below. The record discloses that the motion judge and the respondents failed to see the third act of contempt—failure to produce the data—as a distinct and separate allegation. No one

contemplated that this allegation had its own independent requirement of proof. It was not clearly stipulated as a separate case that the appellant had to meet. To this extent, the proceedings lacked the degree of clarity that is required when trying charges of contempt. The requirement of clarity ensures that a party will not be found in contempt in circumstances where the order or the alleged non-compliance is unclear: *Pro Swing*, at para. 24; *Bell ExpressVu Limited Partnership v. Corkery*, 2009 ONCA 85, 94 O.R. (3d) 614, at para. 22.

[83] It was therefore an error for the motion judge to assume that if the appellant was guilty of the first two acts of contempt—which he admitted—he was invariably guilty of the third. In fact, the third act of contempt, while related to the first two, required proof of an additional element, namely, the continued existence of the data.

[84] This not only reflected error in the court below, it tainted the position the respondents advanced on appeal. The respondents argue that the compulsion in this case is of no moment because the appellant consented to findings of contempt. They say that in light of those admissions, the use of compelled testimony caused no harm. But this argument not only ignores that the protection against testimonial compulsion extends through sentencing, it ignores that the third act of contempt was a separate allegation that required its own body of proof. The appellant's admission to the first two acts of contempt says nothing about his culpability for the third.

[85] To be sure, the circumstances are suspicious. The appellant had, by his own admission, wilfully obstructed the execution of the Anton Piller order. His conduct in withholding the phone and deleting the data constitutes flagrant non-compliance. And one might think it unlikely that someone—particularly someone who has already demonstrated disregard for the court's authority—would forfeit their ability to access assets in the form of cryptocurrency. Finally, I acknowledge that the court should not "treat with special charity people whose acts in violation of an order make subsequent compliance impossible": *Carey*, at para. 41.

[86] Yet despite these considerations, proof of one act of contempt cannot serve as proxy for proof of another. Our criminal law does not permit criminal liability for an act because someone is "the type of person" to engage in that conduct. Instead, persons must be judged on their acts and not their character: *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908. The question is not whether the appellant has shown a general propensity to disobey court orders. It is whether the respondents proved beyond a reasonable doubt that he did, in fact, disobey a court order. Was the appellant able to access the data? Was he intentionally refusing to do so? Were the elements of contempt made out on the evidence in the case? Unfortunately, none of these questions were answered, let alone beyond a reasonable doubt.

[87] Contempt requires proof of three elements. The order allegedly breached "must state clearly and unequivocally what should and should not be done", the

alleged contemnor must have actually known about the order, and they must have intentionally breached it: *Carey*, at paras. 33-35.

[88] The third element is at issue in this case. The appellant could only have intentionally failed to produce the data if the data existed in a form that could be produced.

[89] What about the fact that the motion judge rejected the appellant's assertions as incredible? The motion judge rejected the appellant's statement that he could no longer access the data. But this alone could not result in a finding of contempt for failing to produce it. It is trite law that when a party bears the onus of proof beyond a reasonable doubt, the rejection of exculpatory evidence is only part of the analysis. Even where the exculpatory evidence is rejected outright as not raising a reasonable doubt, the factfinder must go on to ask whether, on the whole of the evidence, the offending act has been proved beyond a reasonable doubt: *R. v. W. (D.)*, [1991] 1 S.C.R. 742, at p. 758. The motion judge rejected the appellant's exculpatory account, but did not assess whether the inculpatory evidence proved the contempt beyond a reasonable doubt.

[90] The evidence tendered by the respondents did not prove this element. First, there is good reason to doubt Mr. Warren's qualifications to offer expert opinion evidence. The motion judge did not conduct a full *voir dire* on the admissibility of his evidence. Mr. Warren signed a declaration acknowledging his duty to the court

to offer objective, unbiased, and independent evidence. But attesting to lack of bias is not the same as proving it.

[91] This is particularly so when the circumstances reveal a situational bias. Mr. Warren was, for all intents and purposes, a member of the respondents' investigative and litigation team. He was closely aligned with the respondents' cause. He actively participated in the execution of the Anton Piller order, and he actively questioned the appellant during the compelled examinations. Indeed, Mr. Warren elicited the very testimony that he later relied upon in his evidence. In these circumstances, he could not plausibly offer an independent, unbiased, and objective opinion.

[92] In *R. v. McManus*, 2017 ONCA 188, 353 C.C.C. (3d) 493, this court ruled that a police officer who was actively involved in a criminal investigation into the accused could not serve as an unbiased expert at the accused's trial. Justice van Rensburg explained that this relationship impugned the officer's ability "to carry out [his] primary duty to the court to provide fair, non-partisan and objective assistance": *McManus*, at para. 70, quoting *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182, at para. 50. Just as the officer had "a strong interest in seeing that McManus was convicted" (*McManus*, at para. 71), so too did Mr. Warren have an interest in proving the appellant's contempt. A collaborative relationship between a litigant and an expert may cause the expert to act as advocate rather than independent commentator. In

those circumstances, it is difficult for a witness to offer an unbiased opinion, even if he or she has the very best of intentions.

[93] This issue was not raised by the appellant, either in the court below, or on appeal. However, Mr. Warren's evidence served as the focal point of the decision below. The question of whether it was properly received by the court should not be ignored.

[94] There were other problems with Mr. Warren's assertions. As noted earlier, his evidence fell short of the requisite standard of proof. He framed his conclusion in inconsistent and sometimes equivocal terms. He stated that the data "could have been" uploaded to the cloud or another device; that he had a "suspicion" that the data had been backed up; and that the appellant "must have" preserved some of the data.

[95] Ultimately, Mr. Warren's opinion was rooted in supposition about what might or could have happened, not in affirmative evidence, capable of meeting the standard of proof, about what did happen.

[96] Without the appellant's testimony, all Mr. Warren could say was that the data had been deleted, the phone had been reset, and the appellant's other phone had an iCloud account. The remaining facts he relied on came directly from the appellant's compelled speech. Thus, the evidentiary foundation for the finding of

contempt for failing to produce the data—frail to begin with—crumbles completely if one omits the compelled testimony.

CONCLUSION AND REMEDY

[97] For these reasons, I conclude that the motion judge erred in:

a) compelling the appellant to testify in violation of s. 11(c) of the *Charter*;
b) relying on the compelled testimony to find the appellant in contempt for failing to produce the deleted data;
c) sentencing the appellant for failing to produce the deleted data when that act of contempt had not been proved; and
d) requiring the appellant to purge the contempt in order to avoid further sanction, absent evidence that it was possible to do so.

[98] In light of these errors, the finding of contempt for failure to produce the deleted data is set aside, as is the sentence imposed by the motion judge. This conclusion makes it unnecessary to address the other grounds of appeal raised by the appellant, concerning procedural fairness and the motion judge's consideration of other acts of non-compliance as aggravating factors on sentence. Nor is it necessary to consider the appellant's application to introduce fresh evidence on appeal.

[99] Having set aside the sentence imposed by the motion judge, what remains is to determine the appropriate appellate remedy. The appellant argued that were the appeal successful, this court should substitute a sentence of time served for the sentence imposed by the motion judge. The appellant has served a total of 40 days in custody. I am disinclined to give effect to this submission, for two reasons.

[100] First, it is not clear that a sentence of time served adequately reflects the gravity of the conduct admitted to by the appellant. His actions in both withholding his phone and deleting the data represent a flagrant disregard of the court's authority. By deleting the data and placing it out of reach, knowing it to be the subject of a court order, the appellant flouted the Anton Piller order in a manner akin to an obstruction of justice. That was worthy of a significant penalty.

[101] Secondly, and conversely, it is not clear whether there are mitigating factors which would support a reduction in penalty. A proportionate sentence is one that reflects the gravity of the offence, and the moral blameworthiness of the offender.

[102] As with all sentencing exercises, sentencing for contempt is a multifactorial exercise that involves a balancing of sometimes conflicting principles and purposes. It is aptly described as more art than science. In *Oliveira v. Oliveira*, 2023 ONCA 520, at para. 74, this court identified five factors bearing on the determination of penalty for contempt: 1) the proportionality of the sentence to the wrongdoing; 2) deterrence and denunciation; 3) the presence of aggravating and mitigating factors; 4) the similarity of other sentences in like circumstances; and 5) the reasonableness of a fine or incarceration.

[103] The record before this court does not permit a robust consideration of these factors. This is, in part, because the appellant was self-represented in the court below and was not given a clear opportunity to make submissions on sentence.

The contemptuous acts in this case are serious, but the appellant is entitled to identify any factors that could justify a lighter sentence. That is best accomplished by directing that a new sentencing hearing take place, at which both parties can address the question of penalty and the related question of whether the 40 days already served is a sufficient response.

DISPOSITION

[104] The finding of contempt for failing to produce the data is vacated. So too is the sentence imposed by the motion judge. The matter is remitted back to the Superior Court for a sentencing hearing to determine the penalty for the acts of contempt admitted by the appellant:

a) the refusal to turn over the phone; and

b) the deletion of the data.

[105] Counsel for the appellant took the position that $15,000 in costs should be awarded to the successful party on appeal. The respondents' position was that costs should be awarded in the amount of $50,000, on a partial indemnity scale. There is obviously a large gap between the respective cost figures submitted to the court. I see the appellant's estimate as the more reasonable of the two. Given that the appellant was successful, I order costs of $15,000 in his favour.

[106] As it relates to costs in the court below, it is not clear whether the outcome on appeal affects the validity of any prior orders. Should this issue require

consideration, and should the parties be unable to agree, they may file written submissions with this court within 15 days of this decision.

Released: March 24, 2025 “L.S.”

“R. Pomerance J.A.”
“I agree. L. Sossin J.A.”
“I agree. L. Madsen J.A.”