

CITATION:

ONTARIO SUPERIOR COURT OF JUSTICE (TORONTO REGION)
CIVIL ENDORSEMENT FORM
(Rule 59.02(2)(c)(i))

| | | |
|---------------|---|--------------------------------------|
| BEFORE | Judge/Case Management Master Myers J | Court File Number: CV-19-00618679 |
|---------------|---|--------------------------------------|

Title of Proceeding:

_____ **THE CORPORATION OF THE TOWN OF CALEDON** _____ Plaintiff(s)

-v-

_____ **DARZI HOLDINGS LTD. et al.** _____ Defendants(s)

Case Management: Yes If so, by whom: _____ No

Participants and Non-Participants: *(Rule 59.02(2)(vii))*

| Party | Counsel | E-mail Address | Phone # | Participant (Y/N) |
|----------------|------------------------------------|--|---------|-------------------|
| 1) Applicant | Melissa Winch and Robert Sniderman | <u>mwinch@cassels.com</u> ; <u>rsniderman@cassels.com</u> | | Y |
| 2) Respondents | Gary Caplan and Carmine Scalzi | <u>gcaplan@mcr.law</u> ; <u>cscalzi@scalzilaw.com</u> | | Y |

Date Heard: *(Rule 59.02(2)(c)(iii))* **November 26 and December 2, 2021**

Nature of Hearing (mark with an "X"): *(Rule 59.02(2)(c)(iv))*

Motion Appeal Case Conference Pre-Trial Conference Application

Format of Hearing (mark with an "X"): *(Rule 59.02(2)(c)(iv))*

In Writing Telephone Videoconference In Person

If in person, indicate courthouse address:

Relief Requested: *(Rule 59.02(2)(c)(v))*

Sentencing for contempt of court.

Disposition made at hearing or conference (operative terms ordered): *(Rule 59.02(2)(c)(vi))*

The defendants are fined \$1 million payable jointly and severally.

| | | |
|------------------------------------|------------------------------|-------------|
| Costs: On a As below | indemnity basis, fixed at \$ | are payable |
| by | to | [when] |

Brief Reasons, if any: (Rule 59.02(2)(b))

By order dated February 8, 2021, I found that the defendants guilty of contempt of court in relation to their failure to comply with the order made by Schabas J dated September 12, 2019. I sentence them in this decision for the contempt as found. This is not a license fee for any ongoing failures to obey the order of Schabas J. since February 8, 2021 or hereafter.

The Town asks for a fine of \$1 million. Mr. Caplan argues that a fine of closer to \$200,000 is more proportionate to the actual offences as found.

In a recent case, *Duncan v. Buckles*, 2021 ONSC 5567, Goldstein J. described the sentencing principles in a case of contempt of court as follows:

[44] The whole point of punishing a contemnor is to maintain the rule of law: *United Nurses of Alberta v. Alberta*, 1992 CanLII 99 (SCC), 1992 1 S.C.R. 901 at p. 931. As Justice Watt put it in *College of Optometrists of Ontario v. SHS Optical*, 2008 ONCA 685 at para. 106: “The underlying purpose of contempt orders is to compel obedience and punish disobedience.” In *Astley v. Verdun*, 2013 ONSC 6734 (affirmed 2014 ONCA 668) at para. 16 I attempted to summarize the principles of sentencing in contempt cases:

- A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender: *Criminal Code*, s. 718.1; *Chiang*, para. 86; *Mercedes-Benz Financial v. Kovacevic*, 2009 CanLII 9423 (ON SC), [2009] O.J. No. 888, 308 D.L.R. (4th) 562, 74 C.P.C. (6th) 326 (Ont. S.C.J.) at para. 12.
- A sentence should be increased or reduced to account for aggravating or mitigating factors surrounding the contempt or the contemnor: *Criminal Code*, s. 718.2(a); *Chiang*, para. 24; *Sussex Group Ltd. v. Fangeat*, [2003] O.J. No. 3348, 42 C.P.C. (5th) 274 (Ont. S.C.J.) at para. 67.
- A sentence should be similar to sentences imposed on similar contemnors for similar contempts committed in similar circumstances: *Criminal Code*, s. 718.2(b); *Chiang*, para. 24.
- Sentences should denounce unlawful conduct, promote a sense of responsibility in the contemnor, and deter the contemnor and others from defying court orders: *Criminal Code*, s. 718; *Sussex Group Ltd.* at para. 67; *Chiang* at para. 24.
- The Court should consider sanctions other than jail: *Criminal Code*, s. 718(2) (d) and (e); *Sussex Group Ltd. v. Sylvester*, 2002 CanLII 27188 (ON SC), [2002] O.J. No. 4350, 62 O.R. (3d) 123 (Ont. S.C.J. [Commercial List]) at paras. 80-82.

Despite its claimed desire to prevent the defendants from continuing to misuse of the land in issue for staging and operating their construction business, the Town has been remarkably unsuccessful. The defendants have been convicted of a provincial offence and treated the \$36,000 fine as a license fee. Thereafter the defendants consented to the order of Schabas J. and have ignored it. It is only as sentencing approached that the defendants seem to have begun to move toward complying.

The Town now proposes to have the court levy a fine which might be related to the profit earned by Mr. Rafat from his businesses while he was operating in breach of the court’s order. But the Town has not taken any real steps to prove the economics at play beyond a superficial look at the defendants’ financial statements. Of course the information is all within the defendants’ knowledge.

The expert report provided by the Town is not very helpful. The value of the enterprise it purports to calculate turns on assumptions for which there is no evidence. Moreover, apart from saying that the defendants' enterprise is big, it is not clear to me that the enterprise value has much to do with sentencing for the counts of contempt proven.

The Town made no sentencing submission about the defendants' refusal to move the Nixon fence. The excuse provided at the hearing made no sense. The defendants argued that they were entitled to keep their fence on their neighbour's land despite the court's order to the contrary because if they moved the fence, the Ministry Labour would require them to fence their own land. Wasn't that the whole point? They were required to move their fence off their neighbour's land. Instead, the defendants made clear their utter defiance when they invited the Town to come in and move the fence for them. That is, they would not move it themselves despite the order of Schabas J. to which they had consented.

The defendants have now removed the fence and belatedly purged that contempt.

The defendants argue that their contempt should properly be seen to be limited to unlawfully parking vehicles on the Colrairie property. They say a proportionate punishment should be limited to the cost savings of their failure to finding alternative parking.

This submission belies the defence advanced by Mr. Salim to the contempt in the first place. He made clear that if he had to move his vehicles, he would lose his business; his 500 employees would lose their jobs; and he and his family would be out on the streets. He said:

I employ five hundred people. I literally don't have any place to go, be honest with you. I'm, I'm on the street. I don't really have no other alternative....I wanna work, you know. I have nowhere place to go. I have nowhere. If you tell me to leave today you gonna put me on the street. Me and my business and the families. I have clearly have nowhere to go now.

So, Mr. Rafat's decision to ignore the order, he said, was a life or death decision for his very substantial enterprise. It turns out that the pandemic may have been difficult for the defendants, but they still managed to make a gross profit of about \$6 million and net income in the construction business of about \$1.3 million in fiscal 2020. That is without adjusting for non-arms length transfers like rent and management salaries etc.

In *West Lincoln (Township) v. Chan*, 2001 CarswellOnt 1885 (SCJ), at para 33, Quinn J. wrote:

33 The defendants should not profit by their failure to comply with the Judgment. In almost every case where a fine is levied for civil contempt ex facie, I think the minimum fine should be the amount of profit or savings realized by the contemnor as a consequence of the contempt. Here, the defendants benefited financially by not closing down the Business at the Property until October 19, 2000. This is the paramount aggravating factor in respect of the first contempt.

I find that the income earned by the business throughout the period of its contempt is indeed a proper benchmark for punishment. On the defendants' own words, the profit was only available to them by defying the court's order.

Moreover, the defendants' evidence on sentencing was not straightforward. They listed a property as a possible alternative that they were considering when it now appears that Mr. Salim already had an interest in it. Several of the properties listed as alternatives that they pursued were not zoned for outdoor storage of equipment. That is, they exaggerated the scope of their supposed search.

Mr. Salim owns two Ferraris. He has a business that is very successful. His apology is half-hearted in my view as he recognized his continued non-compliance and sought to excuse it based on what he viewed as reasonable searches for alternative properties. Justice Schabas's order was made more than two years ago. It has time for compliance built into it on consent.

Moreover, the defendants filed evidence for sentencing indicating that they had finally found alternative sites so that their equipment should be moved by the end of November. It wasn't.

The defendants have shown that they will move their equipment when they are ready and not a minute before. Their definition of "reasonable" searches is not an excuse for failing to comply with the court's order on a timely basis.

Apart from the apology discussed above, there are really no mitigating factors at play here. While the pandemic certainly intervened and perhaps caused some business decline, the defendants' defiance commenced before the pandemic and has continued after Ontario has re-opened.

By contrast, there are aggravating factors. The length of time involved is extreme. The prior conviction and consent to the order in issue leave no room for doubt that the defendants understood that their conduct was unlawful and their ongoing defiance was deliberate.

This situation is on all fours with the facts facing the Court of Appeal in *College of Optometrists (Ontario) v. SHS Optical Ltd*, 2008 ONCA 685:

108 This is a case of flagrant, protracted and deliberate disobedience of a court order to comply with a statute regulating the conduct of a health profession. It seems obvious that the appellants, especially Bruce Bergez, have no intention of complying with the statute or the s. 87 order. This is not a case in which the conduct of the contemnors arose from some mistake or misunderstanding about the application of the underlying order. There is no mistake, no lack of understanding here. The penalty imposed here, including the manner in which it may be enforced, justifiably emphasized not only specific and general deterrence, but also denunciation of the appellants' intransigent and unremitting refusal to obey the law. We cannot suffer the sacrifice of the rule of law to the lure of lucre.

No matter what fine I assess, the defendants will have profited by running for four years in breach of the law and two years in breach of the court's order. The Town does not even ask for a fine equal to the profit admitted by Rafat in its financial statements let alone the actual economic profits earned by Mr. Salim by his conduct during the two year period in which he was in contempt of court. The fine will be a cost of doing business.

In my view a fine of \$1 million as sought by the Town will serve some of the ends of denunciation and general deterrence. It will leave Mr. Salim profiting from his wrongdoing and continuing to thumb his nose at the court and the law as discussed in my prior endorsement. In my view, a short, sharp jail term would be much more likely to make the cost of disobedience more personal and significant for Mr. Salim and more likely therefore to induce compliance with the court's order. I do not think \$1 million fine will do that. But the fear of ever-longer jail terms if defiance continues might.

The Town asks for \$1 million fine. Despite my reservations as to the adequacy of this quantum, I assess a fine of \$1 million payable by the defendants jointly and severally.

I do not ignore the corporate veil. Each defendant has profited handsomely from the contempt – Rafat by operating unlawfully; Darzi by collecting rent; and Mr. Salim from his ownership of the enterprise. As the businesses are closely held, the movement of value and profit among entities is in the control of the owners. It is Mr. Salim who has his hand at the tiller, makes the economic decisions, and ultimately reaps the benefits of his decisions.

The Town may deliver no more than three pages of costs submissions and its Costs Outline by December 20, 2021. The defendants may deliver no more than three pages of costs submissions and shall deliver a Costs Outline by December 31, 2021. Materials are to be filed through the Civil Submissions Online portal and uploaded to Caselines.

Additional pages attached: Yes No

December 9, , 20 **21**

Date of Endorsement (*Rule 59.02(2)(c)(ii)*)

Signature of Judge/Case Management Master (*Rule 59.02(2)(c)(i)*)