

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N :

MONICA MATTA and MARK AMELLO

Applicants

-and-

ALTMORE MORTGAGE INVESTMENT CORPORATION

Respondent

*APPLICATION UNDER SECTION 248(3) OF THE BUSINESS CORPORATIONS ACT
(ONTARIO) AND SECTION 101 OF THE COURTS OF JUSTICE ACT (ONTARIO)*

**FACTUM
(Penalty Phase)**

MAY 2, 2022

MILLER THOMSON LLP
Scotia Plaza
40 King Street West, Suite 5800
P.O. Box 1011
Toronto, ON Canada M5H 3S1

Gregory Azeff LSO#: 45324C
gazeff@millerthomson.com
Tel: 416.595.2660/Fax: 416.595.8695

Monica Faheim LSO#: 82213R
mfaheim@millerthomson.com
Tel: 416.597.6087

Lawyers for the Receiver, BDO Canada LLP

TO: SERVICE LIST

FACTUM

PART I - OVERVIEW

1. Pursuant to the Order of the Honourable Justice Cavanaugh of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) dated April 11, 2022 (the “**Contempt Order**”), the Court declared that Ian Ross McSevney (“**McSevney**”) is in breach of the Order of the Honourable Madam Justice Conway dated November 8, 2021 and is in contempt of Court (the “**Receivership Order**”).
2. Pursuant to the Contempt Order, the Court directed that a hearing be scheduled for May 3, 2022 (the “**Penalty Hearing**”) in order to determine the appropriate penalty for McSevney’s contempt. This factum is filed in support of the Receiver’s position in the Penalty Hearing. For the reasons set out below, the Receiver seeks an Order that McSevney be incarcerated for a period of 60 days.
3. This factum is supplementary to, and should be read in conjunction with, the Receiver’s factum dated April 8, 2022 (the “**Liability Factum**”). Capitalized terms are as defined in the Liability Factum unless otherwise defined herein.

PART II - SUMMARY OF CONTEMPT

A. Overview of McSevney’s Contempt

4. As set out in the Third Report of the Receiver dated January 26, 2022 (the “**Third Report**”) and the Supplement to the Third Report dated April 8, 2022 (the “**Supplementary Report**”), McSevney is in continuing breach of his obligations under the Receivership Order and the BIA.

5. Despite the clear and unequivocal obligations in the Receivership Order, McSevney has failed to do the following on behalf of the Receivership Debtors:
 - (a) advise the Receiver of the existence of any Property (as defined in the Receivership Order) in his possession or control, or provide the Receiver with access to same;
 - (b) advise the Receiver of any Records (as defined in the Receivership Order) in his possession or control; and
 - (c) provide the Receiver with an accounting of receipts and disbursements made by Altmore, a list of all mortgages and other investments in which any of the Receivership Debtors holds or previously held an interest, and a list of all investors in Altmore, among other documents.
6. In fact, McSevney has failed to deliver a single page of the Records to the Receiver, and has ceased acknowledging or responding to email correspondence or voicemail messages from the Receiver in this regard.
7. In addition, despite the Receivership Order's express direction that McSevney assist the Trustee in its administration of the estates of the Bankrupts, McSevney has also disregarded his statutory duties under the BIA, including:
 - (a) Failing to attend the First Meeting of Creditors in respect of his own bankruptcy as well as that of Altmore in his capacity as an officer;
 - (b) Failing to advise the Trustee of any of his assets and liabilities, which may include his interest in the Unit 9 Property;

(c) Failing to disclose and misappropriating rental proceeds from the Unit 17 Property;
and

(d) Failing to keep the Trustee advised of his current place of residence.¹

8. As such, McSevney is in deliberate, flagrant and continuing breach of the Receivership Order, to the ongoing and mounting detriment of his creditors.²

B. Consequences of McSevney's Contempt

9. McSevney's contempt has severely frustrated the Receiver and the Trustee from fulfilling their respective mandates. His failure to disclose information, records and other documents, and to cooperate with the Trustee in the administration of the bankruptcies, has forced the Receiver and the Trustee to incur substantial additional expense in their efforts to identify and secure assets, and ultimately determine what happened to the millions of dollars that Altmore received from investors.

10. McSevney's contempt has also deepened investor losses. In particular, McSevney failed to disclose to the Receiver or Trustee his interest in the Unit 17 Property, and misappropriated rental income after the date of the Receivership Order and his bankruptcy.

PART III - ISSUE ON MOTION

11. The issue before this Honourable Court is the determination of the penalty to which McSevney should be subject as a consequence of his contempt.

¹ Third Report of the Receiver dated January 26, 2022 (the "Third Report") at para 71.

² Third Report at para 70; Endorsement of Cavanagh J. dated April 11, 2022.

12. The Receiver respectfully requests that this Honourable Court issue an Order that McSevney be incarcerated for a period of 60 days.

PART IV - LAW & ARGUMENT

A. Available Penalties

13. Pursuant to Rule 60.11(5), the following sanctions are available to the Court for a finding of civil contempt:³

(5) In disposing of a motion under subrule (1), the judge may make such order as is just, and where a finding of contempt is made, the judge may order that the person in contempt,

- (a) be imprisoned for such period and on such terms as are just;
- (b) be imprisoned if the person fails to comply with a term of the order;
- (c) pay a fine;
- (d) do or refrain from doing an act;
- (e) pay such costs as are just; and
- (f) comply with any other order that the judge considers necessary,

and may grant leave to issue a writ of sequestration under rule 60.09 against the person's property. R.R.O. 1990, Reg. 194, r. 60.11 (5).

B. Relevant Factors for Consideration

14. In *Business Development Bank of Canada v. Cavalon Inc.*⁴, the Court of Appeal identified the following factors as relevant to a determination of an appropriate sentence for civil contempt:

³ *Rules of Civil Procedure*, RRO 1990, Reg. 194.

⁴ [*Business Development Bank of Canada v. Cavalon Inc.*](#), 2017 ONCA 663.

- (a) Proportionality of the sentence to the wrongdoing;
 - (b) Presence of aggravating and mitigating factors;
 - (c) Deterrence and denunciation;
 - (d) Similarity of sentence in like circumstances; and
 - (e) Reasonableness of a fine or incarceration.⁵
15. Numerous courts have held that specific and general deterrence are the most important sentencing objectives in civil contempt cases.⁶
- i. Proportionality**
16. A sentence for civil contempt must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The principle of proportionality requires that the punishment fit the wrongdoing.⁷
17. It is respectfully submitted that an Order that McSevney be incarcerated for a period of 60 days is proportionate to the gravity of the offence and the degree of his responsibility. McSevney is the sole directing mind of Altmore and is alone responsible for the contempt, which includes not only failing to disclose information and records, but also knowingly and deliberately hiding assets from the Receiver and Trustee and continuing to misappropriate funds to the further detriment of creditors.

⁵ *Business Development Bank of Canada v. Cavalon Inc*, 2017 ONCA 663 at para. 90.

⁶ *Business Development Bank of Canada v. Cavalon Inc*, 2017 ONCA 663 at para. 91.

⁷ [*Boily et al. v. Carleton Condominium Corporation 145.*](#), 2014 ONCA 574 at para. 91.

ii. Aggravating & Mitigating Factors

18. There are a number of aggravating factors present in this case:

(a) McSevney's breaches of the Receivership Order are knowing, flagrant, deliberate and continuing;⁸

(b) Since the issuance of the Receivership Order, McSevney has continued to secrete assets from the Receiver and Trustee, and misappropriated revenue (*ie*, rental income) that should have been available to the creditors, furthering their already considerable losses;⁹

(c) Since the issuance of the Contempt Order, McSevney has not taken any steps to purge his contempt;

(d) McSevney has neither admitted his breach of the Receivership Order, nor tendered a formal apology to this Court for same; and¹⁰

(e) McSevney's breaches of the Receivership Order have forced the Receiver to incur significant additional time and expense in fulfilling its mandate, to the detriment of investors and other creditors.

19. The Receiver is not aware of the existence of any mitigating factors, other than the fact that the Receiver is not aware of any previous findings of contempt against McSevney.

⁸ [Nelson Barbados Group Ltd. v. Cox](#), 2010 ONSC 569 (CanLII), at para. 25.

⁹ [Chiang \(Trustee of\) v. Chiang](#), 2007 CanLII 82789 (ON SC), at para. 45.

¹⁰ [Nelson Barbados Group Ltd. v. Cox](#), 2010 ONSC 569 (CanLII), at para. 25.

iii. Deterrence

20. A sentence for civil contempt should denounce the unlawful conduct and promote a sense of responsibility in the contemnor, and should deter the contemnor and others from defying court orders. As noted by the Honourable Justice Cumming in *Sussex Group Ltd. v. Sylvester*:

“The ability of the court to properly function in its responsibility for the administration of justice is put in serious jeopardy if an individual can intentionally and wilfully refuse to follow the dictates of the court's Orders with impunity. We live under the rule of law as a fundamental cornerstone of our society. It is the expectation of citizens generally, and of the parties to any civil dispute in particular, that the court's Orders will be respected and honoured.”¹¹

21. Thus far McSevney has displayed a complete lack of respect and regard for the Orders of this Honourable Court. It is respectfully submitted that such conduct requires forceful denunciation if McSevney and others are to be deterred from defying same in the future.

22. Notably, McSevney's fraudulent scheme has victimized a large number of investors (although the full extent remains unknown due to his failure to disclose the relevant information). The investors have watched as McSevney has blatantly disregarded his obligations under the Receivership Order, and now rely entirely on this Honourable Court to enforce its own clear and unequivocal directions.

23. Acts of civil contempt, like criminal contempt, undermine the authority of the courts and diminish respect for the law.¹²

¹¹ *Sussex Group Ltd. v. Sylvester*, 2002 CanLII 27188 (ON SC) at para. 80.

¹² *Business Development Bank of Canada v. Cavalon Inc.*, 2017 ONCA 663 at para. 78.

24. It is therefore respectfully submitted that anything less than an Order that McSevney be incarcerated for a period of 60 days as a consequence of his contempt would fail to satisfy the need for deterrence, insofar as it would undermine respect for the administration of justice and impede the proper function of this Honourable Court.

iv. Similarity

25. A sentence for civil contempt should be similar to sentences issued in like circumstances. In recommending incarceration for a period of 60 days, the Receiver has considered and relied upon decisions which include the following:

(a) *Business Development Bank of Canada v. Cavalon Inc.*, in which the Ontario Court of Appeal imposed a custodial sentence of 45 days on two contemnors who knowingly and deliberately disobeyed a court order. Notably, in *Cavalon*, the court ordered incarceration despite the fact that in that case (i) the contemnors were liable for only a single breach of a single court order, and (ii) the primary purpose of sentencing – *ie*, remedying the private rights of the litigants – had been satisfied by the issuance of a default judgment. In this case, McSevney is liable for multiple continuing breaches of multiple court orders, and no similar or analogous private rights have been remedied;¹³

(b) *Sussex Group Ltd. v. Sylvester*, in which this Court imposed a custodial sentence of 6 months for the contemnor's deliberate and intentional failure to disclose records to a Court-appointed interim manager, to the prejudice of investors and other creditors;¹⁴

¹³ *Business Development Bank of Canada v. Cavalon Inc.*, 2017 ONCA 663 at para. 100.

¹⁴ [*Sussex Group Ltd. v. Sylvester*](#), 2002 CanLII 27188 (ON SC) at paras. 75-79.

(c) *Nelson Barbados Group Ltd. v. Cox*, in which this Court imposed a custodial sentence of three months (as well as a fine in the amount of \$7,500) for the contemnor's failure to disclose records and failure to attend examinations, in flagrant violation of two court orders;¹⁵

(d) *Cellupica et al. v. Di Giulio*, in which this Court imposed a custodial sentence of 90 days for the contemnor's failure to disclose records and failure to attend examination, in deliberate and wilful breach of a court order; and¹⁶

(e) *Chiang (Trustee of) v. Chiang*, in which this Court imposed custodial sentences of 12 months and 8 months on two married contemnors, to be served consecutively, for their deliberate and continuing breaches of multiple court orders.¹⁷

v. Reasonableness

26. A sentence for civil contempt should be reasonable in the circumstances. Having regard to the facts of this case, McSevney's flagrant, intentional and continuing breaches of the Receivership Order, as well as the resulting harm to investors and other creditors, it is respectfully submitted that a custodial sentence of 60 days is entirely reasonable in the circumstances.

27. The reasonableness of the requested custodial sentence is further buttressed by the fact that McSevney has had ample opportunity (both before and after the issuance of the Contempt Order) to purge his contempt, but has chosen to not do so.

¹⁵ [Nelson Barbados Group Ltd. v. Cox](#), 2010 ONSC 569 (CanLII) at para. 35.

¹⁶ [Cellupica v Di Giulio](#), 2011 ONSC 1715 at para. 49.

¹⁷ [Chiang \(Trustee of\) v. Chiang](#), 2007 CanLII 82789 (ON SC) at para. 59.

C. Insufficiency of Other Available Remedies

28. While custodial penalties should be imposed sparingly in civil contempt cases, they may be imposed when other available sanctions such as fines would not suffice to meet the principles of sentencing.¹⁸
29. It is respectfully submitted that the other remedies available under Rule 60.11(5) will not be sufficient to meet the sentencing principles identified by the Court of Appeal in *Cavalon* and other cases.
30. McSevney has had ample opportunity to purge his contempt, both before and after the issuance of the Contempt Order. He has not taken any steps in this regard. As such, it is respectfully submitted that the issuance of a further order directing him to comply with his obligations, or that he be imprisoned if he fails to comply with a further order, would not result in compliance with the Receivership Order.
31. It is respectfully submitted that a fine would be insufficient to meet the applicable sentencing principles. Based on the available evidence, McSevney has orchestrated a multi-million dollar scheme to defraud investors, for which he is personally liable. The evidence indicates that McSevney is destitute. A fine would simply be one more financial obligation that he is unable to pay and will simply disregard.
32. In light of the foregoing, it is respectfully submitted that in the circumstances a custodial sentence is the only sanction available under Rule 60.11(5) that is capable of meeting applicable sentencing principles.

¹⁸ *Business Development Bank of Canada v. Cavalon Inc*, 2017 ONCA 663 at para. 100.

33. The other measures of ensuring compliance with the Orders of this Honourable Court have effectively been exhausted, and any other sanction would diminish, rather than enhance, respect for the administration of justice.¹⁹

PART V - ORDER SOUGHT

34. For the foregoing reasons, the Receiver respectfully requests an Order:
- (a) Directing that McSevney be incarcerated for a period of 60 days; and
 - (b) Awarding costs to the Receiver on a full indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of May, 2022.



Gregory Azeff & Monica Faheim

MILLER THOMSON LLP
Lawyers for the Receiver, BDO Canada LLP

¹⁹ *Nelson Barbados Group Ltd. v. Cox*, 2010 ONSC 569 (CanLII), at para. 29.

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. [*Business Development Bank of Canada v. Cavalon Inc.*](#), 2017 ONCA 663.
2. [*Boily et al. v. Carleton Condominium Corporation 145.*](#), 2014 ONCA 574.
3. [*Nelson Barbados Group Ltd. v. Cox*](#), 2010 ONSC 569 (CanLII),
4. [*Chiang \(Trustee of\) v. Chiang*](#), 2007 CanLII 82789 (ON SC).
5. [*Sussex Group Ltd. v. Sylvester*](#), 2002 CanLII 27188 (ON SC).
6. [*Cellupica v Di Giulio*](#), 2011 ONSC 1715.

**SCHEDULE “B”
RELEVANT STATUTES**

R.R.O. 1990, Reg. 194: RULES OF CIVIL PROCEDURE

Enforcement of Order to Do or Abstain from Doing any Act

60.05 An order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be enforced against the person refusing or neglecting to obey the order by a contempt order under rule 60.11. R.R.O. 1990, Reg. 194, r. 60.05.

Contempt Order

Motion for Contempt Order

60.11 (1) A contempt order to enforce an order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be obtained only on motion to a judge in the proceeding in which the order to be enforced was made. R.R.O. 1990, Reg. 194, r. 60.11 (1).

(2) The notice of motion shall be served personally on the person against whom a contempt order is sought, and not by an alternative to personal service, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 60.11 (2).

(3) An affidavit in support of a motion for a contempt order may contain statements of the deponent’s information and belief only with respect to facts that are not contentious, and the source of the information and the fact of the belief shall be specified in the affidavit. R.R.O. 1990, Reg. 194, r. 60.11 (3).

Warrant for Arrest

(4) A judge may issue a warrant (Form 60K) for the arrest of the person against whom a contempt order is sought where the judge is of the opinion that the person’s attendance at the hearing is necessary in the interest of justice and it appears that the person is not likely to attend voluntarily. R.R.O. 1990, Reg. 194, r. 60.11 (4).

Content of Order

(5) In disposing of a motion under subrule (1), the judge may make such order as is just, and where a finding of contempt is made, the judge may order that the person in contempt,

- (a) be imprisoned for such period and on such terms as are just;
- (b) be imprisoned if the person fails to comply with a term of the order;
- (c) pay a fine;

- (d) do or refrain from doing an act;
- (e) pay such costs as are just; and
- (f) comply with any other order that the judge considers necessary,

and may grant leave to issue a writ of sequestration under rule 60.09 against the person's property. R.R.O. 1990, Reg. 194, r. 60.11 (5).

Where Corporation is in Contempt

(6) Where a corporation is in contempt, the judge may also make an order under subrule (5) against any officer or director of the corporation and may grant leave to issue a writ of sequestration under rule 60.09 against his or her property. R.R.O. 1990, Reg. 194, r. 60.11 (6).

Warrant of Committal

(7) An order under subrule (5) for imprisonment may be enforced by the issue of a warrant of committal (Form 60L). R.R.O. 1990, Reg. 194, r. 60.11 (7).

Discharging or Setting Aside Contempt Order

(8) On motion, a judge may discharge, set aside, vary or give directions in respect of an order under subrule (5) or (6) and may grant such other relief and make such other order as is just. R.R.O. 1990, Reg. 194, r. 60.11 (8).

Order that Act be done by Another Person

(9) Where a person fails to comply with an order requiring the doing of an act, other than the payment of money, a judge on motion may, instead of or in addition to making a contempt order, order the act to be done, at the expense of the disobedient person, by the party enforcing the order or any other person appointed by the judge. R.R.O. 1990, Reg. 194, r. 60.11 (9).

(10) The party enforcing the order and any person appointed by the judge are entitled to the costs of the motion under subrule (9) and the expenses incurred in doing the act ordered to be done, fixed by the judge or assessed by an assessment officer in accordance with Rule 58. R.R.O. 1990, Reg. 194, r. 60.11 (10).

• **MONICA MATTA and MARK
AMELLO**

and **ALTMORE
INVESTMENT CORP**

MORTGAGE

Court File No: CV-21-00662471-00CL

**ONTARIO
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(COMMERCIAL LIST)**
Proceeding commenced at Toronto

FACTUM OF THE RECEIVER

**MILLER THOMSON LLP
SCOTIA PLAZA
40 KING STREET WEST, SUITE 5800
P.O. Box 1011
TORONTO, ON CANADA M5H 3S1**

Gregory Azeff LSO#: 45324C
gazeff@millerthomson.com
Tel: 416.595.2660/Fax: 416.595.8695

Monica Faheim LSO#: 82213R
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