ONTARIO

Superior Court of Justice
(Name of Court)

Court File Number
FC-19-0058934-0000

at

50 Eagle Street West, Newmarket, Ontario, L3Y 6B1
(Court office address)

APPLICANT'S Statement of Issues & Law (motion returnable Sept. 1, 2021)

Applicant(s)

Full legal name & address for service — street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).	*Lawyer's name & address — street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).*
Maria Zuccaro **c/o Lawyer**	**R. Avery Zeidman** **Avery Zeidman Professional Corporation** **Barristers & Solicitors** **565 Edgeley Blvd.** **Concord, Ontario L4K 4G4** **Tel: 905-669-7577 ext. 222** **Fax: 905-669-5525** **avery@zeidmanlaw.com**

Respondent(s)

Full legal name & address for service — street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).	*Lawyer's name & address — street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).*
Frank Zuccaro **Co-Respondents (c/o Frank A. Mendicino)** **863704 Ontario Limited** **Metropolitan Ice Cream Inc.** **Oraccuz Holding Ltd.**	**Frank A. Mendicino** **Capo Sgro LLP** **Barrister(s) and Solicitor(s)** **7050 Weston Road, Suite 400** **Woodbridge, Ontario L4L 8G7** **Tel: 905-850-7000** **Fax: 905-850-7050** **fmendicino@csllp.ca**
Added Respondents (c/o Mr. Zeidman) **Giuseppe Zuccaro** **Vito Antonio Zuccaro** **Filomena Zuccaro**	**R. Avery Zeidman** **Avery Zeidman Professional Corporation** **Barristers & Solicitors** **565 Edgeley Blvd.** **Concord, Ontario L4K 4G4** **Tel: 905-669-7577 ext. 222** **Fax: 905-669-5525** **avery@zeidmanlaw.com**
Interested Party: **DODICK LANDAU INC., in its capacity as Receiver of the undertaking, property and assets of Frank Zuccaro, 863704 Ontario Limited, Metropolitan Ice Cream Inc. and Oraccuz Holding Ltd., and not in its personal capacity** **c/o lawyer**	**Wendy Greenspoon-Soer** **GARFINKLE BIDERMAN LLP** **Barristers & Solicitors** **1 Adelaide Street East, Suite 801** **Toronto, Ontario M5C 2V9** **Tel: 416-869-1234** **Fax: 416-869-0547** wgreenspoon@garfinkle.com

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APPLICANT WIFE'S STATEMENT OF ISSUES & LAW

(Motion Returnable Sept. 1, 2021)

NATURE OF MOTION & RESPONDENTS' BREACHES

1. The wife, Maria Zuccaro (hereinafter the "applicant") is making a motion for relief arising out of the Respondents' breaches of various court orders. This is the sixth time the applicant has been to court seeking relief from the respondents' breaches.
2. The Applicant brought a motion on March 11, 2020 for relief. It was adjourned with terms including *inter alia* a non-dissipation and disclosure order. An urgent motion was brought by the applicant on June 29, 2020 as a result of breaches of the March 11, 2020 Order, and there was a further Order with new deadlines for compliance.
3. A consent Order was made August 5, 2020, but again this Order was ignored by the respondents.
4. A further motion for relief was brought October 8, 2020 whereby the respondents were declared to be in breach of the prior Court Orders, their ability to bring motions was stayed pending compliance (other than a motion to determine whether there was compliance), and a receiver to be determined was appointed over the respondents' assets. By way of a 14B motion, the Court Orders Dodick Landau Inc. as the receiver to manage the sale of the respondents' properties and estates.
5. Despite these further Court Orders, the respondents continue breaching same *inter alia* by continuing to deplete NFP and assets, refusing to disclose assets, refusing to deliver ordered disclosure or documents, and refusing to assist with finalizing business valuations and income assessment ordered.
6. This has led to the applicant's motion for further relief herein, briefly summarized as follows:
    a. A declaration the respondents are in breach of this Court's Orders
    b. An Order for relief under Rules 1(8) and/or Rules 1(8.1) of the *Family Law Rules,* including:
        i. dismissing all or part of the respondents' case
        ii. that the respondents are not entitled to any further order from this Honourable Court;
    c. Costs on a full indemnity or substantial indemnity basis.

PART III – ISSUES & THE LAW

7. It is respectfully submitted that the following are the issues to be decided on September 1, 2021:
    a. Should the Respondents have an audience with this Honourable Court?
    b. Under Rule 1(8):
        i. Was there non-compliance with a court order "in the case or a related case";
        ii. Is it appropriate to exercise discretion in favour of the non-complying party by not

sanctioning that party under Rule 1(8); and

iii. If discretion in favour of the non-complying party will not be exercised, what remedy should be granted to the Applicant?

Applicant Should Have No Audience With Court

8. A party who does not comply with court orders should not have audience with an Honourable Court until the party complies with those court orders.

Paul Magder Furs Ltd. v. Ontario (Attorney General), 1991 CarswellOnt 403, (Ont.C.A.)

Purcaru v. Purcaru, 2010 CarswellOnt 5507, (S.C.J.), at pr. 83-85

9. The Ontario Court of Appeal has made it clear that it is an abuse of process to assert a right to be heard by the court and at the same time refuse to undertake to obey an order of the court. It is a general rule that a party in contempt of a court order will not be heard until the contempt is purged, and a party not in compliance with a court order will not be heard until the party complies.

Paul Magder Furs Ltd., supra, at pr. 14

10. The Court has discretion to control its own process as set out in s.140(5) of the Courts of Justice Act, which gives the Court express powers to dismiss or stay a proceeding or motion. As stated by Laskin J.A. in his dissenting judgment in Dickie v. Dickie (2006), 78 O.R. (3d) 1 (Ont. C.A.) at para. 85: "the rationale underlying this exercise of discretion is that a court will not allow a litigant to abuse the court's processes, or to impede the court of justice, or to undermine the court's ability to enforce its own orders".

Purcaru, supra, at pr. 85

11. When a party has failed to comply with a disclosure order, or has delayed providing disclosure, especially related to a central issue like income, an adverse inference should be made.

Whalen-Byrne v. Byrne, 2016 CarswellOnt 2428 (Ont. S.C.J.) at para 82

Invoking Rule 1(8) Analysis

12. If a person fails to obey an order in a case or a related case, the court may deal with the failure by making any order that it considers necessary for a just determination of the matter including

a. an order for costs;

b. an order dismissing a claim;

c. an order striking out any application, answer, notice of motion, motion to change, response to motion to change, financial statement, affidavit, or any other document filed by a party;

d. an order that all or part of a document that was required to be provided but was not, may not be used in the case;

e. if the failure to obey was by a party, an order that the party is not entitled to any further order

from the court unless the court orders otherwise;

f. order that the party is not entitled to obtain disclosure from the other;

g. an order postponing the trial or any other step in the case;

h. on motion, a contempt order;

i. make any other appropriate order.

Family Law Rules, O. Reg. 114/99, r. 1(8), 1(8.1), 13(17), 19(10)

13. As long as Your Honour is satisfied that there has been a failure to obey an order "in the case or a related case," subrule 1(8) is triggered.

Hughes v. Hughes, 2007 CarswellOnt 1977, [2007] O.J. No. 1282, (Ont. S.C.J.) at pr. 17.

14. The Court is required to apply the Family Law Rules to promote the primary objective, which is to enable the court to deal with cases justly, including ensuring the procedure is fair to all parties and saving expense and time.

Family Law Rules, O. Reg. 114/99, Rule 2 (2, 3, & 4)

15. The three-step process for assessing non-compliance within the context of subrule 1(8), as articulated by Spence J. in Ferguson v. Charlton, at paragraph 64, is still applicable:

a. First, the court must ask whether there a triggering [sic] event that would allow it to consider the wording of either subrule 1(8) ... That triggering event would be non-compliance with a court order "in the case or a related case" ...

b. Second, if the triggering event exists, the court should then ask whether it is appropriate to exercise its discretion in favour of the non-complying party by not sanctioning that party under subrule 1(8) ... [T]his discretion will only be granted in exceptional circumstances. In my view, the court's decision whether or not to exercise its discretion in favour of a non-complying party, ought to take into account all relevant history in the course of the litigation and, more specifically, the conduct of the non-complying party.

c. Third, in the event that the court determines that it will not exercise its discretion in favour of the non-complying party, it is then left with a very broad discretion as to the appropriate remedy pursuant to the provision ... of ... subrule 1(8) ...

Ferguson v. Charlton, 2008 CarswellOnt 667, 2008 ONCJ 1 (Ont. C.J.) at pr. 64.

Hughes v. Hughes, 2007 CanLII 10905 (ON SC), at pr. 18-19 and 23

Geremia v. Harb, 2008 CanLII 19764 (ON SC), at pr. 56-58

Molina v. Molina, 2011 ONSC 3030 (CanLII) , at pr. 28-30 and 34

Jones v. Hugo, 2012 ONCJ 211 (CanLII), at pr. 98 and 100

Multiple Breaches by Respondents

16. The respondents have now had over 1.5 years to comply with the Family Law Rules and the March 11, 2020 Court Order, reaffirmed on June 29, 2020. They have not even complied with the consent order made on August 5, 2020 or the receivership orders of October 8, 2021 and November 17, 2021. Instead, there are multiple and reoccurring breaches of these orders, and thus the first part of the test is clearly met:
    a. Non-payment of ordered spousal support
    b. Non-payment of multiple halves of mortgage payments on the matrimonial home
    c. Non-payment of multiple halves of property tax payments on the matrimonial home
    d. Continued depletion of assets outside the ordinary course of business despite a non-dissipation order; even closing a business and absconding with all its assets
    e. Non-delivery of ordered disclosure or explanation of efforts undertaken to obtain it
    f. Non-delivery of monthly business reports showing compliance with non-dissipation order
    g. Non-delivery of tracing of and accounting for $800,000 in funds withdrawn from parties' line of credit and Metropolitan Ice Cream Inc.
    h. Non-delivery of tracing and accounting for $110,000 in funds withdrawn after receiver's appointment from account not disclosed to receiver

Sanctions Against the Respondents are Appropriate

17. Given the trigger of 1(8) analysis, does the Respondents' past behaviour or history warrant this Honourable Court using its discretion in favor of the noncomplying party by not sanctioning that party? Absolutely not. Not sanctioning a non-complying party should only be done in "exceptional cases," and this is not one of them.

Ferguson v. Charlton, supra, at pr. 64

18. The history is clear: from two years ago when the respondent refused to show up for a Case Conference, to March 11, 2020 when he sought an adjournment which was granted on terms that he ignored, to the emergency motion on June 29, 2020 wherein he was given a second chance to comply and failed miserably, to the August 5, 2020 consent motion that he also ignored, to the October 8, 2020 motion to which they reacted by further depleting their assets, to the November 17, 2020 receivership order for which the respondents refuse to cooperate, the respondents have shown their utter disregard for this Honourable Courts processes and this Honourable Court's Orders.

19. The respondents do not come to Court with clean hands today, and thus there are no circumstances let

alone exceptional ones that would warrant no sanctions being placed. Quite the contrary, if further sanctions are not placed now, the respondents will be empowered to continue their dissipation of assets and attempts to abscond from their obligations.

20. Sanctions are appropriate and possibly the only way to send a message to the respondents that when the court issues orders, it is essential that they be obeyed. Court orders are not "suggestions", or "frameworks" or "guidelines". They are mandatory. They must be obeyed. A resentful spouse is not above the law. Where a party disagrees with an order, he may seek to appeal it. In some circumstances he may seek to vary it. But it is not an option to simply disregard the order as the respondents have done with March 11th Order, the June 29th Order, and the August 5th Order.

T*aylor v. Taylor*, 2005 CarswellOnt 5264 (Ont. S.C.J.) at pr. 3.

Gordon v. Starr, 2007 CarswellOnt 5438 (Ont. S.C.J.) at pr. 23

Appropriate Remedy – Striking Pleadings

21. In *Levely v. Levely*, Chappel J. stated that subrule 1(8) "must be interpreted broadly", and that "[j]udicial response to a party's failure to respect the court process and court orders should be *strong and decisive*." Thus, as stated by Chappel J., "[t]he judge should be as creative as necessary in crafting remedies so as to ensure that the noncompliance identified and the resulting damage to the other party are addressed as fully, justly and quickly as possible". Accordingly, "[r]emedies for non-compliance with court orders should focus on redressing the wrongs inflicted on the party who was intended to benefit from the orders".

Levely v. Levely, 2013 ONSC 1026, 2013 CarswellOnt 1953 (Ont. S.C.J.) at pr. 13

22. Chappel J. continued: "The Rules referred to above are the main tools which a judge presiding over Family Law matters has in their toolbox to prevent a party from embarking upon the game of litigation abuse. The scope of these Rules must be interpreted broadly in order to protect the integrity of the court process and the beneficial intention of Family Law proceedings, and to ensure that parties who do respect the court system are able to achieve justice in a timely, affordable and emotionally respectful manner."

Levely v. Levely, supra, at pr. 13.

23. Where a party has failed "to obey an order in the case," the court is entitled to make "any order that it considers necessary for a just determination of the matter." The words "just determination" are sufficiently wide to include protecting the integrity of the administration of justice, and that is what is at stake if a party wilfully disobeys an order.

Hughes v. Hughes, supra, at pr. 18.

Clark v. Clark, 2014 ONCA 175, 2014 CarswellOnt 2477 (O.C.A.) at pr. 66.

24. Although striking a respondent's pleadings is a remedy of last resort, it should be applied now because of the length of time the respondents have been in breach of Court Orders without rectifying same. Why should the respondents be able to available themselves of the Court's processes when they have been ignoring them for over 1.5 years and thereby causing unnecessary delay, expense and prejudice to the applicant? Rather, given their utter disregard for this Court, their pleadings should be struck entirely.

25. As per the words of this Honourable Court: "One of the reasons that many family proceedings degenerate into an expensive merry-go-round ride is the all-too-common casual approach to compliance with court orders." It does not take "a breach of multiple orders to result in the dismissal of an application or a motion… Non-compliance with one order is quite enough."

Gordon v. Starr, supra, at pr. 23-24.

26. When a party has a "blatant disregard for the process and the orders of the court", including refusal to make financial disclosure, let alone continuing to deplete assets in light of a non-dissipation order, striking that party's pleading (which deals with financial issues only) is the appropriate remedy.

Sleiman v. Sleiman, 2002 CarswellOnt 1595, (Ont. C.A.), at pr. 1.

27. To determine if striking pleadings is appropriate in situations of non disclosure (although in the case at bar there are also non-payments of support and ordered carrying costs), the Honourable Justice Rogers opined the court should consider the following issues (each of which is answered in brackets):

    a. What was the overall effort to complete disclosure relative to the undisclosed items and what ratio does the completed disclosure bear to the undisclosed items? (The effort to completed disclosure was minimal or non-existent, and basic disclosure like business valuations, tracing of dissipation of assets, and an income assessment remain outstanding.)
    b. Are the missing pieces of disclosure relevant to significant issues in the file or are they about issues that were or have become minor? Does the mover need this disclosure to proceed and would a court be hampered in adjudicating without it? (The business valuations, tracing of funds, and an income assessment are critical to determining proper support and equalization or unequal division of NFP, which are central to this case and needed for adjudication.)
    c. Was there and is there a realistic possibility of obtaining this disclosure? (The disclosure can be obtained by the receiver appointed.)
    d. What is the cost of the disclosure relative to the overall quantum of money at risk? (The money

at risk is in the millions, whereas the cost to obtain the disclosure is paltry in comparison.)

e. Is the disclosure available to the seeker? (Yes, through the receiver's efforts.)
f. Given the advances in the information in the case, has the request for missing disclosure become over-reaching? (No, it was ordered back in March 2020.)
g. Were the orders (or order) concerning the disclosure sufficiently clear that the party ordered to provide the information would understand what was being sought? (The orders were clear.)
h. Were the time-frames for obtaining the disclosure reasonable? (More than reasonable, even during pandemic times.)
i. Did the seeker of the disclosure continue to pursue the disclosure and enforce the order(s)? (Yes, there have been several court appearances for this.)
j. Were the disclosure orders (or order) so onerous that a party could not reasonably locate and disclose the volume of material requested? (The ordered were not onerous and are reasonable.)
k. Is there a lesser remedy that would suffice? Would it be reasonable to provide that information not disclosed could not be used at trial? (No. See Rogers' J. comments at pr. 36.)
l. Has the seeker of disclosure discharged the onus of the burden of proof in the motion? (Adbsolutely.)

Grenier v. Grenier, [2012] O.J. No. 6512 (Ont. S.C.J.), at para. 21, aff'd 2012 ONCA 732 (Ont. C.A.)

28. The husband's non-compliance in this case over more than 1.5 years can only be considered as a blatant disregard for several court orders, warranting the exceptional remedy of striking his pleading. This is the best and most proportionate remedy available sufficient enough to address the continued breaches of Orders and sufficient enough to protect the rights and interests of the applicant Wife. When a party has had this long and this many court appearances to comply with his or her disclosure obligations, nothing short of striking out his or her pleading will do.

Costabile v. Costabile, 2004 CanLii 42935 (ON SC) at pr. 15.

29. In making an order striking out the respondents' pleadings, the applicant seeks to have the following consequences apply:

a. The party is not entitled to any further notice of steps in the case, except as provided by subrule 25 (13) (service of order).
b. The party is not entitled to participate in the case in any way.
c. The court may deal with the case in the party's absence.
d. A date may be set for an uncontested trial of the case.

Family Law Rules, O. Reg. 114/99, Rule 1(8.4)

Conclusion

30. More serious sanctions must be imposed now to help protect the applicant and send the message that this Honourable Court's Orders are not mere suggestions.

31. Anything less that striking the respondents' pleadings and enabling the applicant to proceed by way of an uncontested trial would be an injustice and severally if not irreparably prejudicial to the applicant wife, encouraging these respondents to continue dissipating assets, ignoring this Honourable Court's Orders, and avoiding their obligations.

PART IV – ORDER SOUGHT

32. As per the draft order sought outlined in the applicant's Motion Conformation and per the draft order to be emailed one day prior to the hearing as per the current Practice Direction/Notice to Profession.

DATED at Vaughan this 23rd day of August, 2021.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Avery Zeidman

Avery Zeidman Professional Corporation
R. Avery Zeidman
Of Counsel for the Applicant Wife

Schedule "A"
List of Cases Referred To

1 *Paul Magder Furs Ltd. v. Ontario (Attorney General),* 1991 CarswellOnt 403, (Ont.C.A.)

2 *Purcaru v. Purcaru, 2010 CarswellOnt 5507*, (S.C.J.)

3 *Whalen-Byrne v. Byrne*, 2016 CarswellOnt 2428 (Ont. S.C.J.)

4 *Hughes v. Hughes*, 2007 CarswellOnt 1977, [2007] O.J. No. 1282, (Ont. S.C.J.) at pr. 17.

5 *Ferguson v. Charlton*, 2008 CarswellOnt 667, 2008 ONCJ 1 (Ont. C.J.)

6 *Hughes v. Hughes*, 2007 CanLII 10905 (ON SC)

7 *Geremia v. Harb*, 2008 CanLII 19764 (ON SC)

8 *Molina v. Molina*, 2011 ONSC 3030 (CanLII)

9 *Jones v. Hugo*, 2012 ONCJ 211 (CanLII)

10 *Taylor v. Taylor*, 2005 CarswellOnt 5264 (Ont. S.C.J.)

11 *Gordon v. Starr*, 2007 CarswellOnt 5438 (Ont. S.C.J.)

12 *Levely v. Levely*, 2013 ONSC 1026, 2013 CarswellOnt 1953 (Ont. S.C.J.)

13 *Clark v. Clark*, 2014 ONCA 175, 2014 CarswellOnt 2477 (O.C.A.)

14 *Sleiman v. Sleiman*, 2002 CarswellOnt 1595, (Ont. C.A.)

15 *Grenier v. Grenier*, [2012] O.J. No. 6512 (Ont. S.C.J.)

16 *Costabile v. Costabile*, 2004 CanLii 42935 (ON SC)

Schedule "B"
Relevant Statutes

***Family Law Rules,* O. Reg. 114/99, r. 1(8), 1(8.1), 13(17), 19(10)**

1 (8) If a person fails to obey an order in a case or a related case, the court may deal with the failure by making any order that it considers necessary for a just determination of the matter, including,

(a) an order for costs;

(b) an order dismissing a claim;

(c) an order striking out any application, answer, notice of motion, motion to change, response to motion to change, financial statement, affidavit, or any other document filed by a party;

(d) an order that all or part of a document that was required to be provided but was not, may not be used in the case;

(e) if the failure to obey was by a party, an order that the party is not entitled to any further order from the court unless the court orders otherwise;

(f) an order postponing the trial or any other step in the case; and

(g) on motion, a contempt order. O. Reg. 322/13, s. 1.

1 (8.1) If a person fails to follow these rules, the court may deal with the failure by making any order described in subrule (8), other than a contempt order under clause (8) (g). O. Reg. 322/13, s. 1.

13 (17) If a party has not served or filed a document in accordance with the requirements of this rule or an Act or regulation, the court may on motion order the party to serve or file the document and, if the court makes that order, it shall also order the party to pay costs. O. Reg. 69/15, s. 3 (14).

19 (10) If a party does not follow this rule or obey an order made under this rule, the court may, in addition to any power to make an order under subrule 1 (8) or (8.1),

(a) order the party to give another party an affidavit, let the other party examine a document or supply the other party with a copy free of charge;

(b) order that a document favourable to the party's case may not be used except with the court's permission; or

(c) order that the party is not entitled to obtain disclosure under these rules until the party follows the rule or obeys the order. O. Reg. 322/13, s. 11.

***Family Law Rules*, O. Reg. 114/99, Rule 2 (2, 3, & 4)**

2 (2) The primary objective of these rules is to enable the court to deal with cases justly. O. Reg. 114/99, r. 2 (2).

2 (3) Dealing with a case justly includes,

(a) ensuring that the procedure is fair to all parties;

(b) saving expense and time;

(c) dealing with the case in ways that are appropriate to its importance and complexity; and

(d) giving appropriate court resources to the case while taking account of the need to give resources to other cases. O. Reg. 114/99, r. 2 (3).

2 (4) The court is required to apply these rules to promote the primary objective, and parties and their lawyers are required to help the court to promote the primary objective. O. Reg. 114/99, r. 2 (4).

***Family Law Rules*, O. Reg. 114/99, Rule 1(8.4)**

CONSEQUENCES OF STRIKING OUT CERTAIN DOCUMENTS

1 (8.4) If an order is made striking out a party's application, answer, motion to change or response to motion to change in a case, the following consequences apply unless a court orders otherwise:

1. The party is not entitled to any further notice of steps in the case, except as provided by subrule 25 (13) (service of order).
2. The party is not entitled to participate in the case in any way.
3. The court may deal with the case in the party's absence.
4. A date may be set for an uncontested trial of the case. O. Reg. 322/13, s. 1.

Schedule "C"
Case Law Excerpts

***Paul Magder Furs Ltd. v. Ontario (Attorney General)*, 1991 CarswellOnt 403, (Ont.C.A.)**

14 In my opinion, it is an abuse of process to assert a right to be heard by the court and at the same time refuse to undertake to obey the order of the court so long as it remains in force. That is this case. Magder's disobedience from the beginning and now is such that it impedes the course of justice and impairs the ability of the court to enforce its orders. It is a general rule that a party in contempt will not be heard in the proceedings until the contempt is purged: Hadkinson v. Hadkinson, [1952] 2 All E.R. 567 at 569 (C.A.); Newfoundland (Treasury Board) v. N.A.P.E. (1986), 59 Nfld. & P.E.I.R. 93, 178 A.P.R. 93 (Nfld. C.A.). Magder contends that it falls within an exception to this rule. In my view in no authority to which it has referred is the continued contempt and abuse of process as flagrant as in this case. Accordingly, I think the court ought not to grant an audience to Magder until it has purged its contempt and undertakes to abide by the orders of Farley J. as to closing on holidays, of Chilcott J. as to advertising, and of this court.

***Purcaru v. Purcaru*, 2010 CarswellOnt 5507, (S.C.J.)**

83 When the court issues orders as it did in these proceedings, it is essential that they be obeyed. They are not "suggesutions" or "guidelines" and they must be obeyed as set out by Corbett J. in *Taylor v. Taylor*, 2005 **CarswellOnt** 5264 (Ont. S.C.J.) at para. 3.

84 In my view, the case of *Paul Magder Furs Ltd. v. Ontario (Attorney General)* (1991), 6 O.R. (3d) 188 (Ont. C.A.) is a helpful precedent in this case. Mr. Magder refused to close his business on Sunday and other holidays despite a court order requiring him to do so. Ultimately, Mr. Magder was found in contempt for failing to comply with the orders. He appealed the contempt order and the Court of Appeal refused to entertain the appeal. Brooke J.A. wrote the Court's reasons which I believe are applicable here:

> In my opinion, it is an abuse of process to assert a right to be heard by the court and at the same time refuse to undertake to obey the order of the court so long as it remains in force. That is the case. Magder's disobedience from the beginning and now is such that it impedes the course of justice and impairs the ability of the court to enforce its orders. It is a general rule that a party in contempt will not be heard in the proceedings until the contempt is purged ... Accordingly, I think the court ought not to grant an audience to Magder until it has purged its contempt and undertakes to abide by the orders ....

85 The court has discretion to control its own process as set out in section 140(5) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 which gives the court express power to dismiss or stay a proceeding. As stated by Laskin J.A. in his dissenting judgment in *Dickie v. Dickie* (2006), 78 O.R. (3d) 1 (Ont. C.A.) at para. 85: "the rationale underlying this exercise of discretion is that a court will not allow a litigant to abuse the court's processes, or to impede the court of justice, or to undermine the court's ability to enforce its own orders".

***Whalen-Byrne v. Byrne*, 2016 CarswellOnt 2428 (Ont. S.C.J.)**

82 In the circumstances it is reasonable for the Applicant to request that I draw an adverse inference from the Respondent's failure to fully comply with his disclosure obligations. I am prepared to draw an adverse inference in concluding that the income disclosure of the Respondent, had it been provided, would more likely than not have disclosed a higher level of income than that suggested by the available evidence for the year 2013, 2014 and 2015. My ultimate determination of income should be based upon the evidence and reasonable extrapolation therefrom, informed by such adverse inferences as may reasonably arise from the Respondent's failure to provide material disclosure within his control.

***Hughes v. Hughes*, 2007 CarswellOnt 1977, [2007] O.J. No. 1282, (Ont. S.C.J.)**

17 Subrule 1(8) is available where there is "a failure to obey an order in the case." There is no requirement that the order be made on motion; and it matters not who obtained the order. As long as the judge is satisfied that there has been a failure to obey an order "in the case or a related case," subrule 1(8) is triggered.

***Ferguson v. Charlton*, 2008 CarswellOnt 667, 2008 ONCJ 1 (Ont. C.J.)**

64 As may be apparent from the foregoing, I have approached the non-compliance issue by following a three-step process:

> • First, the court must ask whether there a triggering event that would allow it to consider the wording of either subrule 1(8) or subrule 14(23). That triggering event would be non-compliance with a court order "in the case or a related case" [subrule 1(8)] or an order "made on motion" [subrule 14(23)].
>
> • Second, if the triggering event exists, the court should then ask whether it is appropriate to exercise its discretion in favour of the non-complying party by not sanctioning that party under subrule 1(8), or by ordering that subrule 14(23) does not apply. My review of the foregoing case law suggests that this discretion will only be granted in exceptional circumstances. In my view, the court's decision whether or not to exercise its discretion in favour of a non-complying party, ought to take into account all relevant history in the course of the litigation and, more specifically, the conduct of the non-complying party.
>
> • Third, in the event that the court determines that it will not exercise its discretion in favour of the non-complying party, it is then left with a very broad discretion as to the appropriate remedy pursuant to the provisions of either subrule 1(8) or subrule 14(23).

***Hughes v. Hughes*, 2007 CanLII 10905 (ON SC)**

[18] Where a party has failed "to obey an order in the case", the court is entitled to make "any order that it considers necessary for a just determination of the matter". The words "just determination" are sufficiently wide to include protecting the integrity of the administration of justice, and that is what is at stake if a party wilfully disobeys an order.

[19] The husband cannot expect to come before this court and be given a voice in circumstances where he has thumbed his nose at the legal system by deliberately breaching an order.

[23] However, the sanctions listed in subrule 1(8) are not the only arrows in the court's quiver. This is evident from the word "including". Therefore, striking the answer-claim of a disobeying party is an available sanction under subrule 1(8). [See Note 2 below]

***Geremia v. Harb*, 2008 CanLII 19764 (ON SC)**

[56] It seems to me that any remedy available to the court under either subrules 14(23) or 1(8) is available under both.

[57] The motion of the mother is allowed in part.

[58] The intentional disregard of any court order is serious and there must be sanctions for such conduct. It is particularly offensive that, while litigating, so strenuously, the issue of access to his daughter, the father ignored his elementary duty to pay proper child support.

***Molina v. Molina*, 2011 ONSC 3030 (CanLII)**

[28] In summary, Mr. Molina has been given ample opportunity to bring himself into compliance with the disclosure order made over a year and a half ago by Gilmore J. and the order regarding the Church Street property. As I noted

above, the evidence discloses a deliberate intention to mislead the court, and a deliberate dissipation of funds in the face of a clearly worded court order. The non-compliance is repetitive, aggregious and deliberate. The explanations given fall far short of offering an adequate, or any, explanation for why Mr. Molina would be unable to comply with the orders.

[29] I thoroughly agree with the comments of Quinn J. in Gordon v. Starr, supra, at para. 23:

> ...Court orders are not made as a form of judicial exercise. An order is an order, not a suggestion. Non-compliance must have consequences. One of the reasons that many family proceedings degenerate into an expensive merry-go-round ride is the all-too-common casual approach to compliance with court orders.

[30] The provisions of subrule 14(23) will be invoked, as Mr. Molina has not raised convincing argument as to why it should not apply, in respect of the order made on motion by Nelson, J. The provisions of subrule 1(8) will be invoked for all other interlocutory orders made in this proceeding that have been ignored. The next question is what sanction should be imposed for his failure to comply.

[34] This is a case in which the court is justified in striking pleadings, and I so order. Mr. Molina's actions in failing to provide disclosure and in dissipating funds has impeded the course of justice. He has abused and ignored the processes of the court repeatedly even when given several chances to remedy his non-compliance. He has given the court false evidence under oath in his affidavit. Allowing him to continue to advance claims before this court would bring the administration of justice into disrepute.

***Jones v. Hugo*, 2012 ONCJ 211 (CanLII)**

[98] The case law is clear that striking pleadings is a last resort. See: Marcoccia v. Marcoccia, 2008 ONCA 866. However, pleadings can be struck where non-compliance with financial disclosure orders has been severe. See: Purcaru v. Purcaru, 2010 ONCA 92. It is also clear that court orders are not suggestions and should be enforced by courts – otherwise the administration of justice may fall into disrepute. See: Gordon v. Starr, 2007 CanLII 35527 (ON SC), 2007 CarswellOnt 5438 (SCJ).

[100] I wish to make it perfectly clear to the respondent that he will be given one last chance to change his attitude and demonstrate that he will comply with court orders. The respondent has made this case much more complicated than it needs to be. The applicant's motion to strike the respondent's pleadings will be adjourned to monitor the respondent's compliance with the court's order.

***Taylor v. Taylor*, 2005 CarswellOnt 5264 (Ont. S.C.J.)**

3 When the court issues orders, it is essential that they be obeyed. Court orders are not "suggestions", or "frameworks" or "guidelines". They are mandatory. They must be obeyed. A resentful spouse is not above the law. Where a party disagrees with an order, he may seek to appeal it. In some circumstances he may seek to vary it. But it is not an option to simply disregard the order.

***Gordon v. Starr*, 2007 CarswellOnt 5438 (Ont. S.C.J.)**

23 Subrule 14(23) should not be taken lightly. It means what it says. It recognizes the offensiveness of allowing a party to obtain relief while in breach of a court order. Court orders are not made as a form of judicial exercise. An order is an order, not a suggestion. Non-compliance must have consequences. One of the reasons that many family proceedings degenerate into an expensive merry-go-round ride is the all-too-common casual approach to compliance with court orders.

24 Ms. Scholz argues that the modest amount of the May costs order does not warrant the relief sought by Mr. Wilson. I do not think that the amount of the costs order being disobeyed has much relevance. I also do not accept that

it takes a breach of multiple orders to result in the dismissal of an application or a motion, as contended by Ms. Scholz. Non-compliance with one order is quite enough.

***Levely v. Levely*, 2013 ONSC 1026, 2013 CarswellOnt 1953 (Ont. S.C.J.)**

13 The Rules referred to above are the main tools which a judge presiding over Family Law matters has in their toolbox to prevent a party from embarking upon the game of litigation abuse. The scope of these Rules must be interpreted broadly in order to protect the integrity of the court process and the beneficial intention of Family Law proceedings, and to ensure that parties who do respect the court system are able to achieve justice in a timely, affordable and emotionally respectful manner. Judicial response to a party's failure to respect the court process and court orders should be strong and decisive. The judge should be as creative as necessary in crafting remedies so as to ensure that the noncompliance identified and the resulting damage to the other party are addressed as fully, justly and quickly as possible.

***Clark v. Clark*, 2014 ONCA 175, 2014 CarswellOnt 2477 (O.C.A.)**

66 Second, the FLRs afford judges in matrimonial cases a wide discretion to make any order considered necessary for a just determination of the case, including an order for costs. At the time of the trial judge's costs disposition,[2] rule 1(8) of the FLRs confirmed this broad discretionary authority in order to deal with a party's "failure to follow [the FLRs]" or failure to obey a court order. But nothing in rule 1(8) of the FLRs authorized a trial judge to deem costs awarded in a matrimonial case to be "in relation to support or maintenance" in a case where support or maintenance was never in issue. Similarly, rule 1(8) afforded no licence to trial judges to characterize costs in a matrimonial proceeding as relating to spousal support where spousal support was never in issue.[3]

***Sleiman v. Sleiman*, 2002 CarswellOnt 1595, (Ont. C.A.)**

1 In our view the motions judge's finding that the appellant had a "blatant disregard for the process and the orders of the court" is fully justified by the record. The main way in which the appellant has failed to comply with court orders has been his refusal to make financial disclosure. We are therefore satisfied that the motions judge correctly precluded the appellant from contesting the respondent's financial claims.

Grenier v. Grenier, [2012] O.J. No. 6512 (Ont. S.C.J.)

Consideration Before Striking Pleadings

21 A court being asked to strike pleadings looks to Rules 1(8), 13(6), 13(7), 14(23) and 19(10). The remedy of striking of pleadings has the most drastic impact for a party that is not in compliance with court orders and should only be imposed in the most egregious of circumstances. To determine if said sanction is appropriate in situations of non disclosure, the court should consider the following issues:

1. What was the overall effort to complete disclosure relative to the undisclosed items and what ratio does the completed disclosure bear to the undisclosed items?

2. Are the missing pieces of disclosure relevant to significant issues in the file or are they about issues that were or have become minor? Does the mover need this disclosure to proceed and would a court be hampered in adjudicating without it?

3. Was there and is there a realistic possibility of obtaining this disclosure?

4. What is the cost of the disclosure relative to the overall quantum of money at risk?

5. Is the disclosure available to the seeker?

6. Given the advances in the information in the case, has the request for missing disclosure become over-reaching?

7. Were the orders (or order) concerning the disclosure sufficiently clear that the party ordered to provide the information would understand what was being sought?

8. Were the time-frames for obtaining the disclosure reasonable?

9. Did the seeker of the disclosure continue to pursue the disclosure and enforce the order(s)?

10. Were the disclosure orders (or order) so onerous that a party could not reasonably locate and disclose the volume of material requested?

11. Is there a lesser remedy that would suffice? Would it be reasonable to provide that information not disclosed could not be used at trial?

12. Has the seeker of disclosure discharged the onus of the burden of proof in the motion?

***Costabile v. Costabile*, 2004 CanLii 42935 (ON SC)**

[15] He is clearly in violation of several terms of the disclosure order made by Boyko J. The case has been made out for an order under rules 1 (8), 13 (17) and 19 (10). I do not think that rule 14 (23) is applicable because it expressly deals only with orders made on motions, not in case conferences. The husband has had 10 months, two case conferences and two adjournments to comply with his disclosure obligations under the rules and the orders of the court. The ultimate sanction is of course striking out the answer (and with it the claims made by the husband). He was twice warned explicitly by the case conference judges that he was at serious risk of that sanction. I am of the view that, after two orders and 10 months, nothing short of striking out will do. The onus will then be on him to show why he should be let back into the case, and the court can assess whether it is reasonable to allow the case to go forward in light of the state of the husband's disclosure and efforts to provide disclosure at that time.