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## Supreme Court of Canada Finds Lawyer Guilty of Civil Contempt for Returning Funds to Client

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In a case that should be regarded carefully by all lawyers and other professionals who handle client funds, the Supreme Court of Canada found in *Carey v. Laken*, 2015 SCC 17 that a lawyer was guilty of civil contempt when the lawyer returned money to a client from his trust account in the face of a *Mareva* injunction.

### Background

The lawyer represented a client who was being sued by an investor for loss of investment funds. In the course of the litigation, a Superior Court judge issued a *Mareva* injunction on very broad terms. The injunction prohibited any person from “disposing of, or otherwise dealing with” any of the client’s assets and specifically mentioned “trust accounts”. The client transferred \$500,000.00 to the lawyer, and the money was deposited into the lawyer’s trust account in compliance with the by-laws of the Law Society of Upper Canada. Later, the client instructed the lawyer to use the trust money to settle the claims of another creditor. However, the lawyer informed the client that he could not do so because of the prohibitions in the *Mareva* injunction. When negotiations failed to settle the lawsuit, the client instructed the lawyer to return the funds to him. The lawyer did so, deducting a certain amount of money to cover legal fees.

### Contempt proceedings

The investor was eventually awarded a judgment of over \$1 million against the client. However, the client and all his assets had disappeared from the jurisdiction. The investor applied to have the lawyer found in contempt for returning the funds in breach of the *Mareva* injunction.

A judge found the lawyer in civil contempt of court. The judge was satisfied beyond a reasonable doubt that the *Mareva* injunction was clear, and that the lawyer “knowingly and deliberately” breached the injunction by transferring the funds back to the client. However, at a second hearing, the judge accepted evidence provided by the lawyer indicating that his action in returning the money was consistent with the practice of counsel generally. The lawyer also provided testimony about his perception of his professional duties and the reasons that he returned the money. At this hearing, the judge set aside her previous findings of contempt.

The second decision was overturned by the Court of Appeal, which held that it was not necessary for a person in civil contempt to have desired or knowingly chosen to disobey the order. Furthermore, it was inappropriate for the trial judge her set aside the initial finding of contempt.



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### **Supreme Court of Canada's review**

The Supreme Court of Canada found that the three elements of civil contempt are well-established in Canadian law. The first element is that the order “must state clearly and unequivocally” what should and should not be done. The second element is that the party must have had actual knowledge of the order, or had knowledge imputed on the principle of the wilful blindness doctrine. The third element is that the party must have “intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels”.

A hotly contested issue at the Supreme Court of Canada is whether there was a necessity in civil contempt for the contemnor to have a contumacious intent. The lawyer argued that it was necessary that the contemnor must have intended to interfere with the administration of justice. The Supreme Court of Canada held that the case law was clear that it was only necessary that the person intentionally committed the act that was forbidden or refused to perform the act that was required. Furthermore, the Supreme Court of Canada rejected the argument that there should be a special intent required for third parties or lawyers. The Supreme Court of Canada rejected the suggestion by the lawyer that because he had professional obligations to his client, he should be treated differently than a contemnor who was not in a solicitor-client relationship.

The Supreme Court of Canada also held that it was wrong for the trial judge to have set aside the contempt order at the second hearing. The Court acknowledged that a civil contempt matter is generally bifurcated, with the first hearing addressing whether or not contempt had occurred and the second hearing addressing the appropriate punishment. However, a judge could overturn the finding of contempt after a final order had been made only where the contemnor subsequently purged the contempt or, in exceptional circumstances, where new evidence is provided that was not available at the original hearing.

This decision provides a cautionary reminder to lawyers and others who handle money for clients that they are bound to obey court orders, despite any duties owed to clients.

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