Federal Court  Cour fédérale

Date: 20200608

Docket: T-386-18

Citation: 2020 FC 675

Ottawa, Ontario, June 8, 2020

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

CHARLES WACHSBERG

Plaintiff

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND THE ATTORNEY GENERAL OF CANADA

Defendants

ORDER AND REASONS

I. Introduction

[1] This is an appeal of an Order made on January 28, 2020 by a prothonotary dismissing a motion brought by the Plaintiff. The Plaintiff sought an Order to compel the Defendants to appear and to show cause as to why they should not be found in contempt of an Order made on March 12, 2019 by Justice Barnes in the underlying action. The action appeals findings that the

Plaintiff had contravened the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* S.C. 2000, c.17 (PCMLTFA or the Act) and seeks other substantive and declaratory relief. The Defendants'motion to dismiss the action, considered at the same time by the Prothonotary, was also dismissed. That decision is not under appeal in this proceeding.

[2] The Plaintiff seeks an Order pursuant to Rule 51 of the *Federal Courts Rules*, SOR/98-106 (FCRs) to set aside the Prothonotary's decision and a show cause order, pursuant to Rule 467(1). Before a show cause hearing under Rule 467(1) can be ordered, a *prima facie* case of contempt must be made out. The grounds of the appeal are, essentially, that the Prothonotary erred in law by holding that a *prima facie* finding of contempt requires "willful and contumacious conduct" on the part of the Defendants and also that the Prothonotary erred by finding that a *prima facie* finding of contempt cannot be made where a court order has been frustrated by a third party.

[3] The Defendants concede that the Prothonotary did not apply the correct test for a show cause order. However, the Defendants contend that the Prothonotary correctly found that the settlement agreement between the parties which led to the Court's Order of March 12, 2019 had become frustrated by a "supervening event" that resulted in the discharge of their obligation to comply with the Order. They, therefore, seek dismissal of the appeal with costs.

II. **Background**

[4] The Plaintiff is a resident of Toronto, Ontario. He is in the business of importing and distributing retail products and for that purpose frequently travels to the United States and

abroad. Most of his sales are in the U.S. To facilitate his travels he relies on membership in the NEXUS trusted traveller program and has done so since it was launched in 2007. He was a member of the predecessor program. NEXUS is jointly administered by the Canada Border Services Agency (CBSA) and the United States Customs and Border Protection agency (US CBP). The Plaintiff's minor children are also members of the program and often travel with him.

[5] On March 6, 2017 the Plaintiff and a minor daughter returned to Toronto from Paris, France following a brief vacation. Upon arrival at Pearson International Airport, they presented a joint customs declaration card and were referred for a secondary inspection. During that inspection, a CBSA officer found a quantity of money in the Plaintiff's hand baggage. The total amount, in several different currencies, exceeded the threshold in Canadian dollars ($10,000) requiring reporting under the Act. The Plaintiff's explanation was that he believed that the threshold was not met as the total value of the funds in Canadian dollars did not exceed the amount that he and his daughter could together bring into the country under the Act without making a declaration. As family members travelling together, one declaration had been submitted. This explanation was not accepted by the CBSA officer.

[6] As there had been no attempt to conceal the money, the funds were returned to the Plaintiff. However, the officer undertook an enforcement action, imposed an administrative penalty of $250 and seized the Plaintiff's NEXUS card. The Plaintiff's membership in the NEXUS program was subsequently revoked for failure to meet the terms and conditions. At the time of the enforcement action, the Plaintiff's NEXUS membership was valid until July 25, 2017.

[7] The Plaintiff sought Ministerial review of the enforcement action, the imposition of the penalty, the seizure of his NEXUS card and revocation of his membership. In a decision letter dated November 30, 2017, the Minister's delegate upheld the administrative penalty, seizure of the NEXUS card and declaration of ineligibility for membership in the program under the *Presentation of Persons (2003) Regulations*, SOR/2003-323 (the Regulations). One of the requirements for eligibility, the letter stated, was that applicants "must be of good character". In defining that term for the purposes of the CBSA trusted traveller programs, the delegate wrote, factors such as whether there had been a serious infraction of the laws of Canada and the U.S. were taken into account. Since the enforcement action taken on March 6, 2017 "remains in CBSA records", the delegate determined the Plaintiff was ineligible for membership. He was informed that he could reapply after the retention period for the records expired, six years later.

[8] The plaintiff reapplied for a NEXUS membership on December 14, 2017. In doing so, he answered affirmatively to the question of whether or not he had been found in violation of any customs or other federal import laws. That question was contained in the online re-application form used by both the CBSA and US CBP. The Plaintiff's re-application was refused in January 2018 because of the March 6, 2017 enforcement action.

[9] On February 28, 2018, the Plaintiff filed and served a Statement of Claim on the Defendants to set aside the finding that the Plaintiff had contravened the PCMLTFA and for other declaratory and substantive relief. Among other claims, the Plaintiff sought a declaration that several provisions of the Act and Regulations and actions by the CBSA contravened the

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 (Charter).

[10] Following the service and filing of the pleadings, and multiple exchanges between counsel, a Pre-Trial Conference was convened by Prothonotary Aalto on February 13, 2019. During that conference, the parties agreed to a settlement wherein the CBSA would return the Plaintiff's NEXUS card, reinstate his membership in the program and set aside the enforcement action. A draft settlement order in those terms was prepared by the Plaintiff's counsel and was sent to the Defendant's counsel on February 15, 2019.

[11] It appears from the record that CBSA attempted to renege on the settlement when it became known that the Plaintiff's NEXUS card had expired prior to the agreement. Nonetheless, after some further exchanges, counsel for the Defendants prepared a draft order which included deadlines for the CBSA's compliance. This was accepted by the Plaintiff and submitted to the Court for approval. The Order was issued by Justice Barnes on March 12, 2019.

[12] The March 12, 2019 Order set aside the finding in the Ministerial Decision that the Plaintiff had contravened the PCMLTFA and the related finding that the Plaintiff does not meet the "good character" requirement under s 6 (b) of the Regulations. The Court ordered further that the CBSA expunge all records that it held relating to the enforcement action and the cancellation of the Plaintiff's membership in the NEXUS program. The CBSA was ordered to reinstate Mr. Wachsberg's membership and his NEXUS card was to be returned to him forthwith and in any event within ten days of the date of the Order.

[13] On March 21, 2019, counsel for the Defendants confirmed that the enforcement action had been canceled and requested an extension until April 1, 2019 to allow the CBSA to coordinate with US CBP to waive the usual risk assessment required to reinstate the Plaintiff's membership in the NEXUS program. The Plaintiff consented to this extension but was then required to attend an interview with US CBP on April 24, 2019. During that interview, according to Mr. Wachsberg's uncontested evidence, a CBSA officer was present and referred to the enforcement action in the presence of the US CBP official contrary to an express understanding between the parties.

[14] The Plaintiff received written notice on May 16, 2019 that his application for renewal of his NEXUS membership had not been approved by US CBP for "failure to meet the program eligibility requirements". In light of this, a Case Management Conference was convened on May 30, 2019. Following the conference, Justice Barnes issued a Direction to the Defendants requiring them to communicate with the appropriate United States authority responsible for the administration of the NEXUS program to determine the basis for the refusal to reinstate the Plaintiff's membership and to use their best efforts to have the Plaintiff's NEXUS membership reinstated by that authority.

[15] On July 25, 2019, counsel for the Defendants provided the Plaintiff with a letter from the Executive Director of Admissibility and Passenger Programs at the Office of Field Operations of US CBP which provided a list of reasons as to why the Plaintiff may not qualify for the NEXUS program including the revocation of the Plaintiff's membership by the CBSA. The following

month, the Plaintiff filed a Motion for an Order to Show Cause which was set down for a Case Management Conference on October 7, 2019.

[16] At the October 7, 2019 conference, counsel for the Defendants claimed that US CBP's refusal to reinstate Mr. Wachsberg's membership was unrelated to the CBSA's enforcement action and was instead connected to an unspecified 2005 incident involving the Plaintiff. This was based on information counsel had received in a telephone call with an American official. Justice Barnes then issued a further Direction to the Defendants requiring that an appropriate representative of the CBSA write to the Executive Director of the United States Trusted Traveler Program seeking further and better information as to the reasons for the denial of the Plaintiff's NEXUS application with particular reference to the alleged event dating back to 2005.

[17] It should be noted that the 2005 alleged event predated the start of the NEXUS program and the screening of the Plaintiff that would have been conducted by both CBSA and US CBP prior to the approval of his membership application.

[18] Mr. John Ommanney, Director General of the Travelers Program at CBSA, wrote to officials of the US CBP on October 12, 2019 advising that, in order for the CBSA to fulfill its legal obligation to the Court, it would need to request that the reason(s) for the US CBP's denial be provided directly to Mr. Wachsberg.

[19] No response having been received by December 9, 2019, the Plaintiff refiled his motion for an order to compel the Defendants to appear and show cause as to why they should not be

found in contempt of the Order made by Mr. Justice Barnes on March 12, 2019. On the same date, the Plaintiff received correspondence from US CBP advising that the Plaintiff's NEXUS application was denied "due to failure to declare commercial merchandise on April 1, 2015." This was the first time that any reference had been made to an allegation relating to any event in 2015. And in the subsequent two years, the Plaintiff had entered the United States on multiple occasions without difficulty.

[20] The show cause motion came before Prothonotary Milczynski on January 28, 2020, together with the motion filed by the Defendants to dismiss the Plaintiff's action. The same date, Prothonotary Milczynski made an order dismissing both motions.

III. **Decision under Appeal**

[21] Prothonotary Milczynski determined that the relief sought by both Plaintiff and Defendants should not be granted. With respect to the Defendants' motion, the Prothonotary held that the Plaintiff was entitled to pursue his action and, in the event he is successful, to whatever remedy the Court deemed appropriate. She considered that it would be appropriate for the action to be case managed and ordered that it be referred to the office of the Chief Justice for the appointment of a Case Management Judge.

[22] Regarding the Plaintiff's motion, Prothonotary Milczynski held that despite the parties' intentions, as evidenced by the proposals sent by the Plaintiff, and the terms agreed to by the Defendants, the settlement had been frustrated. It could not be found to have been fulfilled or completed as the Plaintiff had not been reinstated in the NEXUS program and had not received

his membership card as had been required. However, the Prothonotary found that neither the agreement of the parties nor this Court could compel the U.S. authorities to do anything regarding the Plaintiff's participation in the NEXUS program. She was not prepared to issue the show cause order in an effort to have the Defendants make further and better efforts to persuade the American authorities to relent. That option remained open to the parties to discuss at any time, she stated.

[23] The Prothonotary held that "there was no flouting of a court order or wilful and contumacious conduct" [emphasis added] on the part of the Defendants that would warrant the issuance of a show cause order.

IV. **Legislative Framework**

[24] Rule 51 (1) of the *Federal Courts Rules* provides that orders of prothonotaries may be appealed by a motion to a judge of the Federal Court.

Appeal	**Appel**
51 (1) An order of a prothonotary may be appealed by a motion to a judge of the Federal Court.	**51 (1)** L'ordonnance du protonotaire peut être portée en appel par voie de requête présentée à un juge de la Cour.

[25] The Rules define who may be found in contempt:

Contempt	**Outrage**
466 Subject to rule 467, a person is guilty of contempt	**466** Sous réserve de la règle 467, est coupable d'outrage au tribunal quiconque :

of Court who

…

b) disobeys a process or order of the Court;

…

Right to a hearing

467 (1) Subject to rule 468, before a person may be found in contempt of Court, the person alleged to be in contempt shall be served with an order, made on the motion of a person who has an interest in the proceeding or at the Court's own initiative, requiring the person alleged to be in contempt

(a) to appear before a judge at a time and place stipulated in the order;

(b) to be prepared to hear proof of the act with which the person is charged, which shall be described in the order with sufficient particularity to enable the person to know the nature of the case against the person; and

(c) to be prepared to present any defence that the person may have.

…

…

b) désobéit à un moyen de contrainte ou à une ordonnance de la Cour;

…

Droit à une audience

467 (1) Sous réserve de la règle 468, avant qu'une personne puisse être reconnue coupable d'outrage au tribunal, une ordonnance, rendue sur requête d'une personne ayant un intérêt dans l'instance ou sur l'initiative de la Cour, doit lui être signifiée. Cette ordonnance lui enjoint :

a) de comparaître devant un juge aux date, heure et lieu précisés;

b) d'être prête à entendre la preuve de l'acte qui lui est reproché, dont une description suffisamment détaillée est donnée pour lui permettre de connaître la nature des accusations portées contre elle;

c) d'être prête à présenter une défense.

…

Burden of Proof	**Fardeau de preuve**
(3) An order may be made under subsection (1) if the Court is satisfied that there is a prima facie case that contempt has been committed.	**(3)** La Cour peut rendre l'ordonnance visée au paragraphe (1) si elle est d'avis qu'il existe une preuve prima facie de l'outrage reproché.

V. **Standard of Review on Appeal**

[26] The general principle is that appeals from orders of prothonotaries are to be decided on the basis of the material that was before the prothonotary: *Shaw v Canada,* 2010 FC 577. The Rules do not prescribe a Standard of Review on appeal from decisions of prothonotaries. However, since the Federal Court of Appeal's decision in *Hospira Healthcare Corp. v Kennedy Institute of Rheumatology*, 2016 FCA 215 (*Hospira*), it is well-established that the Court may only interfere with a decision of a prothonotary if the prothonotary made an error of law or a palpable and overriding error regarding a question of fact or mixed fact and law: *Hospira* at paras 64-65, 79. This is the standard enunciated by the Supreme Court of Canada in *Housen v Nikolaisen*, 2002 SCC 33 (*Housen*) for appellate review of decisions by trial judges.

[27] An extricable error in principle, such as applying the wrong test for a civil contempt finding, constitutes an error of law invoking the correctness standard: *Housen* para 33. If the prothonotary has made an error of law, the reviewing court is entitled to intervene and substitute its own decision. No deference is required. With respect to factual conclusions, the reviewing court must defer unless the prothonotary has failed to give sufficient weight to the relevant circumstances or has misapprehended the facts.

VI. **Issues**

[28] As noted in the introduction, the parties are in agreement that the Prothonotary erred in requiring proof that the Defendants intended to disobey Justice Barnes' March 12, 2019 Order. They further agree that it is open to the Court to set aside the Prothonotary's dismissal of the show cause motion and direct the Prothonotary to reconsider the matter having regard to the correct test. Rather than do so, however, they are also in agreement that this Court should intervene and substitute its own decision on the motion. They disagree on what that decision should be.

VII. **Analysis**

[29] In *Carey v Laiken*, 2015 SCC 17 (*Carey*) the Supreme Court of Canada held that requiring proof that the alleged contemnor intended to disobey a court order imposed too high a test. At paragraphs 32 to 35, the Supreme Court set out the requirements:

> [32] Civil contempt has three elements which must be established beyond a reasonable doubt:… These three elements, coupled with the heightened standard of proof, help to ensure that the potential penal consequences of a contempt finding ensue only in appropriate cases…
>
> [33] The first element is that the order alleged to have been breached "must state clearly and unequivocally what should and should not be done"… This requirement of clarity ensures that a party will not be found in contempt where an order is unclear… An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning…
>
> [34] The second element is that the party alleged to have breached the order must've had actual knowledge of it… It may be possible to infer knowledge in the circumstances, or an alleged

> contemnor may attract liability on the basis of the willful blindness doctrine.
>
> [35] Finally, the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels…
>
> [Citations and some text omitted]

[30] It is clear from the record that the first two elements of the test have been met. It is not suggested that the Order is unclear or that the Defendants had no knowledge of it. Indeed, the evidence is that they drafted its terms and included time limits that the Plaintiff had not requested. The difficulty is with the third element. Did the Defendants intentionally fail to do the acts that the order compels? The Plaintiff contends he has clearly demonstrated a *prima facie* case to prove this. Not only did the Defendants delay in expunging the records of the enforcement action, his membership has not been restored and his NEXUS card has not been returned.

[31] The Plaintiff argues that in addition to imposing an overly burdensome requirement that there be "willful and contumacious conduct" in order to warrant a *prima facie* contempt finding against the Defendants, the decision under appeal incorporates factors that are only relevant in the second stage of the process i.e. at the show cause hearing. Chief among these is the alleged unenforceability of the Order. The Plaintiff submits that the objective impossibility of compliance is a defence that the alleged contemnor may pursue in the show cause hearing but does not factor into the test for getting to that stage. Had the matter solely concerned deletion of the records, the Defendants could argue that they had purged their contempt, albeit beyond the

time period fixed by the Order. But they have no answer, the Plaintiff argues, to the failure to comply with the remainder of the Order.

[32] In this instance, the Plaintiff contends the role of the US authorities has no bearing on whether the Defendants are *prima facie* in contempt of the Order and that the test has been met by the "numerous and flagrant refusals of the Defendants to take affirmative action in fulfilling the Court Order" and their failure to fulfill the Order to date.

[33] Among the failures of the Defendants to comply with the Order, the Plaintiff points to CBSA's initial refusal to expunge all of its records relating to the enforcement action and their contention that the plain terms of the Order did not apply to their "internal records". This questionable interpretation of the Order was only abandoned two months after the Court-imposed deadline was passed and just prior to a further Case Management Conference where it was to have been a key issue. Belated compliance with this aspect of the Order may well have jeopardized the Plaintiff's eligibility for re-entry into the NEXUS program, the Plaintiff argues.

[34] Further, a CBSA officer attended the Plaintiff's interview with US CBP and brought up the fact of the enforcement action contrary to the agreement of the parties and the clear intent of the Order. The CBSA officer's knowledge of the enforcement action could be interpreted as a "record", and as such disclosure of that fact was a clear breach. Whether this was done deliberately or was a blunder by the officer, the result was that US CBP was made aware, if it was not already, of the enforcement action prior to its assessment of the Plaintiff's re-application to the NEXUS program.

[35] The Plaintiff argues the Defendants' assertion that the bi-lateral nature of the program prevented the CBSA from reinstating the Plaintiff's membership is incongruous with the Defendants' drafting of the consent order and their committing to an unconditional reinstatement of the membership.

[36] While the Defendants concede the Prothonotary's error with respect to the test, they argue that intentional failure to comply must still be demonstrated in order to establish a *prima facie* case of contempt. The bare fact of a breach is insufficient. The moving party must demonstrate the intent to do the act or omission that has resulted in the breach. Here, they contend there is no evidence that the Defendants intended not to return the NEXUS Card to the Plaintiff or to effect his reinstatement in the program. The Order was frustrated not by their actions but by reason of the position taken by the U.S. authorities.

[37] In support of their position, the Defendants rely on the doctrine of frustration as enunciated by the Supreme Court of Canada in *Naylor Group Inc. v Ellis-Don Construction Ltd.*, 2001 SCC 58 at paras 53-56 [*Naylor*].

[38] *Naylor* is a contract law case. The Appellant in that case argued that even if it was bound by the contract, it was relieved of any obligation to fulfill it by the supervening effect of a tribunal decision. At para 53, the Supreme Court stated that "[f]rustration occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes "a thing radically different from that which was undertaken by the contract"".

In such instances, the court is asked to intervene because a supervening event has occurred without the fault of either party: *Naylor* at para 55.

[39] In my view, there was no supervening event that frustrated compliance with the March 12, 2019 Order. The Order was incapable of execution from the outset without the agreement of a third party who was not involved in the proceedings and did not consent to the settlement. The fatal flaw in the settlement agreement was that it ignored the fact that the Plaintiff's membership had expired by the date of the Order and could not be reactivated without a fresh application and acceptance by both agencies. Counsel for the Defendants acknowledged this in an email to the Plaintiff on March 26, 2019. This should have been considered and resolved before the consent order was placed before the Court for approval.

[40] There appears to be no basis for the allegation, conveyed to the Court by counsel for the Defendants, that the Plaintiff had committed some transgression in 2005. His NEXUS application had been granted at the outset of the program in 2007 and renewed at least once. The subsequent explanation that he was denied "due to failure to declare commercial merchandise on April 1, 2015" is, in the circumstances, hard to credit. The Plaintiff appears to have had no difficulty using his NEXUS membership in the months prior to March 2017. But that explanation, even if spurious, is not reviewable by this Court. Nor does the refusal by the American authorities constitute an intentional act or omission by the Defendants amounting to a *prima facie* case of contempt for failing to comply with the Court's Order.

[41] Thus I am unable to find that the prerequisites for a show cause hearing have been met. As much as I think it might be instructive to require the Defendants to appear before the Court to explain why they were unable to persuade their American counterparts to comply with the Order, I doubt that it would have any practical effect. Even if this Court were to agree that the Plaintiff had met the test to demonstrate that he had a *prima facie* case of civil contempt, the US CBP is a foreign agency which controls its own practices and procedures and has exercised its sovereign right to deny his application. For that reason I would not issue the requested Order.

VIII. **Costs**

[42] In his motion record before the Prothonotary, the Plaintiff requested costs. While that request was not repeated in the appeal motion, I assume this was a simple oversight. The Defendants have requested costs on this appeal, which I would refuse to award them given the history described above.

[43] The Court has considerable discretion under Rule 400 to award costs. In the ordinary course, the losing party is unlikely to receive a costs award; however, the "cardinal principle" is the full discretion of the trial judge (*Whalen v Fort McMurray No 468 First Nation,* 2019 FC 1119 at para 6). In making a costs determination, the Court will consider multiple factors under Rule 400(3), not only the result of the proceeding. This Court recently awarded costs to an Applicant who was unsuccessful in his judicial review, on the basis that the respondent failed to provide a timely or reasonable explanation for delay (*Cumming v Canada (Royal Mounted Police)*, 2020 FC 271 at paras 34-36). In the present circumstances, although the main relief sought by the Plaintiff is not practicable, the Defendants' errors caused the problem which led to

the proceedings below and on this appeal. That in my view justifies awarding costs to the Plaintiff both for this appeal and the motion before Prothonotary Milczynski payable in any event of the cause.

ORDER IN T-386-18

THIS COURT ORDERS that:

1. The Plaintiff's appeal of Prothonotary Milczynski's Order of January 28, 2020 is dismissed; and

2. The Plaintiff is awarded costs on the normal scale for this appeal and the motion below in any event of the cause.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-386-18
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