Federal Court  Cour fédérale

Date: 20121206

Docket: T-1180-11

Citation: 2012 FC 1436

Ottawa, Ontario, December 6, 2012

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

MIKE ORR

Applicant

and

FORT MCKAY FIRST NATION CHIEF AND COUNCIL

Respondents

REASONS FOR ORDER AND ORDER

[1] Mr. Mike Orr ["the Applicant"] is seeking by motion an Order from this Court pursuant to Rule 467 of the *Federal Courts Rules*, SOR/98-106, requiring Fort McKay First Nation Chief and Council ["the Respondents"] to be held in contempt for disobeying an Order of the Court. This is the first step of the contempt procedure commonly referred to as the "show cause" stage. In order to be successful at this stage, the Applicant must submit evidence that shows that a *prima facie* case of contempt has been made against the Respondents.

I. A Brief Summary of the Facts at Play

[2] The Applicant, who has been an elected councillor of the Band Council since 1998, having been re-elected through different elections and who is also a Director of ten Band-owned companies, was suspended temporarily without pay by the Respondents by resolution dated July 13, 2011 as a result of "sexual assault charges" made against him. These criminal charges were withdrawn on November 14, 2012.

[3] The Applicant initiated an application for judicial review with this Court of the Resolution of the Band Council to suspend him temporarily without pay. Justice Near rendered a decision on November 14, 2011 allowing the application for judicial review of the resolution, quashing it and ordering that the Applicant resume his duties as councillor of the Band Council and Director of the Related Band Companies (Amended Reasons were issued on December 5, 2011).

[4] On November 25, 2011, the Respondents filed an appeal of the Judgment and on January 18, 2012, the Federal Court of Appeal granted a stay of the Federal Court Judgment until final judgment by the Court.

[5] On October 30, 2012, the Federal Court of Appeal dismissed the appeal with costs.

[6] Counsel for the Applicant wrote to counsel for the Respondents on November 5, 2012 requesting some information regarding future Council meetings, as well as the costs awarded and other monetary entitlements. A response asking for particulars as to costs and other monetary requests was forwarded by counsel for the Respondents two days after, November 5, 2012.

[7] On that same day, the Applicant signed an affidavit in support of this show cause motion which was served on the Respondents on November 9, 2012 and filed on November 13, 2012.

[8] By letter addressed to the Respondents, dated November 14, 2012, the Applicant sought all information in relation to the Band, its corporate businesses and his monetary requests.

[9] On November 15, 2012, a representative of the Respondents replied, assuring the Applicant that the best efforts would be made to supply the information requested and that the monetary claims should be addressed directly to the Band Council and the Board of the Group of the Band-owned companies.

[10] On November 19, 2012, the day that the show cause motion was presented, counsel for the Respondents reiterated the Respondents' intention to comply with the decision of the Court. To this effect, at my request, Counsel for the Respondents wrote and signed a letter which summarized the undertakings of her clients:

> "Further to the Court's request, we confirm that the Respondents have taken steps to ensure the following and further have made a commitment, independent of any further Order of the Court, to ensure that the following is in place no later than one week from today's date (i.e. Monday, November 26th):
>
> - Mr. Orr will be on the payroll of Fort McKay First Nation and will receive his regular pay for the month of November;
> - Mr. Orr's Fort McKay e-mail address will be reactivated;
> - Mr. Orr will be provided with an iPad for use in relation to Council business;
> - Mr. Orr will be provided with an iPhone for use in relation to

> Council business (the Blackberry device previously issued to Mr. Orr was never returned);
>
> - Mr. Orr will be provided with the keys to an office at Fort McKay First Nation; and
>
> - Mr. Orr will be provided with a key fob for access to the Council wing.
>
> In accordance with my prior correspondence with Ms. Kennedy, I confirm my understanding that the Council anticipates that Mr. Orr will raise any issues respecting retroactive pay for discussion at a Council meeting."

[11] In the correspondence between counsel, and between the Applicant and the Band representative, as well as in the affidavit filed by the Respondents, it was indicated that the Applicant should deal directly with the Band Council and the representatives of the band-owned companies. It was suggested that counsel for the Applicant should not intervene in solving the issues as a result of the Federal Court of Appeal Judgment.

II. The Show Cause Rule and the Jurisprudence

[12] Rule 467 of the *Federal Courts Rules*, SOR/98-106 reads as follows:

Federal Courts Rules, SOR/98-106	*Règles des Cours fédérales*, DORS/98-106
Right to a hearing	Droit à une audience
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	**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*) to appear before a judge at a time and	*a)* de comparaître devant un juge aux date,

place stipulated in the order;	heure et lieu précisés;
(*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	*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*) to be prepared to present any defence that the person may have.	*c*) d'être prête à présenter une défense.
Ex parte motion	Requête *ex parte*
(2) A motion for an order under subsection (1) may be made *ex parte*.	(2) Une requête peut être présentée *ex parte* pour obtenir l'ordonnance visée au paragraphe (1).
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.
Service of contempt order	Signification de l'ordonnance
(4) An order under subsection (1) shall be personally served, together with any supporting documents, unless otherwise ordered by the Court.	(4) Sauf ordonnance contraire de la Cour, l'ordonnance visée au paragraphe (1) et les documents à l'appui sont signifiés à personne.

[13] A contempt procedure is very serious. It requires strict compliance with the different steps that the Rules stipulate. The outcome of this type of procedure can have great consequences on the person alleged to be in contempt. Indeed, if found in contempt, the person may be imprisoned for a period of less than five years or until compliance with the Order. The person may also have to pay a fine, be obliged to do or refrain from doing any act and pay costs (see Rule 472 of the *Federal Courts Rules*).

[14] From the beginning of the proceedings to the end, the moving party must meet specific procedural requirements. At the "show cause" stage, the evidence presented must establish a *prima facie* case that contempt has been committed. Then, it is for the Court to be satisfied that a *prima facie* case of contempt has been made. In order to establish a *prima facie* case and satisfy the Court that such a norm has been met, the party "[m]ust show a *prima facie* case of wilful and contumacious conduct on the part of the contemnor." (See *Chaudhry v Canada*, 2008 FCA 173 at para 6, 2008 CarswellNat 1339 (FCA), referring to *Imperial Chemical Industries PLC v Apotex Inc*, (1989), 24 CPR (3d) 176, 26 FTR 47).

[15] In *Mennes v Canada (Correctional Services)*, 2001 FCT 571 at para 5, 2001 CarswellNat 1230, Justice Pelletier, as he then was, held that a show cause motion "[…] requires proof of a court order or other court process, proof of the respondent's knowledge of the order or process and proof of a deliberate flouting of the court order or process […]". In a very elaborate and well-thought decision, Justice Martineau referred to these cases in order to demonstrate that even at the show cause stage, the intent must be shown on the part of the contemnor (see *Canadian Private Copying Collective v Fuzion Technology Corp*, 2009 FC 800 at paras 54, 60-62, 77 CPR (4th) 1).

[16] Having identified what the *Federal Courts Rules* require as evidence at the show cause stage and how it has been applied in case law, we will now examine the facts of this case in light of the applicable law.

III. Analysis

[17] The Applicant has shown satisfactorily to the Court that a Court Order exists and that the Respondents are aware of it. However, the evidence relied upon by the Applicant does not establish a *prima facie* case of contempt.

[18] The Applicant decided to sign an affidavit in support of a show cause motion only seven days after the Federal Court of Appeal Judgment dismissed the appeal. At that time, counsel for both parties were exchanging letters in order to take steps towards compliance with the Federal Court Judgment. The motion was served and filed in the days following and this Court heard counsel twenty days after the decision of the Federal Court of Appeal was rendered.

[19] Such a short time period does not give the parties the opportunity to discuss and agree upon how the Court's Order shall be complied with. Indeed, there are different approaches to resolve this situation as it is only a matter of establishing the foundation for the monetary claims and the documentation required. Such a short time is not indicative at all of evidence supporting a *prima facie* case of contempt.

[20] More importantly, the evidence presented by the Respondents indicates that they want to comply with the Judgment. Indeed, they filed an affidavit signed by a representative, which included an e-mail dated November 15, 2012 by the Respondents, sent in response to the Applicant's e-mail dated November 14, 2012 in which he requested "all information pertaining to Band and Corporate Business of the Band including all minutes, correspondence, financial reports, etc. from July 2011 to date". The response was straightforward. The Band Council indicated that it

"will make best efforts to prepare this information as soon as possible", that "[r]ebuilding the last 18 months of Council business will be a substantial undertaking", that it will be "taking steps to get [the Applicant] back on the payroll and to reactivate e-mail and other accounts". The Band Council added that the Applicant "will have to address the issue of back pay directly with the Council and the Board of the Group of Companies."

[21] In addition, as stated earlier, counsel for the Respondents made it clear that her clients would comply with a large part of the Judgment of the Federal Court and that discussion on this matter should take place between the Applicant and Council concerning retroactive pay.

[22] This is certainly not indicative of "a wilful and contumacious conduct" against a Judgment or Order of this Court or "deliberate flouting of such Judgment or Order." On the contrary, this is straightforward evidence of the Respondents' desire to comply with the Judgment. I cannot find any clear indication that the Respondents do not want to comply. Therefore, the *prima facie* case required to show that contempt has been committed is not made out.

[23] Having heard both counsel and read the Motion Records, it is my understanding that there is some uneasiness on the part of the Respondents with regard to communicating with counsel for the Applicant the valuable, confidential information of the Band Council and its corporate entities. Without deciding upon these obvious different points of view, I can say that this should not be a reason not to comply with a Judgment of the Federal Court.

[24] The Applicant has a right to be represented by counsel, he was represented by counsel during these proceedings but he also must begin to act independently as his position as councillor so requires. On the other hand, the Respondents must comply with the Judgment. Their undertakings clearly show this intention and they must not use the argument of counsel's intervention to circumvent this obligation. Surely, there must be a *modus vivendi* between the parties that will show clear compliance with the Judgment but there should also be respect of the non-necessity of having to deal through counsel for the Applicant on all matters. The Applicant being councillor of the Band Council and Director of the Related Band Corporations must resume his important responsibilities. As he did so in the past, the Applicant does not need a counsel to act as Councillor and Director.

[25] In such a situation, the motion to find at the show cause stage that there is a *prima facie* case that contempt has been committed is dismissed. Because of the particular situation, whereby the Applicant is trying to recuperate his rights as a result of a Judgment rendered in his favour, no costs will be allowed against him.

ORDER

THIS COURT ORDERS AND ADJUDGES THAT:

1. The motion pursuant to Rule 477 of the *Federal Courts Rules* is dismissed with costs against the Applicant, each party assuming their respective costs.

"Simon Noël"

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Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1180-11
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PLACE OF HEARING:	Edmonton, Alberta
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APPEARANCES:

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J. Trina Kondro	FOR THE RESPONDENTS

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