Federal Court of Appeal | Cour d'appel fédérale

Date: 20240502

Docket: A-29-24

Citation: 2024 FCA 85

Present: **BIRINGER J.A.**

BETWEEN:

LUCY MUSQUA

Appellant

and

TERRINA BELLEGARDE AND JOELLEN HAYWAHE

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 2, 2024.

REASONS FOR ORDER BY: BIRINGER J.A.

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REASONS FOR ORDER

BIRINGER J.A.

[1] The appellant moves for a stay of an Order of the Federal Court (*per* Favel J.) until this Court determines the appeal from that Order. The Order found her in contempt: 2024 FC 48.

[2] The background to the contempt decision starts with the removal of Councillors Terrina Bellegarde and Joellen Haywahe from the Carry the Kettle First Nation (CTKFN) Council in late 2022. Councillors Bellegarde and Haywahe are challenging their removal in judicial review

applications in the Federal Court. The applications have been heard, but the Federal Court has not released its decision.

[3] On January 27, 2023, Councillors Bellegarde and Haywahe obtained an order from the Federal Court (*per* Grammond J.) staying their removal and also staying a by-election scheduled to fill their seats, pending resolution of the judicial review applications: 2023 FC 129. The stay order was not appealed.

[4] Notwithstanding the stay order, the by-election was held; Brady O'Watch and Morris Pasap were elected as councillors. Councillors Bellegarde and Haywahe then brought a motion in the Federal Court for an order finding the appellant, Chief Scott Eashappie, Councillors Shawn Spencer and Tamara Thomson, and Brady O'Watch and Morris Pasap in contempt of the stay order. (In these reasons, I refer to Councillors Bellegarde and Haywahe as councillors, but not Messrs. O'Watch and Pasap, although their status will be addressed in the underlying judicial review applications.)

[5] On January 15, 2024, the Federal Court found the appellant, Chief Eashappie, and Councillors Spencer and Thomson (together, the contemnors) to be in contempt of the stay order, but not Messrs. O'Watch and Pasap. The Federal Court ordered that the matter be referred to the judicial administrator to set a date for a sentencing hearing. The hearing has not yet occurred.

[6] Councillor Musqua has appealed her contempt conviction to this Court. The other contemnors have not. Now Councillor Musqua seeks to stay the sentencing hearing pending

resolution of her conviction appeal. She says she meets the tripartite test for a stay in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

[7] For the following reasons, the appellant's motion will be dismissed.

[8] Paragraph 398(1)(*b*) of the *Federal Courts Rules*, SOR/98-106 permits this Court to stay an order that is under appeal. The test for obtaining a stay is set out in *RJR-MacDonald*. Moving parties must establish that: (1) their appeal raises a serious issue; (2) they will suffer irreparable harm if the stay is not granted; and (3) the balance of convenience favours granting the stay: *RJR-MacDonald* at 334; *Canada v. Canadian Council for Refugees*, 2008 FCA 40 at para. 18. All three criteria must be met for a stay to be issued.

[9] The threshold for determining whether there is a serious issue is low: *RJR-MacDonald* at 335; *Western Oilfield Equipment Rentals Ltd. v. M-I L.L.C.*, 2020 FCA 3 at para. 8. The test is met where there is at least one issue to be determined on appeal that is "not frivolous or vexatious": *RJR-MacDonald* at 337; *Toronto Real Estate Board v. Commissioner of Competition*, 2016 FCA 204 at para. 11; *Canadian Council for Refugees* at para. 22.

[10] Councillor Musqua claims that her appeal raises a number of serious issues, including whether the "beyond a reasonable doubt" standard for establishing contempt was met and whether the Federal Court judge relied on evidence that was not applicable to her and failed to consider evidence that was. She also claims ineffective representation by counsel and that the Federal Court judge erred in refusing to re-open the contempt proceedings.

[11] The respondents essentially argue that Councillor Musqua's appeal lacks merit. However, on a stay motion, the Court's view on the appeal's chances of success is irrelevant: *RJR-MacDonald* at 338; *Western Oilfield* at para. 8.

[12] The question at this stage is whether Councillor Musqua has raised at least one issue on appeal that is neither frivolous nor vexatious. I am satisfied that she has met this low threshold. The "serious issue" branch of the test is satisfied.

[13] Under the second branch of the *RJR-MacDonald* test, Councillor Musqua must show that she would suffer irreparable harm if the stay were not granted. "Irreparable" refers to the nature of the harm, not the magnitude. It is harm that cannot be quantified in monetary terms or remedied through compensation: *RJR-MacDonald* at 341.

[14] Although the alleged harm in an *RJR-MacDonald* analysis is necessarily future harm, it cannot be "hypothetical and speculative": *Janssen Inc. v. Abbvie Corporation*, 2014 FCA 112 at para. 24. There must be "a real probability" of irreparable harm that cannot be avoided: *Bell Canada v. Beanfield Technologies Inc.*, 2024 FCA 28 at para. 21, and the cases cited therein.

[15] Councillor Musqua submits that the sentencing hearing would generate irreparable harm because of the potentially serious penalties for contempt, including imprisonment, which could negatively impact her livelihood and infringe her civil liberties. She also argues that the sentencing hearing would cause further, irreparable harm to her reputation.

[16] I do not accept these submissions. I am unable to conclude that the sentencing hearing itself would cause harm to Councillor Musqua's reputation incremental to that arising from the Federal Court's finding of contempt. Further, I do not accept that the mere possibility of a penalty of imprisonment constitutes irreparable harm.

[17] The Federal Court has discretion to choose from a wide range of penalties for a person found to be in contempt. They are set out in rule 472 of the *Federal Courts Rules* and include imprisonment (rule 472(*a*) and (*b*)), a fine (rule 472(*c*)), an order to refrain from doing any act (rule 472(*d*)), and an order to pay costs (rule 472(*f*)). The Federal Court must ultimately fashion a sentence that is proportional in the circumstances: *Professional Institute of the Public Service of Canada v. Bremsak*, 2013 FCA 214 at paras. 29 and 33. Sometimes a warning along with criticism in reasons for judgment is good enough. Not all of these penalties would constitute irreparable harm.

[18] Until the Federal Court determines the appropriate sanction, I do not know what harm Councillor Musqua will suffer and therefore cannot determine if the harm is irreparable. The Ontario Court of Appeal similarly held in *Sabourin and Sun Group of Companies v. Laiken*, 2011 ONCA 757. That Court concluded that the motion to stay a contempt order prior to the sentencing hearing was premature: *Sabourin* at para. 7. The Court did not accept that the mere risk of being sent to jail qualified as irreparable harm: *Sabourin* at para. 13.

[19] Even accepting that a risk of imprisonment may constitute irreparable harm, it is potentially avoidable. If the Federal Court were to order imprisonment at the sentencing hearing,

Councillor Musqua could immediately appeal the order to this Court and seek a stay of the sentence. This Court could then assess the merits of a stay application with a complete picture of the harm she faces, as is recommended in *Sabourin* at para. 13. It may also be possible for Councillor Musqua to ask the Federal Court to adjourn her sentencing hearing until after the appeal is heard: *Canada (Attorney General) v. Oshkosh Defense Canada Inc.*, 2018 FCA 102 at para. 24; *Hama v. Werbes*, 1999 BCCA 714 at para. 3.

[20] At this point, the harm alleged by Councillor Musqua is hypothetical, speculative, and avoidable. The "irreparable harm" criterion for the issuance of a stay is not met.

[21] The third step of the *RJR-MacDonald* test, the "balance of convenience", involves a comparison of the harm to the responding party from granting the stay and the harm to the moving party from refusing to grant the stay, pending a decision on the merits: *RJR-MacDonald* at 342; *Canada (Citizenship and Immigration) v. Canadian Council of Refugees*, 2020 FCA 181 at para. 10. As the *RJR-MacDonald* test is conjunctive, and Councillor Musqua has not satisfied the second step of the test, it is unnecessary for me to consider the balance of convenience: *Janssen* at para. 14; *Western Oilfield* at para. 7.

[22] In any case, in these circumstances, I would be reluctant to intervene in the Federal Court's contempt proceeding, which does not conclude until a sanction has been determined. While within this Court's power to order a stay, it is generally preferable not to interrupt proceedings in the trial court if the consequence is to fragment the appeals: *Sabourin* at para. 7; *Hama* at para. 3. The sanction for contempt, while determined in a separate hearing, will reflect

the Federal Court's views of the seriousness of the contempt, which is potentially relevant to this Court's full appreciation of the matter under appeal.

[23] For the foregoing reasons, the motion for a stay will be dismissed, with costs in the all-inclusive amount of $2,500.

"Monica Biringer"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-29-24
STYLE OF CAUSE:	LUCY MUSQUA v. TERRINA BELLEGARDE AND JOELLEN HAYWAHE

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	BIRINGER J.A.
DATED:	MAY 2, 2024

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