

Federal Court



Cour fédérale

Date: 20180529

Docket: T-1866-16

Citation: 2018 FC 549

Montréal, Quebec, May 29, 2018

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

MINISTER OF NATIONAL REVENUE

Applicant

and

DARRIN GRAY

and

619947 NB INC.

Respondents

ORDER AND REASONS

I. INTRODUCTION

[1] The Minister of National Revenue (the “Applicant”) seeks an Order pursuant to the *Federal Courts Rules*, SOR/98-106 (the “Rules”) that Darrin Gray and 619947 NB Inc. (the “Respondents”) are in contempt of an Order of this Court, specifically the Order made on

December 15, 2016 issued pursuant to subsection 231.1(1) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.).

II. BACKGROUND

[2] The Applicant is the Minister responsible for the administration of the Act.

[3] The Compliance Order obtained by the Applicant required the Respondents to provide certain records, identified in Schedule A of that Order, within 30 days after having been served with a copy of the said Order.

[4] Upon motion dated April 27, 2017, the Applicant sought a further Order of the Court pursuant to Rule 466 of the Rules, requiring the Respondents to show cause (the “Show Cause Order”) why they not should not be held in contempt for their failure to comply with the Compliance Order.

[5] The Show Cause Order set a hearing date for St. John’s, Newfoundland and Labrador, on Thursday, August 24, 2017.

[6] Upon the commencement of the trial on August 24, 2017, the Court Commissionaire, Mr. Patrick Brennan, was directed to call out the name of the personal Respondent in the area outside the Court room in St. John’s, located at 354 Water Street, and also to go down to the first floor of the building in the lobby and call out the name of the personal Respondent, that is Mr. Darrin Gray.

[7] The Commissionaire did so and reported back to the Court that no one answered to that name.

[8] The Applicant then opened her case and called as the first witness Mr. David Carroll, a process server in the St. John's area.

[9] In the course of Mr. Carroll's evidence on August 24, 2017, it became apparent that the Respondents had not been personally served with the Show Cause Order of May 19, 2017. Mr. Carroll testified about the affidavit of service that he had sworn on June 14, 2017, in connection with service of the Show Cause Order upon the Respondents. However, the exhibit attached to that affidavit was a copy of the Compliance Order, not a copy of the Show Cause Order.

[10] In light of the recent decision of the Supreme Court of Canada in *Pintea v. Johns*, [2017] 1 S.C.R. 470, before a person can be found in contempt of a Court Order, the moving party must prove personal service of the Show Cause Order upon the alleged contemnor, therefore the proceedings of August 24, 2017 were adjourned by Order issued on August 25, 2017 until November 16, 2017.

[11] The Order of August 25, 2017 provided as follows:

The Applicant will serve upon the Respondents a copy of the Order of May 19, 2017, together with a copy of the materials and information set out in paragraph 5 of that Order of May 19, 2017, and a copy of this Order.

The hearing of this matter for contempt will be heard on Thursday, November 16, 2017 at 9:30 a.m. at the Federal Court in St. John's,

Newfoundland and Labrador on the 2nd floor, 354 Water Street,
St. John's, NL.

[12] The contempt hearing was convened again on Thursday, November 16, 2017. When the matter was called in open Court, no one appeared on behalf of the Respondents.

[13] Again, the Commissionaire was requested to go down to the entrance to the building housing the Federal Courts and to call out the name of the personal Respondent; he was also requested to call out the name of the personal Respondent in the precincts of the Court, that is outside the Court room in St. John's.

[14] Three witnesses appeared on behalf of the Applicant, that is Mr. Michael Carroll, Mr. Gary Badcock and Ms. Kelly McKinnon.

[15] Mr. Carroll is a process server who testified that he served a copy of the Compliance Order upon the personal Respondent and the corporate Respondent. His affidavit sworn on January 3, 2017, was entered as Exhibit A-1.

[16] Mr. Gary Badcock is also a process server. He testified that he served documents, including the Show Cause Order and the Order of August 25, 2017 upon the personal Respondent on October 15, 2017.

[17] The third witness called on behalf of the Applicant was Ms. Kelly McKinnon, an income tax auditor with the Canada Revenue Agency (the "CRA") in Moncton, New Brunswick.

[18] She was engaged in a tax audit of the Respondents. She testified that, according to records obtained from the Corporate Affairs Registry for the Province of New Brunswick, the personal Respondent is the sole shareholder and director of the corporate Respondent.

[19] In connection with the income tax audit, the Moncton office of the CRA sent letters dated July 6, 2016, called an “Audit Confirmation Letter”, to each of the Respondents, asking for certain documents and banking records including income tax returns and schedules, financial statements, personal investment statements and personal banking documents. Ms. McKinnon produced receipts showing delivery of these letters by Purolator courier to the address of the corporate Respondent in Moncton and a residential address of the personal Respondent in St. John’s, Newfoundland.

[20] Ms. McKinnon testified that a response was received from an accountant, on behalf of the personal Respondent, forwarding some but not all of the requested documentation. No response was forthcoming on behalf of the corporate Respondent.

[21] Subsequently, the CRA took steps to obtain the Compliance Order that was granted on December 15, 2016. Schedule A to the Compliance Order identified the documents and information that were still outstanding.

[22] According to the evidence of Mr. Carroll, that Order was served upon the personal Respondent on January 3, 2017, at his St. John’s address. The affidavit of service, entered as

Exhibit A-1, says that the personal Respondent identified himself as the owner of the corporate Respondent.

[23] Ms. McKinnon testified that the CRA did not receive any of the documents that were the subject of the Compliance Order. As the next step, the CRA instructed the Department of Justice to take steps to obtain a Show Cause Order, pursuant to the Rules, respecting the failure of the Respondents to provide the documents listed in Schedule A of the Compliance Order.

[24] As of the date of her evidence, that is November 16, 2017, Ms. McKinnon testified that none of the outstanding requested documents had been received by her office.

III. DISCUSSION

[25] The sole issue arising in this proceeding is whether the Applicant has shown that the Respondents, or either of them, should be found in contempt of Court for failure to comply with the Compliance Order of December 15, 2016. Rule 466(b) of the Rules is relevant and provides as follows:

Contempt

466 Subject to rule 467, a person is guilty of contempt of Court who

(b) disobeys a process or order of the Court;

Outrage

466 Sous réserve de la règle 467, est coupable d'outrage au tribunal quiconque :

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

[26] Rule 467 addresses the process to be followed in a contempt hearing and provides as follows:

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.

***Ex parte* motion**

(2) A motion for an order under subsection (1) may be made *ex parte*.

Burden of proof

(3) An order may be made under subsection (1) if the Court is satisfied that there is a

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.

Requête *ex parte*

(2) Une requête peut être présentée *ex parte* pour obtenir l'ordonnance visée au paragraphe (1).

Fardeau de preuve

(3) La Cour peut rendre l'ordonnance visée au paragraphe (1) si elle est d'avis

prima facie case that contempt has been committed.

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.

[27] The sole issue arising in this matter is whether the Respondents are in contempt of Court as a result of failing to provide the documents identified in the Compliance Order.

[28] The burden of proof in a contempt hearing lies upon the moving party. According to the decision in *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1990] 2 S.C. R 217, contempt of court is a matter of criminal or quasi-criminal jurisdiction and the constituent elements of contempt must be proven beyond a reasonable doubt.

[29] The first matter to be addressed is whether the Respondents had notice of the hearing that was held on November 16, 2017.

[30] Two process servers testified on November 16, 2017, that is Mr. Michael Carroll and Mr. Guy Badcock.

[31] Mr. Badcock testified about his attempts to serve documents upon the Respondents and his efforts to locate the personal Respondent in the environs of St. John's.

[32] He succeeded in locating the personal Respondent in the community of Seal Cove and testified that he satisfied himself as to the identity of the personal Respondent by asking him to identify himself.

[33] The following appears at page 16 of the transcript of the hearing of November 16, 2017:

Q. Okay. Now have him identify what he has in his hand.

A. It's an Affidavit of Service, my lady, and there's about seven or eight tabs attached to it. I was given two, this one, plus another one to give to Mr. Gray, and company that sent it to me on behalf of the department asked me to compare one to the other. So, I skimmed through it to make sure that one was what it was, two, what it was and so on. I recognize Mike Carroll's Affidavit and the different Orders and so on that were there. So -

[34] Mr. Badcock's affidavit of service was entered as Exhibit A-4. That affidavit contains a list of the documents that were served on the personal Respondent and on "the company".

[35] Mr. Badcock was not asked if he took steps to confirm that the personal Respondent remains the sole director of the corporate Respondent. The only reference in Mr. Badcock's affidavit of service to the corporate Respondent is the following sentence: "On Sunday, October 15, 2017 at 6:30 pm, I served Darrin Gray and 619947 NB Inc with the seven documents itemized below".

[36] The itemized list refers to a number of documents as follow:

1. September 19, 2017 Letter from Maeve Baird to Darin Gray;
2. Order of the Federal Court (The Honourable Mr. Justice Bell) dated December 15, 2016;

3. Affidavit of Service of Mike Carroll sworn January 3, 2017 regarding service of the December 15, 2016 Order;
4. Applicant's Motion Record (*Ex Parte*) filed with the Federal Court on April 27, 2017 including:
 - a. Notice of Motion;
 - b. Affidavit of Kelly MacKinnon;
 - c. Written Submissions;
 - d. List of Authorities;
 - e. Draft Order; and
 - f. Copies of the listed authorities;
5. Order of the Federal Court (Prothonotary Richard Morneau) dated May 19, 2017;
6. Affidavit of Service of Dave Carroll sworn June 14, 2017 regarding service of the May 19, 2017 Order attaching:
 - a. June 2, 2017 Letter from Maeve Baird to Darrin Gray;
 - b. Order of the Federal Court (Prothonotary Richard Morneau) dated May 19, 2017;
 - c. Order of the Federal Court (The Honourable Mr. Justice Bell) dated December 15, 2016; and
7. Order of the Federal Court (The Honourable Madam Justice Heneghan) dated August 25, 2017.

[37] Items 1, 5 and 7 are particularly relevant to the present proceeding, that is whether the Applicant has shown that the Respondents should be held in contempt.

[38] Item 1 is a letter dated September 19, 2017, signed by the lawyer representing the Applicant. The letter is addressed to the personal Respondent and the subject matter is "Darrin Gray and 619947 NB Inc.". The letter refers to the hearing scheduled for November 16, 2017.

[39] Item 5 is a copy of the Order of Prothonotary Morneau dated May 19, 2017, that is the Show Cause Order. The second, item 7, is a copy of the Order issued on August 25, 2017, setting the hearing date of November 16, 2017.

[40] I am satisfied that the Applicant has complied with the requirements of paragraph 5 of the Show Cause Order, that is to serve the evidence relied upon to obtain the Show Cause Order, a list of any document to be used as evidence at the hearing, and a list of the witness(es) who would testify at the hearing, no less than 2 weeks before the date of the hearing. The letter of September 19, 2017, referred to above, refers to the documents and information referenced in the Show Cause Order and all the materials are included in the affidavit of service entered as Exhibit A-4.

[41] Item 7 is a copy of the Order of August 25, 2017, setting the hearing date of November 16, 2017. I am satisfied that this Order was served on the personal Respondent.

[42] However, I am not satisfied that service was effected upon the corporate Respondent.

[43] Rule 130(1) of the Rules provides for service upon a corporation as follows:

Personal service on corporation

130 (1) Subject to subsection (2), personal service of a document on a corporation is effected

(a) by leaving the document

Signification à une personne morale

130 (1) Sous réserve du paragraphe (2), la signification à personne d'un document à une personne morale s'effectue selon l'un des modes suivants :

a) par remise du document :

- | | |
|--|---|
| <p>(i) with an officer or director of the corporation or a person employed by the corporation as legal counsel, or</p> | <p>(i) à l'un des dirigeants ou administrateurs de la personne morale ou à toute personne employée par celle-ci à titre de conseiller juridique,</p> |
| <p>(ii) with the person apparently in charge, at the time of the service, of the head office or of the branch or agency in Canada where the service is effected;</p> | <p>(ii) à la personne qui, au moment de la signification, semble être le responsable du siège social ou de la succursale ou agence au Canada où la signification est effectuée;</p> |
| <p>(b) in the manner provided by any Act of Parliament applicable to the proceeding; or</p> | <p>b) le mode prévu par la loi fédérale applicable à l'instance;</p> |
| <p>(c) in the manner provided for service on a corporation in proceedings before a superior court in the province in which the service is being effected.</p> | <p>c) le mode prévu par une cour supérieure de la province où elle est effectuée, qui est applicable à la signification de documents aux personnes morales.</p> |

[44] In *Pintea, supra*, at paragraph 1, Justice Karakatsanis, writing for the Court, said the following:

The common law of civil contempt requires that the respondents prove beyond a reasonable doubt that Mr. Pintea had actual knowledge of the Orders for the case management meetings he failed to attend.

[45] It is not clear upon the oral evidence of Mr. Badcock or from his affidavit of service that at the time of service upon the personal Respondent that Mr. Gray was an officer or director of the corporate Respondent. There is no evidence that the place of service in Seal Cove is the head office or branch office of the corporate Respondent. There is no evidence about the manner in which a corporation can be served in the province of Newfoundland and Labrador.

[46] The only evidence about the head office or registered office of the corporate Respondent is the document from the New Brunswick Corporate Affairs Registry Database and that document appears to be dated October 14, 2016.

[47] There is no presumption of regularity about service upon the corporate Respondent and I am not satisfied that service was properly effected upon it. Accordingly, I cannot determine the allegations of contempt in relation to that party. However, this finding is without prejudice to the right of the Applicant to pursue another Show Cause Order if she wishes, in relation to the corporate Respondent.

[48] I turn now to the substance of the allegations against the personal Respondent.

[49] The personal Respondent was served with the Compliance Order, to compel the production of documents related to an audit being conducted by the CRA. Ms. McKinnon testified that he did not produce the material requested.

[50] In my view, it is within the authority of the Applicant to decide whether a response from a taxpayer, such as the personal Respondent, is an adequate reply to the Compliance Order. Ms. McKinnon testified that the material provided in the response to the Audit Confirmation Letter was not responsive.

[51] I am satisfied, upon the basis of the evidence submitted, that the personal Respondent was served with the Compliance Order, the Show Cause Order and the Order of

August 25, 2017. In these circumstances he was aware of the contempt proceedings and of the hearing date.

[52] On the basis of the evidence of Ms. McKinnon, I am satisfied that the personal Respondent has not complied with the request made to provide certain information and documents relating to his personal income tax file, including bank statements, credit card statements and insurance documents.

[53] The burden of proof in a contempt hearing is the same as that in a criminal trial, that is proof beyond a reasonable doubt.

[54] In *Lyons Partnership, L. P. v. MacGregor* (2005), 5 C.P.R. (4th) 157, the Court said that the Rules codify the common laws of contempt. The moving party, here the Applicant, must prove beyond a reasonable doubt that the alleged contemnor had personal knowledge of the Court Order in issue; that he was a primary actor, expressly or impliedly in the conduct that is the subject of the contempt proceedings; and that he possessed the necessary *mens rea* or intention to disobey the Court Order.

[55] According to the evidence of Ms. McKinnon, the personal Respondent replied to the Audit Confirmation Letter when his accountant sent a fax to the office of the CRA, forwarding some, but not all, of the requested information and documents.

[56] There is no evidence that the CRA took any further steps to communicate with the personal Respondent; the evidence is that a request was made to the Department of Justice to obtain a Compliance Order.

[57] In the present case, I am satisfied that the Applicant has discharged her burden of proof, that is, proof beyond a reasonable doubt, with respect to the three elements.

[58] The Applicant personally served the personal Respondent either the Compliance Order of December 15, 2016. The personal Respondent was subject to that Order, so he was a primary actor who was responsible for replying to and satisfying the Compliance Order. The necessary mental element, that is, the intention of *mens rea* of failure to comply with the Compliance Order, can be inferred from the personal Respondent's failure to provide the requested information and documents.

[59] In the result, I am satisfied that the Applicant has met the test for a finding that the personal Respondent is in contempt of an Order of this Court and an Order will issue accordingly.

[60] Rule 472 addresses the penalties that may be imposed after a finding of contempt and provides as follows:

Penalty

472 Where a person is found to be in contempt, a judge may order that

Peine

472 Lorsqu'une personne est reconnue coupable d'outrage au tribunal, le juge peut ordonner :

- | | |
|---|--|
| (a) the person be imprisoned for a period of less than five years or until the person complies with the order; | a) qu'elle soit incarcérée pour une période de moins de cinq ans ou jusqu'à ce qu'elle se conforme à l'ordonnance; |
| (b) the person be imprisoned for a period of less than five years if the person fails to comply with the order; | b) qu'elle soit incarcérée pour une période de moins de cinq ans si elle ne se conforme pas à l'ordonnance; |
| (c) the person pay a fine; | c) qu'elle paie une amende; |
| (d) the person do or refrain from doing any act; | d) qu'elle accomplisse un acte ou s'abstienne de l'accomplir; |
| (e) in respect of a person referred to in rule 429, the person's property be sequestered; and | e) que les biens de la personne soient mis sous séquestre, dans le cas visé à la règle 429; |
| (f) the person pay costs. | f) qu'elle soit condamnée aux dépens. |

[61] I refer to the decision of the Federal Court of Appeal in *Canadian Human Rights Commission v. Winnicki* (2007), 359 N.R. 101 (F.C.A.), where the Federal Court of Appeal instructed that a person should be given the opportunity to make submissions on the appropriate penalty before the Court determines that issue.

[62] I direct that a further hearing to address penalty and costs will be heard in St. John's, Newfoundland and Labrador on Thursday, September 27, 2018 at 9:30 am.

ORDER in T-1866-16

THIS COURT ORDERS that:

1. The Respondent Darrin Gray is guilty of contempt for failure to comply with the Order of the Court dated December 15, 2016;
2. No finding is made relative to the Respondent 619947 NB Inc., without prejudice to the Applicant in seeking another Show Cause Order;
3. The Applicant shall serve the Respondent Darrin Gray with a certified copy of the Order and Reasons no later than July 16, 2018 and file proof of such service with the Registry of this Court;
4. The sentencing hearing shall take place at the Federal Court located at 354 Water Street, Suite 209, St. John's, Newfoundland and Labrador on Thursday, September 27, 2018 at 9:30 am;
5. Costs will be addressed at the sentencing hearing.

“E. Heneghan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1866-16

STYLE OF CAUSE: MINISTER OF NATIONAL REVENUE V DARRIN GRAY AND 619947 NB INC.

PLACE OF HEARING: ST. JOHN'S, NEWFOUNDLAND AND LABRADOR

DATE OF HEARING: AUGUST 24, 2017 AND NOVEMBER 16, 2017

ORDER AND REASONS: HENEGHAN J.

DATED: MAY 29, 2018

APPEARANCES:

Maeve Baird

FOR THE APPLICANT

SOLICITORS OF RECORD:

Attorney General of Canada
St. John's, Newfoundland and
Labrador

FOR THE APPLICANT