

Federal Court



Cour fédérale

Date: 20180621

Docket: T-1147-16

Citation: 2018 FC 644

BETWEEN:

MINISTER OF NATIONAL REVENUE

Applicant

and

**LUCA M. CICIARELLI,
a.k.a. LUCA CICARELLI
1585677 ONTARIO LTD.**

Respondents

REASONS FOR SENTENCING ORDER

PHELAN J.

I. Introduction

[1] These are the Reasons in respect of my Sentencing Order imposing a fine of \$6,000, costs of \$4,560.66, ordering production of records once again and specifying terms of imprisonment for failure to comply with the payment and production terms of the Sentencing Order.

[2] The history of the Respondents' contempt is described in the Reasons for my Contempt Order of April 19, 2018. The contempt found – non-compliance with Justice Brown's Compliance Order to produce records – is continuing despite the Court of Appeal's confirmation of Justice Brown's Order. The contempt continues in respect of my Contempt Order in that the same records have not been produced as ordered.

The Respondents, while appealing my Contempt Order, have not sought a stay of that Order.

II. Facts

[3] While the key facts are described in the Reasons for the Contempt Order and are incorporated here, it is useful to touch on some of them. As indicated in the Reasons for the Montana Sentencing Order, these Reasons are an almost mirror reflection of the Montana Reasons.

[4] The Minister's application under s 231.7 of the *Income Tax Act*, RSC 1985, c 1(5th Supp), and s 289.1 of the *Excise Tax Act*, RSC 1985, c E-14, was granted by Justice Brown on August 9, 2016. The Compliance Order required the production of certain records and information (as described in Appendices A to E of that Order) within 30 days.

[5] The appeal of that Compliance Order was dismissed on September 21, 2017.

[6] Despite the Compliance Order and the Court of Appeal's decision, the records and information have not been produced.

[7] This Court, in its Contempt Order of April 19, 2018, found the Respondents in contempt of the Compliance Order and ordered the production within 10 days of the records and information described in the Compliance Order.

[8] There has been no compliance with the Compliance Order or the Contempt Order nor has any satisfactory excuse been offered. As this Court found, the defence to the breach of the Compliance Order was based on nonsense questions submitted to the Applicant in an effort to delay compliance with the Minister's demand to produce.

[9] The Respondents are continuing on this path of contempt.

III. Analysis

[10] The Court is faced with a situation of continuing non-compliance with Court orders.

[11] In considering the sentence to be imposed, the Court has had the benefit of the arguments and case authorities of both parties. The Court of Appeal in *Winnicki v Canada (Human Rights Commission)*, 2007 FCA 52 at para 17, 155 ACWS (3d) 66, described the factors to be considered as:

1. the gravity of the contempt in the context of the particular circumstances of the case as they pertain to the administration of justice;
2. whether the contempt offence is the first offence;
3. presence of any mitigating factors such as good faith or an apology; and
4. deterrence of similar conduct.

[12] Those factors are consistent with the earlier decision (referred to by both parties) of *Canada (Minister of National Revenue) v Marshall*, 2006 FC 788, 294 FTR 297. In that case, the learned judge summarized the relevant factors (with which I concur) as follows:

[16] To summarize, the factors relevant to determining a sentence in contempt proceedings are:

- i. The primary purpose of imposing sanctions is to ensure compliance with orders of the court. Specific and general deterrence are important to ensure continued public confidence in the administration of justice;
- ii. Proportionality of sentencing requires striking a balance between enforcing the law and what the Court has called “temperance of justice”;
- iii. Aggravating factors include the objective gravity of the contemptuous conduct, the subjective gravity of the conduct (i.e. whether the conduct was a technical breach or a flagrant act with full knowledge of its unlawfulness), and whether the offender has repeatedly breached orders of the Court; and
- iv. Mitigating factors might include good faith attempts to comply (even after the breach), apologize or accept responsibility, or whether the breach is a first offence.

[13] With respect to compliance and deterrence, the Respondents have shown not only contempt but a continuing intention to refuse to comply with Court orders. It is essential that Court orders be followed and it is important to deter non-compliance and to reinforce the Court’s condemnation of non-compliant acts or refusal to act. This is an important factor in setting the level of fine and the potential terms of imprisonment.

[14] Non-compliance with the various Courts’ orders has a public interest aspect. The Canadian tax system is based on self reporting and self assessment. It depends on compliance

with the tax laws. Canadian tax payers daily comply with the law. Outliers, such as the Respondents, in defying the legal obligations undermine this tax system.

[15] In terms of the sentence, there is a balance between enforcement and “the temperance of justice”. Further orders to produce without sanctions would be meaningless. On the other hand, imprisonment should be a last option not the first. Provision for “reasonable excuse” for non-compliance, such as the inability to obtain certain records and information, must be factored into the sentence, as has been done here.

[16] In the present case, the aggravating factors of knowing, deliberate, continuing and wholly unreasonable excuse outweigh any offsetting factors such as “first offence”. The Respondents have not just committed a technical violation, they have barefacedly defied Justice Brown’s Compliance Order, the Court of Appeal’s confirmation of the Compliance Order and the Contempt Order.

[17] The Respondents have a history of non-compliance, having not filed tax returns since 2000. They have also presented no mitigating factors in respect of this non-compliance with Court orders. There is no evidence of good faith, or inadvertence. There is no apology or purging of the contempt.

[18] Therefore, I have concluded that the sentence should contain:

- a) a fine at a sufficiently high level to meet the goals of compliance and deterrence.
The Respondents' reliance on lower fines in other cases does not reflect the contemptuous conduct evident in this case. \$6,000 is an appropriate level;
- b) legal costs on solicitor/client basis as evidenced by the Minister;
- c) the continuing obligation to produce the records and information as ordered; and
- d) a term of imprisonment for continued non-compliance of 30 days absent proof of excuse or explanation.

"Michael L. Phelan"

Judge

Ottawa, Ontario
June 21, 2018

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1147-16

STYLE OF CAUSE: MINISTER OF NATIONAL REVENUE v LUCA M. CICIARELLI, a.k.a. LUCA CICARELLI 1585677 ONTARIO LTD.

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JUNE 19, 2018

REASONS FOR SENTENCING ORDER: PHELAN J.

DATED: JUNE 21, 2018

APPEARANCES:

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