Federal Court  Cour fédérale

Date: 20190212

Docket: T-1608-17

Citation: 2019 FC 175

Ottawa, Ontario, February 12, 2019

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

BRENDA JOLY, WILLIAM JOHN AND TREVOR JOHN

Applicants

and

GORDON GADWA, BENJAMIN BADGER, JASON MOUNTAIN AND VERNON WATCHMAKER

Respondents

JUDGMENT AND REASONS

I. Nature of the matter

[1] In *Brenda Joly, William John and Trevor John v Gordon Gadwa, Benjamin Badger, Jason Mountain and Vernon Watchmaker*, 2018 FC 746, dated July 17, 2018 [the Contempt Decision], and after a trial in Edmonton, I found the Respondents in contempt of the Order of Justice Lafrenière issued November 10, 2017 [the November 10, 2017 Order].

[2] This contempt hearing was bifurcated to deal separately with the issues of contempt and sentencing, as in the circumstances was appropriate given the contempt decision would be reserved and the Federal Court of Appeal's decision in *Winnicki v Canada (Human Rights Commission)*, 2007 FCA 52, per Sexton JA.

[3] On January 15, 2019, I continued the trial in Edmonton to determine the appropriate sentence for the contempts.

[4] These reasons deal with the appropriate sentence.

[5] That said, as a preliminary issue, the Respondents also challenged the Applicants' standing to address the issue of appropriate sentence based on the fact that this First Nation's elections in September, 2018, resulted in the Applicant Brenda Joly [Joly], who was interim Chief at the time of the contempt trial, being defeated by the Respondent Vernon Watchmaker [Watchmaker] who is now Chief of this First Nation. The Applicant William John and the Respondent Jason Mountain [Mountain] are no longer on Council. The Respondent Benjamin Badger [Badger] remains on Council. The Respondent Gordon Gadwa [Gadwa] was removed from the former Council both as Chief and as a Councillor; Gadwa is now neither Councillor nor Chief. After hearing argument, I dismissed the Respondents' objections on the standing issue. My reasons for doing so are reported herein.

II. Facts

A. *Background facts leading to the Contempt Decision of July 17, 2019*

[6] The background facts in this case are found in my earlier Contempt Decision of July 17, 2018:

> II. Background
>
> [5] The application which gives rise to this contempt proceeding was filed on October 23, 2017. The Applicants are Brenda Joly [Interim Chief Joly], the elected Councillor and Council-appointed interim Chief of the Kehewin Cree Nation, which is a custom election band recognized under the *Indian Act*, RSC 1985, c I-5 [Kehewin], William John and Trevor John, both of whom are elected Councillors of Kehewin.
>
> [6] The Respondents include Gordon Gadwa [Mr. Gadwa], a former Chief and Councillor of Kehewin whose 2015 election as Chief and Councillor was voided for corrupt practices by an Elections Officer, and who was subsequently removed as a Councillor by a unanimous decision of Council dated July 7, 2016. The other Respondents are Councillors Benjamin Badger, Jason Mountain and Vernon Watchmaker, all of whom were elected Councillors of Kehewin in September 2015. I should add that Mr. Mountain is quite ill and was removed as Councillor by Band Council Resolution [BCR] dated March 13, 2018.
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> III. Chronology of facts leading to the November 10 Order
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> [7] The last Councillor election under the *Kehewin Cree Nation Custom Election Act* [the Election Code] was held on September 1, 2015. Councillors Badger, Trevor John, William John, Mountain and Watchmaker along with Interim Chief Joly and Mr. Gadwa were elected Councillors for a three-year term ending in 2018.
>
> [8] The last election for Chief was held on September 29, 2015. Mr. Gadwa won the election with three votes more than Interim Chief Joly. An election appeal challenging the result of the 2015 Chief election was successful; the Elections Officer found Mr. Gadwa engaged in corrupt election practices. The election was voided and Mr. Gadwa was removed as Chief and Councillor by the Elections Officer. The Elections Officer also declared Interim Chief Joly elected as Chief of Kehewin.
>
> [9] In May 2016, Justice Strickland upheld the Elections Officer's removal of Mr. Gadwa as Chief, but set aside the Elections Officer's removal of Mr. Gadwa as Councillor. Justice

Strickland also set aside the declaration of Interim Chief Joly as Chief and ordered a new Chief election.

[10] In May 2016, the Council appointed Interim Chief Joly to serve as interim Chief pending a new Chief election.

[11] In June 2016, Interim Chief Joly appealed to the Federal Court of Appeal from Justice Strickland's judgment setting aside her appointment as Chief, and Justice Strickland's decision to set aside the Elections Officer's removal of Mr. Gadwa as Councillor. Mr. Gadwa, for his part, appealed Justice Strickland's finding that he engaged in corrupt elections practices.

[12] In June 2016, the Kehewin Council considered a complaint of malfeasance and neglect of duty or misconduct against Mr. Gadwa. In July 2016, a unanimous Council removed Mr. Gadwa from office as a Councillor.

[13] Mr. Gadwa did not challenge the Council's decision to remove him as Councillor.

[14] In July 2016, the Federal Court of Appeal stayed the holding of a new Chief election pending the outcomes of Interim Chief Joly's appeal and Mr. Gadwa's cross-appeal.

[15] On October 4, 2017, the Federal Court of Appeal dismissed Interim Chief Joly's appeal. Mr. Gadwa abandoned his cross-appeal at the hearing before the Federal Court of Appeal.

[16] As a result of allegations that Mr. Gadwa was improperly acting and holding himself out as a Councillor, in October 2017, the Applicants filed a notice of application for judicial review seeking:

- a Declaration that Mr. Gadwa ceased to be a Councillor of Kehewin on July 7, 2016 when he was removed by Council under the Election Code;

- a *quo warranto* Order declaring that Mr. Gadwa does not hold the office of Councillor of Kehewin and cannot participate nor be counted in making quorum for meetings of Kehewin;

- a Declaration that under the Election Code, three members of Council do not have the power or authority to put an individual back onto Council after that individual has been removed from Council under section X of the Election Code;

- an Order enjoining Mr. Gadwa from holding himself out of the public as a sitting Councillor of Kehewin; and

- a Declaration that no clique or group of four individuals, even if all are elected Councillors can meet together as a "quorum of four" or as a self-styled "Quorum of Council" and make any decisions binding on Council or Kehewin and that no decision of Councillors Badger, Mountain and Watchmaker made since October 4, 2017 with or without Mr. Gadwa is a valid or binding decision on Kehewin.

IV. The October 31, 2017 Order of Justice Zinn

[17] Within the application for judicial review, the Applicants moved on an urgent *ex parte* basis for interim relief. The motion was heard and granted by Justice Zinn, who made the following interim Order to expire November 14, 2017:

> THIS COURT ORDERS that:
>
> 1. The Respondent Gordon Gadwa is hereby enjoined and prohibited from:
>
> (a) holding himself out to the public as if he were a Councillor of the Kehewin Cree Nation;
>
> (b) acting as if he were a Councillor of the Kehewin Cree Nation; and
>
> (c) interfering with the administration of the financial and other affairs of the Kehewin Cree Nation;
>
> 2. The Respondent Vernon Watchmaker is hereby enjoined and prohibited from:
>
> (a) holding himself out to the public as if he were the Interim or Acting Chief of the Kehewin Cree Nation; and
>
> (b) acting as if he were the Interim or Acting Chief of the Kehewin Cree Nation;
>
> 3. "Public" in paragraphs 1 and 2 includes all members of the Kehewin Cree Nation; all employees and staff of the Kehewin Cree Nation; indigenous, federal, provincial, territorial and municipal governments, their departments,

employees and staff; individuals and corporations doing business with the Kehewin Cree Nation; and the media; and

4. The Respondents Benjamin Badger, Jason Mountain, and Vernon Watchmaker are enjoined and prohibited from:

(a) calling Council Meetings;

(b) attending any Council Meeting that is not the regular Tuesday 9:00 a.m. Council Meeting in the Administration Building on Kehewin Cree Nation Reserve, unless:

> (i) a Special Council Meeting has been called by or on the direction of Brenda Joly, and at least 48 hours' notice has been given to all of Benjamin Badger, Brenda Joly, Trevor John, William John, Jason Mountain and Vernon Watchmaker by e-mails sent to [...]; or (ii) an emergency Council Meeting has been called by or on the direction of either:
>
> > A. two (2) of either Benjamin Badger, Jason Mountain, and Vernon Watchmaker and one (1) of Brenda Joly, Trevor John, and William John, or
> >
> > B. two of Brenda Joly, Trevor John, and William John and one (1) of Benjamin Badger, Jason Mountain, and Vernon Watchmaker,
>
> and at least 24 hours' notice has been given by emails sent to [...]

5. This Order and the Applicants' Notice of Motion, the Affidavits of Brenda Joly and Lavonna M. Trenchie in support and the Memorandum of Fact and Law may be served on the Respondent Gordon Gadwa by sending it by e-mail addressed to [...];

6. A copy of this Order is to be posted in a prominent location in the Band Council offices;

> 7. This Order shall expire on November 14, 2017; and
>
> 8. Unless an earlier date is set by the Case Management Judge and notice thereof provided to all parties by email or telephone, this Court shall hear the Applicants' *inter partes* motion under Rule 373 for the re-issuance of this Order pending final judgment in this application, at 10:00 a.m. EST on November 14, 2017, via teleconference.

V. The November 10, 2017 Order of Justice Lafrenière

[18] The Applicants then moved to have the interim order of Justice Zinn made *inter partes* and permanent. Counsel for the parties discussed the matter and the Respondents engaged new counsel. In the result, new counsel for the Respondents advised the Court that the parties consented to a further interim injunction which continued the same injunctive terms made by Justice Zinn. Counsel also provided the Court with a draft order.

[19] Justice Lafrenière, having requested timelines for the orderly prosecution of the matter, issued a consent Order on November 10, 2017 – the November 10 Order that is now sought to be enforced by this contempt proceeding.

[20] The injunctive provisions of the November 10 Order were the same as those found in the Order of Justice Zinn. The November 10 Order in material part states (in addition to timelines):

> THIS COURT ORDERS that:
>
> 1. The Respondent Gordon Gadwa is hereby enjoined and prohibited from:
>
> > (a) holding himself out to the public as if he were a Councillor of the Kehewin Cree Nation;
> >
> > (b) acting as if he were a Councillor of the Kehewin Cree Nation; and
> >
> > (c) interfering with the administration of the financial and other affairs of the Kehewin Cree Nation.
>
> [...]

3. “Public” in paragraphs 1 and 2 of this Order includes all members of the Kehewin Cree Nation; all employees and staff of the Kehewin Cree Nation; indigenous, federal, provincial, territorial and municipal governments, their departments, employees and staff; individuals and corporations doing business with the Kehewin Cree Nation, and the media.

4. The Respondents Benjamin Badger, Jason Mountain, and Vernon Watchmaker are enjoined and prohibited from:

(a) calling Council Meetings;

(b) attending any Council Meeting that is not the regular Tuesday 9:00 a.m. Council Meeting in the Administration Building on Kehewin Cree Nation Reserve, unless:

(i) a Special Council Meeting has been called by or on the direction of Brenda Joly, and at least 48 hours’ notice has been given to all of Benjamin Badger, Brenda Joly, Trevor John, William John, Jason Mountain and Vernon Watchmaker by e-mails sent to [...] or

(ii) an Emergency Council Meeting has been called by or on the direction of either:

A. two (2) of either Benjamin Badger, Jason Mountain, and Vernon Watchmaker and one (1) of Brenda Joly, Trevor John, and William John, or

B. two (2) of Brenda Joly, Trevor John, and William John and one (1) of Benjamin Badger, Jason Mountain, and Vernon Watchmaker, and at least 24 hours’ notice has been given by e-mails sent to [...]

> VI. Request for Show Cause Order
>
> [21] As a result of allegations that the Respondents breached various provisions of the November 10 Order, the Applicants moved for a show cause Order against the Respondents under Rule 467(1) of the Rules requiring them to show cause why they should not be found in contempt of the November 10 Order. The Applicants also moved for an additional interim injunction, which is not relevant to today's proceeding.
>
> [22] On March 19, 2018, Justice Martineau found a *prima facie* case of contempt was made out. Justice Martineau ordered the Respondents to appear before the Court to hear proof of their contempt of the Court's November 10 Order and to present any defence they may have to their *prima facie* breach of paragraphs 1 and 4 of the November 10 Order. Specifically, Justice Martineau's Order stated:
>
> > 1. Each of the respondents, Gordon Gadwa, Benjamin Badger, Jason Mountain and Vernon Watchmaker shall:
> >
> > a) Appear before a Judge of this Court on June 13, 2018 at 9:30 a.m. at the Federal Court, Scotia Place Tower 1, 5th Floor, 10060 Jasper Avenue, City of Edmonton, in the Province of Alberta;
> >
> > b) To hear proof of their contempt of the Court's November 10, 2017 Order, in particular their signing and publishing and acting upon the documents attached as Exhibits E and F to the affidavit of William John sworn March 12, 2018 and as alleged in that affidavit; and
> >
> > c) To present any defence they may have to their prima facie contempt of paragraphs 1 and 4 of the November 10, 2017 Order.

[7] The last sentence in paragraph 21 just quoted from the Contempt Decision requires amplification at this time. Justice Martineau had two motions before him, the first being the show cause Order leading to these contempt proceedings. The second motion before Justice Martineau, not discussed above, was a request for an interim injunction to prohibit the election

process the Respondents purported to set in motion by unlawful means when they met on January 31, 2018. At that time the Respondents had held a purported Band Council Meeting and had signed a Band Council Resolution [BCR] calling for elections of Chief and Councillors in March of 2018. Justice Martineau granted an injunction to terminate the carrying out of this so-called election [Justice Martineau's Injunction].

[8] Although the Respondents did not obey the November 10, 2017 Order, for which they have been found in contempt, it seems they did obey Justice Martineau's Injunction and stopped their unlawful election process. I say unlawful because, as I found in the Contempt Decision, the so-called Band Council Meeting of January 31, 2018, was contrary to the November 10, 2017 Order of Justice Lafrenière. So too was the Respondents' signing of the BCR; that signing was unlawful, first because there was no lawful BCR to sign, and second because Respondent Gadwa was not Councillor despite his signing the BCR in that capacity. Gadwa had been removed as Chief for misconduct, and while he was reinstated by the Federal Court as a Councillor, he was then removed from Council in 2017 by its unanimous vote.

[9] Justice Martineau's Injunction is somewhat relevant to the sentencing submissions made by some of the Respondents, as will be seen.

B. *Summary of findings in the July 17, 2018 Contempt Decision*

[10] The following are the summary findings made in the July 17, 2018 Contempt Decision:

(1) Re Former Chief and Former Councillor Gadwa

> [68] In summary, I have found beyond a reasonable doubt that Mr. Gadwa is in contempt of the November 10 Order on five counts. Mr. Gadwa breached both paragraphs 1(a) and 1(b) by signing the BCR. Mr. Gadwa breached both paragraphs 1(a) and 1(b) by signing the Notice Document. Further, Mr. Gadwa breached paragraph 1(a) in voting at the Annual General Meeting of the Tribal Chiefs' Child and Family Services East Society on November 29, 2017. Therefore, Mr. Gadwa is in contempt on five counts in relation to the November 10 Order.

(2) Re Chief-Elect Watchmaker, Councillor Badger, and Former Councillor Mountain

> [80] In summary, I find Councillors Badger, Mountain and Watchmaker each in contempt on two counts in relation to the November 10 Order. Each individually breached paragraph 4(b) of the November 10 Order by signing the purported BCR dated January 31, 2018 in that they attended an unauthorized Council Meeting to do so. Each also breached paragraph 4(b) of the November 10 Order by signing the Notice Document for the same reasons.

C. *Procedural history since the Contempt Decision*

[11] With the consent of the parties, I scheduled the sentencing phase of this proceeding to take place in Edmonton on November 20, 2018, with pleadings, if any, to be filed in advance. While the Applicants filed material the Respondents did not.

[12] This sentencing hearing was then adjourned and rescheduled by Order of the Chief Justice to take place in Edmonton on December 12, 2018. However, late in the week just before December 12, 2018, counsel for the Applicants advised she had recently accepted a retainer in Ottawa at another hearing on December 12, 2018. She requested an adjournment by letter. Due

to the lateness of the request I refused to consider the matter; requests to adjourn to accommodate counsel's desire to take on a conflicting hearing in another matter require a proper motion and affidavit from counsel. Nothing material was added in counsel's affidavit. With misgivings I granted the adjournment, noting the Court does not lightly adjourn a scheduled hearing to allow counsel thereafter to accept a conflicting retainer.

[13] I directed the issue of costs of the December adjournment be addressed at the rescheduled sentencing hearing in Edmonton in January, which they were. The Applicants filed two bills of costs, which among other things covered the time related to the Respondents' motion to adjourn. The Applicants claim costs of the adjournment letter and motion to both of which they responded, totalling $3,430.00, to which GST should be added. Counsel for the Respondents did not dispute this amount, and to her credit, she accepted responsibility for these costs by undertaking to personally pay that amount to the Applicants. In my view, an undertaking of counsel to pay money such as this is enforceable as if it is an order of the court: *Hudson v Andros*, 2010 ONSC 3417, per Pierce RSJ at para 23; *Ex parte Smith re Hilliard* (1845), 67 Rev R 880 (Queen's Bench (Bail Court)), per Coleridge J at 822; *United Mining & Finance Corp Ltd v Becher*, [1910] 2 KB 296, per Hamilton J at 305; *Law Society of Alberta v Elander*, [2011] LSSD No 243 (QL) (Law Society Discipline Decisions) at para 137. For convenience, I am incorporating counsel's undertaking into the Court's Judgment.

[14] I would have made the same order if the undertaking had not been given. In my view, nothing would justify requiring the Respondents to pay costs occasioned solely by the conduct of their counsel where their counsel took on a new retainer in the face of a scheduled hearing in this

Court to the disadvantage of opposing counsel and inconvenience to the Court's efforts to keep this litigation on a timely track. I need say no more given the undertaking.

D. *Respondents' new issue of standing*

[15] On November 19, 2018, after the Respondents' deadline to file written submissions, the Respondents filed a letter advising of certain changes in Chief and Council reported already in these reasons at para 5, above. The Respondents submitted that the roles of the Councillors were in effect reversed. They submitted this entitled them to the dismissal of the sentencing proceedings, and possibly, it was not clear, the dismissal of the entirety of this contempt proceeding.

[16] Case Management Judge Tabib reviewed the matter and issued the following direction dated November 22, 2018:

> The Court is not satisfied that electoral changes necessarily remove the Applicant's interest and standing, whether on the merits of the judicial review or on the sentencing hearing, especially given that the Applicants' position is at odds with the Respondents' position on that matter. The sentencing hearing will therefore proceed as scheduled and the parties may raise the issue of the Applicants' standing for the purpose of sentencing with the presiding judge. With respect to the merits of the judicial review, for which issues of standing and interest may be different, the Respondent may either make a motion to strike or raise the issue of standing at the hearing on the merits.

[17] Given the matter was deferred to me, I requested written submissions with argument set for December 12, 2018, when the sentencing phase was to have taken place. I subsequently allocated time for the standing issue to be argued orally in Edmonton on January 15, 2019.

[18] Having heard from both counsel and with the benefit of their written submissions, I found myself in agreement with the conclusion suggested by Case Management Judge Tabib. Accordingly, I dismissed the standing motion and delivered the following oral reasons for doing so, edited for syntax, consistency, and grammar:

> The Respondents request that this sentencing hearing be dismissed on the basis that as a result of a change in the roles of Councillors and Chief, consequential to the First Nation Chief and Councillor election of September, 2018, their roles have now been reversed.
>
> It is true that the roles have in a sense been reversed if one turns to the style of cause in this matter. Brenda Joly who was interim Chief at the time of the contempt finding, ran again for Chief but was defeated. William John is no longer on Council, Trevor John is a Councillor, and Gordon Gadwa is not on Council. Benjamin Badger is now a Councillor, Jason Mountain is not on Council, and Vernon Watchmaker is now Chief. I recognize these facts.
>
> However the Respondents' argument fails to appreciate, in my respectful view at least, the difference between these contempt proceedings in the Federal Court that is now sitting, and matters of First Nation governance: in particular, the composition of the Band Council and Chief, as it evolves from time to time, and in particular, as it has evolved and changed as a consequence of the September 2018 Band elections.
>
> I appreciate that roles have changed at the First Nation and First Nation governance level, but there has been no change with respect to the Orders of Justice Lafrenière and Justice Martineau.
>
> In particular, the role of the Applicants before the Court has not changed, nor has the role of the Respondents within this Court proceeding. The status of the underlying Judicial Review is that it remains pending until further order of this Court, whether on consent or on motion.
>
> Therefore, I am compelled to find that there is no merit in the Respondents' argument that this sentencing proceeding should not proceed on the basis that the Applicants have no standing to bring their motion.

III. Issue

[19] Therefore, the only remaining issue to decide is the appropriate penalty for the counts of contempt committed by the Respondents. Such penalty falls into two categories: first, the fine to be paid to the Receiver General for Canada. The second is the matter of costs, that is, costs payable by the Respondents to the Applicants. In a case like this the order for costs should reflect the law that those who bring Court proceedings to enforce Court Orders incur legal costs that they may recover from those who breached the Court's Order in the first place. I note that Rule 472(f) of the *Federal Courts Rules*, SOR/98-106 include costs under the heading of "Penalty".

IV. Discussion and analysis

A. *Issue 1 – Quantum of fine*

[20] The Applicants seek an Order fining each of the Respondents $3,000.00 for each count of contempt found against them. Based on the Applicants' request, this would result in the Respondent Gadwa being fined $15,000.00 for his five counts of contempt, and the Respondents Badger, Mountain, and Watchmaker each being fined $6,000.00 for each of their two counts of contempt.

[21] The law in relation to penalty and fines in contempt of court matters is not disputed, and is set out by my colleague Justice Noël in *Canada (Minister of National Revenue) v Vallelonga*, 2013 FC 1155 [*Vallelonga*] at para 26, citing from *Canada (Minister of National Revenue) v Marshall*, 2006 FC 788 [*Marshall*] at para 16:

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

[22] In *Professional Institute of the Public Service of Canada v Bremsak*, 2013 FCA 214, per Trudel JA [*Professional Institute of the Public Service of Canada*], the Federal Court of Appeal also set out guiding principles in contempt sentencing at paras 35–36:

> 1.2 Civil Context
>
> [35] As already mentioned, the test for appellate court interference with regard to criminal sentencing also applies in relation to civil matters. Moreover, as with the criminal cases cited above, there is no single correct approach to weighing aggravating and mitigating factors when determining a sentence for civil contempt. Federal Courts case law has developed a number of guiding principles for judges to consider. For example:
>
> - The trial judge should consider “the gravity of the contempt in the context of the particular circumstances of the case as they pertain to the administration of justice" (*Baxter Travenol Laboratories of Canada, Ltd. v. Cutter Canada, Ltd.*, [1987] 2 F.C. 557 at page 562 (C.A.) [*Baxter Travenol*]; *Lyons Partnership, L.P. v.*

MacGregor(2000), 186 F.T.R. 241 at paragraph 21 (T.D.));

- 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 (*Canada (Minister of National Revenue) v. Marshall*, 2006 FC 788 at paragraph 16 [*Marshall*]);

- In the case of corporate offenders, the trial judge should also consider the size, scale and nature of the offender's operations and the premeditation and deliberation involved in committing the offence (*Apotex Inc. v. Merck & Co. Inc.*, 2003 FCA 234 at paragraph 83 [*Apotex v. Merck*]);

- The fine must not be a mere token amount, but must reflect the ability of the person found in contempt to pay the fine (*Wanderingspirit v. Salt River First Nation 195*, 2006 FC 1420 at paragraph 4 [*Wanderingspirit*]; *Desnoes & Geddes Ltd. v. Hart Breweries Ltd.*, 2002 FCT 632 at paragraph 7);

- Mitigating factors might include good faith attempts to comply (even after the breach), whether there was an apology or acceptance of responsibility, or whether the breach is a first offence (*Marshall* at paragraph 16);

- The judge can consider whether an order subsequently issued has somewhat changed the situation of the contemnor or an order violated by him has been found by the Court to be invalid (*R. v. Bernier*, 2011 QCCA 228; *R. v. Emmelkamp*, 2013 ABCA 71; *Liberty Net* at paragraph 27.

[36] There is nothing in the case law to suggest that the factors listed above are exhaustive. Again, a trial judge has wide discretion when determining the appropriate sanction for civil contempt, based on the circumstances.

i. Appropriate fines

[23] In terms of the fines payable, for convenience I will follow the headings of the Federal Court of Appeal in *Professional Institute of the Public Service of Canada*, cited at para 22, above.

(a) *The trial judge should consider "the gravity of the contempt in the context of the particular circumstances of the case as they pertain to the administration of justice" (Baxter Travenol Laboratories of Canada, Ltd. v. Cutter Canada, Ltd., [1987] 2 F.C. 557 at page 562 (C.A.) [Baxter Travenol]; Lyons Partnership, L.P. v. MacGregor(2000), 186 F.T.R. 241 at paragraph 21 (T.D.))*

[24] On January 31, 2018, the Respondents Gadwa, Badger, Mountain, and Watchmaker purported to conduct an unlawful Band Council Meeting in which they purported to order unlawful band elections for both Chief and Council to take place in March 2018. I have already found this breached the November 10, 2017 Order. This breach in my view was grave.

[25] Gadwa, in response to a question from the Court, testified he was Chief for 18 years and was Councillor for 16 years. This counts against him; given his knowledge and experience with First Nation governance, he should have known far better.

[26] The Respondents' defence was that a band meeting was called on that day, albeit not a proper Band Council Meeting. At that meeting, a petition calling for elections was presented that was signed by some 200 First Nation members. Many First Nation members were at this meeting.

[27] Gadwa and Watchmaker stated in effect they were “directed” by those at the meeting and their petition to take the steps, which I have found constituted contempt, namely calling an unlawful band council meeting and purporting to issue a BCR setting in motion an election in March 2018. There is no merit to this defence.

[28] In the first place, I have already held in the Contempt Decision that the Respondents knew of the November 10, 2017 Order when they took these actions.

[29] I appreciate there are only 2,000 or so First Nation members including children. While I do not know the number of electors, i.e., First Nation members eligible to vote, there is little doubt that 200 is, relatively speaking, a large number in the adult population. But - and I underscore this point - size does not matter. In this case, these Respondents appear to have thought they would show leadership by following some of the First Nation membership’s call for elections.

[30] In my respectful view, tempting as it may have been, the holding of the meeting and signing the BCR and Notice Document did not amount to leadership, it amounted to the *abandonment* of leadership. This conduct replaced the rule of law with unlawfulness. Instead of following the rule of law, and in particular, instead of obeying the November 10, 2017 Order, the Respondents chose to disobey it. Proper leadership would have resulted in the Respondents declining the invitation of the 200 or so petitioners because it was contrary to the Order of this Court.

[31] It is obvious that this First Nation was divided into at least two camps, one led by former Chief Gadwa and the other by interim Chief Joly. But former Chief Gadwa was removed as Chief for misconduct committed during the last election. He litigated his removal but was not successful. Not only was his conduct in January 2018 contrary to the November 10, 2017 Order, it was a brazen demonstration of disrespect to the electoral processes put in place by his First Nation over the years. He should have been respecting those processes and their results, not pretending he was still a Councillor which he was not.

> (b) *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 (Canada (Minister of National Revenue) v. Marshall, 2006 FC 788 at paragraph 16 [Marshall])*

[32] This conduct was not a technical breach. The Respondents' actions were taken knowing of its unlawfulness.

[33] Nor was this an isolated breach. The record before the Court indicates that similar unlawful meetings were held leading up to and forming the basis of the injunctive Orders issued by Justice Zinn on October 31, 2017 and the consent Order issued by Justice Lafrenière on November 10, 2017. Specifically, five unlawful meetings are detailed in the Applicant's application filed at that time. First, there was a meeting on October 13, 2017 called by one or all of Councillors Badger, Mountain, and Watchmaker, without the consent of interim Chief Joly. The meeting was only attended by those three Councillors and Gadwa, who participated as if he was an elected Councillor, which he was not. Second, there was a Council Meeting on October 18, 2017 called by one or all of Councillors Badger, Mountain, and Watchmaker, again without

interim Chief Joly's consent, but which did not proceed because only interim Chief Joly and Councillors William John and Trevor John attended. A third meeting was called, again for October 18, 2017, between Councillors Badger, Mountain, and Watchmaker, and again without notice to interim Chief Joly and Councillors William John and Trevor John, but attended by Gadwa, who was counted for the purposes of making a quorum for a Council Meeting, and who acted as an elected Councillor, despite the fact he was not a Councillor. A fourth meeting was held later on October 19, 2017 between Councillors Badger, Mountain, and Watchmaker, without notice to interim Chief Joly and Councillors William John and Trevor John, but attended by Gadwa, who was counted for the purpose of quorum, and participated as an elected Councillor, which he was not. Finally, a Council Meeting was called by Councillors Badger, Mountain, and Watchmaker, and by Gadwa, on October 23, 2017.

> (c) *In the case of corporate offenders, the trial judge should also consider the size, scale and nature of the offender's operations and the premeditation and deliberation involved in committing the offence (Apotex Inc. v. Merck & Co. Inc., 2003 FCA 234 at paragraph 83 [Apotex v. Merck])*

[34] Although this consideration speaks to corporate offenders, which the Respondents are not, premeditation and deliberation are relevant for the purpose of this sentencing.

[35] In this case, the conduct does not appear to have been entirely premeditated; in my view, the Respondents made wrong choices when faced with pressure from a crowd at the meeting. In my view, they were carried away by the moment. That said, they should not have persisted with their unlawful conduct: there should have been no need for Justice Martineau to order them to stop again, as became necessary.

(d) *The fine must not be a mere token amount, but must reflect the ability of the person found in contempt to pay the fine (Wanderingspirit v. Salt River First Nation 195, 2006 FC 1420 at paragraph 4 [Wanderingspirit]; Desnoes & Geddes Ltd. v. Hart Breweries Ltd., 2002 FCT 632 at paragraph 7)*

[36] There was evidence led at the hearing on the Respondents' ability to pay.

[37] Watchmaker is now Chief. He said he earns some $80,000 in that capacity. He has some additional earnings due to membership on other committees including the Tribal Chiefs Child and Family Services East Society, the Tribal Chiefs Ventures Incorporation, Assembly of First Nations, and Conference of Treaty 6. Because I am not satisfied as to what those additional sums are, I base my decision in this respect on his $80,000 salary as Chief.

[38] Former Chief Gadwa is retired. His evidence is that his income is $1,430 a month, or $17,160 annually. No tax returns or other documents were filed to support his testimony in this respect. He denied owning what he once owned, testifying he had turned over his farm and equipment to his son. He testified he was no longer renting out the farmland he once owned. He testified he lives in a converted trailer home and owns a team of two horses. While Gadwa, according to his testimony, has limited means, in my view he has the ability to pay a fine because he has proven himself resourceful and successful: he was a First Nation leader for some 32 years.

[39] Mountain is unemployed, has no income, and is not in good health. I am not satisfied of Mountains' ability to pay anything but a most modest amount.

[40] Badger is still a Councillor, and as such earns approximately $60,000 annually. Although he earns a small amount for his work on a First Nation board, my finding in this respect will be based on his Councillor income. I will also take into account his evidence that he has responsibility for 12 children, to one extent or another.

(e) *Mitigating factors might include good faith attempts to comply (even after the breach), whether there was an apology or acceptance of responsibility, or whether the breach is a first offence (Marshall at paragraph 16)*

[41] There was no evidence that any of the Respondents committed contempt in the past. However I cannot be unmindful of the five unlawful meetings organized and attended by the Respondents that led up to the Orders of Justice Zinn issued October 31, 2017 and the consent Order of Justice Lafrenière dated November 10, 2017.

[42] At the hearing, all Respondents were represented by counsel and testified in response to questions from their counsel. Some of the questions from their counsel were very open-ended. Each was given ample opportunity by their counsel to accept responsibility and to apologize for their contempt, that is, to purge their contempt if they wished.

[43] Watchmaker apologized to the Court and said he followed and respected the law. He said, which I accept, that there had been no breaches since Justice Martineau's Injunction of March, 2018. That is, they obeyed the Order and stopped the process of election they started in January. However, in my view, Watchmaker did not fully accept responsibility for his acting contrary to the November 10, 2017 Order. As noted it was the Respondents' position that they were directed

to breach the November 10, 2017 Order by some of the First Nation's membership. In this circumstance I find that Watchmaker has not fully purged his contempt.

[44] Badger on the other hand, apologized in Court openly, fully, and sincerely. He did the same at the contempt hearing conducted in June, 2018, and would have said more back then but for my ruling it was not the time to apologize, given the bifurcation of the hearing. Badger noted the need to find resolution internally for the divisions in this First Nation, which he indicated, and I am convinced, persists still; he said what happened was shameful and hurt him. He also noted the need for the First Nation and Canada to come to grips with their respective relationship with one to the other. I find that Badger has purged his contempt.

[45] Gadwa said he felt bad about his contempt. He says he has respect for the Court. However, he claims he was directed to do what he did by the First Nation petitioners and others who were requesting new elections. Former Chief Gadwa said that he felt bad because it looks like he didn't have respect for Court – he felt bad because it's not his style to ignore courts. He said he was not as much aware as he should have been about courts, and apologized. I am concerned with his suggestion he did not know of the consent Order of November 10, 2017, in which respect I have already found otherwise in the Contempt Decision. I find he has shown some acceptance of responsibility for his actions.

[46] Gadwa also testified he believed that he was still on Council because he had been reinstated by Justice Strickland, whose decision was upheld by the Federal Court of Appeal.

From this I can only conclude that he does not yet fully accept the unanimous decision of the Council itself dated July 7, 2017, to remove him as Councillor.

[47] In the circumstances I am unable to find Gadwa has fully purged his contempt.

[48] Mountain did not expressly apologize. As best he could, he explained he wanted to get something done because the First Nation community was split. As already noted he is in poor health and unemployed.

(f) *The judge can consider whether an order subsequently issued has somewhat changed the situation of the contemnor or an order violated by him has been found by the Court to be invalid (R. v. Bernier, 2011 QCCA 228; R. v. Emmelkamp, 2013 ABCA 71; Liberty Net at paragraph 27*

[49] The composition of the First Nation Council has changed, but that does not affect the legal situation in this case, as explained in my decision on standing.

[50] Turning to the precedents. I have reviewed the cases identified by the Federal Court of Appeal in Annex A to *Professional Institute of the Public Service of Canada*, and the sentences imposed by other roughly comparable jurisprudence including:

1. In *Mayflower Transit Inc v Bedwell Management Systems Inc*, 2000 CarswellNat 6120 (WL Can) (Fed Ct (TD)), per McKeown J, the Court imposed a fine of $5,000 against each of the companies (one defendant and another counterclaim defendant) and a fine of $3,000 against the individual defendant for breach of a consent Order.

2. In *Universal Foods Inc v Hermes Food Importers Ltd*, 2003 FCT 448, Lemieux J considered that in the breach of a consent Order, a plaintiff exhibited some good faith, the consent Order was not deliberately flaunted, but sufficient importance was not placed in achieving compliance with the consent Order, the value of goods involved was not substantial, and there was an apology to the Court and a defendant; and this is not the type of case where the party made a profit or gained financial advantage from noncompliance. However, the Court also considered there was no justification for the noncompliance and there was a need for deterrence, among other factors. Therefore the Court found it would be fair and reasonable to impose a fine at the upper end of the range, setting the fine at $4,000.

3. In *Marshall*, cited at para 21, above, a taxpayer was fined $3,000 when she was found in contempt of court for failing to provide tax-related information and documents pursuant to a court Order.

4. In *Canada (Minister of National Revenue) v Belanger*, 2015 FC 35, a taxpayer was found in contempt for failing to pay a fine and produce tax-related information and documents, pursuant to two different court Orders. The taxpayer was sentenced to pay a fine of $2,000.

5. In *Vallelonga,* cited at para 21, above, a taxpayer was found in contempt for failing to disclose requested tax-related information and documents, pursuant to a compliance order. The respondent was sentenced to pay a fine of $3,000.

[51] I will now conduct a summary assessment of the appropriate fine for each Respondent.

(i) Chief Watchmaker

[52] Watchmaker did not offer a convincing explanation for his actions, nor did he fully purge his contempt. I agree with his counsel that the two acts of contempt, signing the purported BCR at the unauthorized Council Meeting, which purported to initiate Chief and Councillor elections set for March, 2018, and signing the Notice Documents to that effect are sufficiently connected to be treated as one, especially given that is how they were seen at the time; and the need for "temperance" of contempt penalties addressed by the jurisprudence, especially *Vallelonga* at para 26, citing *Marshall* at para 16; *Canada (Minister of National Revenue) v Schimpf*, 2015 FC 1354, per Russell J at para 23, citing *Lyons Partnership, LP v MacGregor*, 186 FTR 241, per Lemieux J at para 21. He has the ability to pay. Given the gravity of the contempt and his ability to pay, Watchmaker will be ordered to pay a fine of $3,000.

(ii) Councillor Badger

[53] Councillor Badger's two contempts should only be seen as one for sentencing. Again however, his was a grave contempt. He has the ability to pay financially but has family obligations. He has purged his contempt, which of itself warrants a significant reduction in the fine otherwise appropriate, which would be the same as Gadwa - namely $3,000. In my view Councillor Badger's fine should be reduced to $750.00, because of the need to repair the damage done to the rule of law and the need to generally denounce disobedience of Orders of this Court. Badger will be ordered to pay a fine of $750.00.

(iii) Former Chief and Former Councillor Gadwa

[54] Gadwa of all the Respondents, as already noted, should have known better than to do what he did. I see three groups of contempt, not five, for the purposes of sentencing. The first is that he (1) unlawfully held himself out as if he were Councillor by signing the BCR, and (2) acted as Councillor by signing the false BCR. The second is that he was (3) holding himself out to the public as if he were Councillor in signing the Notice Document, and (4) acted as if he were Councillor by signing the Notice Document. The third contempt is that he (5) held himself as Councillor by voting at the Annual General Meeting of the Tribal Chiefs Child and Family Services East Society.

[55] The first involving the BCR constituted a grave contempt and constituted a clear affront to the rule of law. Instead of showing leadership by saying no to the meeting participants and to the petitioners, he said yes to their demands. He signed the BCR as Councillor when he was not. This he did in a very public manner in signing the unlawful BCR and the equally false Notice Document. Again, he lent his name to very unlawful conduct. It matters little that he stopped the election when ordered to do so by Justice Martineau's Injunction; he disobeyed the November 10, 2017 Order in five respects as I have already found. As to the third contempt, Gadwa knowingly misrepresented his status at the Annual General Meeting of the Tribal Chiefs Child and Family Services East Society. He did this openly in the presence of other Chiefs and their delegations. His conduct entailed a misrepresentation to the broader community. Despite his limited income, given his contempt was not fully purged, but also given the gravity of his

conduct and how much better he should have known of what he was doing, in the circumstances, an appropriate fine is $3,000.00.

(iv) Former Councillor Mountain

[56] Mountain's contempt was grave. The Court must also consider Mountain's poor health and unemployment. While Mountain wanted to help make things better, no one suggested he played a leadership role at the time of his contempt. I am not sure he understood the nature of the sentencing hearing before me, and so I discount the fact he did not apologize or purge his contempt. While there must be some consequences for his participation, they will be minimal, and I set Mountain's fine at $250.00.

B. *Issue 2 – Costs*

[57] The Applicants request solicitor-client costs for their efforts to enforce the Court's November 10, 2017 Order, calculated from the time the show cause trial was ordered on March 19, 2018. Justice Martineau did not order costs. The Applicants' position is that they should not be out of pocket for proceeding to enforce Justice Martineau's Injunction. I agree.

[58] Their cost request is calculated as the aggregate of $19,906.90 claimed in the Applicants' first bill of costs, plus $8,771.00 claimed in the second bill of costs, plus $1,960.00 spent at the hearing itself on January 15, 2019, plus $178.50 for photocopying with respect to disbursements incurred between September 2018 and January 19, 2019, totalling $30,816.40 plus taxes, minus the $3,430.00 plus taxes to be paid by Respondents' counsel personally to the Applicants

pursuant to her undertaking at the hearing January 15, 2019, resulting in a total claim for costs, assuming Respondents' counsel executes her undertaking, payable by the Respondents to the Applicants of $27,386.40, exclusive of taxes.

[59] The Respondents did not dispute the reasonableness of these cost claims at the hearing nor afterwards. I have also considered and find them to be reasonable. This amount insures that, to the extent possible, the Applicants are not out of pocket for what they have done to ensure the proper enforcement of the November 10, 2017 Order.

[60] There is no need to assess the amount owing, given my assessment of its reasonableness. Therefore, I will order the Respondents to be jointly and severally liable to pay to the Applicants the sum of $27,926.12, inclusive of fees, disbursements, and taxes. This amount was requested by the Applicants, without objection by the Respondents, after the hearing.

[61] As noted in para 13 above, counsel for the Respondents Loretta Pete Lambert undertook at the hearing on January 15, 2019, to personally pay to the Applicants the sum of $3,430.00 excluding taxes for the costs of the adjournment caused by her accepting a conflicting retainer; with taxes that becomes $3,631.05 inclusive of fees, disbursements, and taxes. This amount was requested by the Applicants, without objection by the Respondents, after the hearing.

JUDGMENT in 1608-17

THIS COURT'S JUDGMENT is ordered and adjudged that:

1. The Respondent Vernon Watchmaker shall pay to the Receiver General for Canada the sum of $3,000.00.
2. The Respondent Gordon Gadwa shall pay to the Receiver General for Canada the sum of $3,000.00.
3. The Respondent Benjamin Badger shall pay to the Receiver General for Canada the sum of $750.00.
4. The Respondent Jason Mountain shall pay to the Receiver General for Canada the sum of $250.00.
5. The Respondents Vernon Watchmaker, Gordon Gadwa, Benjamin Badger, and Jason Mountain are jointly and severally liable to and shall pay the Applicants the sum of $27,926.12.
6. Counsel for the Respondents Loretta Pete Lambert shall forthwith pay to the Applicants the sum of $3,631.05.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1608-17
STYLE OF CAUSE:	BRENDA JOLY, WILLIAM JOHN AND TREVOR JOHN v GORDON GADWA, BENJAMIN MOUNTAIN AND VERNON WATCHMAKER
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	JANUARY 15, 2019
JUDGMENT AND REASONS:	BROWN J.
DATED:	FEBRUARY 12, 2019

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