

Date: 20060407

Docket: T-687-05

Citation: 2006 FC 455

Toronto, Ontario, April 7, 2006

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Applicant

and

KEVIN WILLIAM MIDDLETON

Respondent

REASONS FOR ORDER AND ORDER

I. Introduction

[1] The Minister of National Revenue (the “Minister”) seeks an Order, pursuant to the *Federal Courts Rules*, SOR/98-106 (the “Rules”) that Mr. Kevin William Middleton (the “Respondent”) is in contempt of Court.

II. History of this Action

[2] By Notice of Application filed on April 19, 2005, the Minister sought an Order pursuant to section 231.7 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the “Act”) that the Respondent provide certain information and documents to the Minister, pursuant to subsection 231.2(1) of the Act.

[3] Following a hearing, an Order (“Compliance Order”) was issued by Justice Kelen on May 9, 2005, requiring the Respondent to comply with a notice issued by the Minister pursuant to the Act.

The Order provides as follows:

THIS COURT ORDERS pursuant to section 231.7 of the *Income Tax Act* that the Respondent shall comply with the notice issued by the Minister and shall forthwith, and in any event not later than 30 days after being served with this Order, provide the Information and Documents to a Canada Customs and Revenue Agency officer acting under the authority conferred by the *Income Tax Act* or other person designated by the Commissioner of Customs and Revenue.

THIS COURT FURTHER ORDERS that the Minister is authorized to effect service of this Order on the Respondent by personal service pursuant to Rule 128 of the *Federal Court Rules, 1998*.

THIS COURT FURTHER ORDERS that costs are awarded to the Minister in the amount of \$400.00.

[4] On December 5, 2005, upon the motion of the Minister, a further order was issued requiring the Respondent to appear February 14, 2006 at 9:30 a.m., before a judge of this Court to show cause why he should not be found in contempt of an Order of the Court, specifically the Order of May 9, 2005. By letter dated January 10, 2006, the Minister sought Directions from the Court concerning the manner of proving the contents of the Court file. On January 23, 2006, a Direction was issued by

the Court, directing the Minister to prove the contents of the Court file by means of certified copies of the relevant documents, that is copies certified under the seal of the Court.

[5] The Minister, by his counsel, submitted copies of documents purporting to be certified by a legal assistant with the office of counsel. Following two brief adjournments on February 14, 2006, counsel obtained certified copies of relevant documents from the Registry of the Court.

III. The Evidence

[6] As part of his case, the Minister submitted certified copies of certain documents maintained on the Court file in this proceeding as follows:

1. Exhibit 1 – certified copy of the Order of Justice Kelen dated May 9, 2005;
2. Exhibit 2 – certified copy of the Affidavit of Michael J. Lawless, swearing to personal service of the Order of May 9, 2005 upon the Defendant at the Victoria Sheriff's cells on August 5, 2005.
3. Exhibit 3 – certified copy of the Order of May 5, 2005, requiring the Respondent to appear before a Judge of the Federal Court at Vancouver on Tuesday the 14th day of February, 2006, at 9:30 a.m. to hear proof of the charge that he is or may be guilty of contempt of the Order of Mr. Justice Kelen dated May 9, 2005;
4. Exhibit 4 – Certified copy of the affidavit of service of Jan Falkowski relative to personal service upon the Respondent at 3620 Munns Road, Victoria of the Order of December 5, 2005, together with a copy of the Order of May 9, 2005 and the affidavit of Tiziana Hesper sworn October 11, 2005.

[7] Following the entry of the above-referenced certified copies as Exhibits 1 to 4, Mr. Allan Tocher was called to testify on behalf of the Minister. Mr. Tocher, an employee with the Canada Revenue Agency, is a resource officer/complex case officer who handles the collection of complex “high dollar” files. He is responsible for the collection of taxes owed by the Respondent. He testified that the Respondent’s tax debt is approximately \$30,000.00.

[8] Mr. Tocher said that, in preparing himself to testify, he had reviewed approximately 50 pages of computer diary entries, as well as file folders containing Federal Court Certificates, asset searches and correspondence to and from the Respondent. The file materials reviewed by Mr. Tocher include a copy of a “Requirement to Provide Information and Documents” that was issued on September 17, 2004, addressed to the Respondent. According to Mr. Tocher, he attempted to serve this document upon the Respondent in the hallway of the Provincial Court in Victoria on September 17, but the document fell to the floor and the Respondent walked away. A copy of the Requirement was entered as Exhibit 5.

[9] The Respondent, after receipt of the Requirement, sent a note to the Canada Customs and Revenue Agency in Victoria on September 23, 2004. The Respondent apologized if he had “appeared rude to you on Friday the 17th of September”. A copy of this note was entered as Exhibit 6.

[10] Mr. Tocher testified that he subsequently re-served the Requirement upon the Respondent on November 2, 2004. This service took place at the first meeting of creditors after the Respondent had assigned himself into bankruptcy. The Respondent did not provide the information and

documents requested in the Requirement, although he did submit various correspondence to the Agency. This correspondence was not produced by the witness.

[11] However, Mr. Tocher said that recently the Respondent had forwarded two documents to the Tax Service Office in Victoria. The two documents were submitted together. The first is entitled “Registered Notice of Copyright Name Common Law Trademark Claim” and the second is entitled “User Agreement”. The two documents, stapled together, were admitted as Exhibit 7.

[12] Mr. Tocher testified that apart from a couple of voicemails from the Respondent within the last several weeks, there has been no other communication with him. In concluding his evidence, Mr. Tocher said that the Respondent has not provided any response to the Compliance Order.

IV. Discussion and Disposition

[13] The issue in this motion is whether the Minister has met the burden of showing that the Respondent is in contempt of an Order of this Court, specifically the Compliance Order dated May 9, 2005. That Order was issued pursuant to section 231.7 of the Act which provides as follows:

231.7. (1) On summary application by the Minister, a judge may, notwithstanding subsection 238(2), order a person to provide any access, assistance, information or document sought by the Minister under section 231.1 or 231.2 if the judge is satisfied that

(a) the person was required under section 231.1 or 231.2 to

231.7. (1) Sur demande sommaire du ministre, un juge peut, malgré le paragraphe 238(2), ordonner à une personne de fournir l'accès, l'aide, les renseignements ou les documents que le ministre cherche à obtenir en vertu des articles 231.1 ou 231.2 s'il est convaincu de ce qui suit:

a) la personne n'a pas fourni l'accès, l'aide, les

provide the access, assistance, information or document and did not do so; and

(b) in the case of information or a document, the information or document is not protected from disclosure by solicitor-client privilege (within the meaning of subsection 232(1)).

(2) An application under subsection (1) must not be heard before the end of five clear days from the day the notice of application is served on the person against whom the order is sought.

(3) A judge making an order under subsection (1) may impose any conditions in respect of the order that the judge considers appropriate.

(4) If a person fails or refuses to comply with an order, a judge may find the person in contempt of court and the person is subject to the processes and the punishments of the court to which the judge is appointed.

(5) An order by a judge under subsection (1) may be appealed to a court having appellate jurisdiction over decisions of the court to which the judge is appointed. An appeal does not suspend the execution of the order unless it is so ordered by a judge of the court to which the appeal is made.

renseignements ou les documents bien qu'elle en soit tenue par les articles 231.1 ou 231.2;

b) s'agissant de renseignements ou de documents, le privilège des communications entre client et avocat, au sens du paragraphe 232(1), ne peut être invoqué à leur égard.

(2) La demande n'est entendue qu'une fois écoulés cinq jours francs après signification d'un avis de la demande à la personne à l'égard de laquelle l'ordonnance est demandée.

(3) Le juge peut imposer, à l'égard de l'ordonnance, les conditions qu'il estime indiquées.

(4) Quiconque refuse ou fait défaut de se conformer à une ordonnance peut être reconnu coupable d'outrage au tribunal; il est alors sujet aux procédures et sanctions du tribunal l'ayant ainsi reconnu coupable.

(5) L'ordonnance visée au paragraphe (1) est susceptible d'appel devant le tribunal ayant compétence pour entendre les appels des décisions du tribunal ayant rendu l'ordonnance. Toutefois, l'appel n'a pas pour effet de suspendre l'exécution de l'ordonnance, sauf ordonnance contraire d'un juge du tribunal saisi de l'appel.

[14] Contempt proceedings in this Court are governed by Rules 466 to 472. Rules 466(b), 467(1), (3) and (4), 469 and 470(2) are relevant to the present matter and provide as follows:

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

...

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

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.

...

(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.

(4) An order under subsection (1) shall be personally served, together with any supporting documents, unless otherwise ordered by the Court.

469. A finding of contempt shall be based on proof beyond a reasonable doubt.

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;

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.

..

(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.

(4) Sauf ordonnance contraire de la Cour, l'ordonnance visée au paragraphe (1) et les documents à l'appui sont signifiés à personne.

469. La déclaration de culpabilité dans le cas d'outrage au tribunal est fondée sur une preuve hors de tout doute

470. (2) A person alleged to be in contempt may not be compelled to testify.

raisonnable.

470.(2) La personne à qui l'outrage au tribunal est reproché ne peut être contrainte à témoigner.

[15] In *Lyons Partnership, L.P. v. MacGregor* (2000), 5 C.P.R. (4th) 157 (F.C.T.D.), the Court held that the Rules codify the common law of contempt. The moving party must prove beyond a reasonable doubt that the defendant had personal knowledge of the Court order; that the defendant was a primary actor, expressly or impliedly, in the conduct at issue; and that the defendant possessed the necessary *mens rea*.

[16] The Minister bears the burden of showing, first, that the Respondent was served with the Compliance Order of May 9, 2005. In that regard, he relies on the affidavit of Michael Lawless who deposed that he personally served the Respondent at the Victoria Sheriff's cells on August 2, 2005.

[17] Personal service upon an individual is governed by Rule 128. Rule 128(1) provides as follows:

128. (1) Personal service of a document on an individual, other than an individual under a legal disability, is effected
 (a) by leaving the document with the individual;
 (b) by leaving the document with an adult person residing at the individual's place of residence, and mailing a copy of the document to the individual at that address;
 (c) where the individual is carrying on a business in

128. (1) La signification à personne d'un document à une personne physique, autre qu'une personne qui n'a pas la capacité d'ester en justice, s'effectue selon l'un des modes suivants :
 a) par remise du document à la personne;
 b) par remise du document à une personne majeure qui réside au domicile de la personne et par envoi par la poste d'une copie du document à cette dernière à la même

Canada, other than a partnership, in a name or style other than the individual's own name, by leaving the document with the person apparently having control or management of the business at any place where the business is carried on in Canada;	adresse;
(d) by mailing the document to the individual's last known address, accompanied by an acknowledgement of receipt form in Form 128, if the individual signs and returns the acknowledgement of receipt card or signs a post office receipt;	c) lorsque la personne exploite une entreprise au Canada, autre qu'une société de personnes, sous un nom autre que son nom personnel, par remise du document à la personne qui semble diriger ou gérer tout établissement de l'entreprise situé au Canada;
(e) by mailing the document by registered mail to the individual's last known address, if the individual signs a post office receipt; or	d) par envoi par la poste du document à la dernière adresse connue de la personne, accompagnée d'une carte d'accusé de réception selon la formule 128, si la personne signe et retourne la carte d'accusé de réception;
(f) in any other manner provided by an Act of Parliament applicable to the proceeding.	e) par envoi par courrier recommandé du document à la dernière adresse connue de la personne si la personne signe le récépissé du bureau de poste;
	f) le mode prévu par la loi fédérale applicable à l'instance.

[18] Since there is no evidence that any attempt was made to serve the Respondent by any of the means addressed in Rule 128(1)(b) to (e), I must consider whether service upon him at the Victoria Sheriff's cells is valid personal service, for the purpose of Rule 467(4).

[19] The Rules provide no specific requirements as to the place of service. According to Rule 128(1)(a), personal service upon an individual may be effected by leaving the document with the individual. Rule 144(1) provides that service of a document under the Rules may be effected at any time. According to the affidavit of Michael Lawless, the Respondent was served with a copy of the

Order of May 9, 2005, at the Victoria Sheriff's Cells on August 2, 2005 at 2:40 p.m. I am satisfied that the Respondent was personally served with the Order of which he is alleged to be in contempt. The requirements of Rule 467(4) have been met.

[20] The next question for consideration is whether the Minister has met his burden of showing that the Respondent, having knowledge of the Compliance Order, failed to comply with it. The Minister must establish this with proof beyond a reasonable doubt; see *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1990] 2 S.C.R. 217.

[21] On the basis of the evidence of Mr. Tocher, I am satisfied that the Respondent has failed to produce the information and documents requested. Mr. Tocher gave his evidence in a straight-forward manner and there is no basis to disbelieve him. The documents submitted as Exhibits 6 and 7, that is a note and copies of a Copyright Agreement and a User Agreement, do not respond to the terms of the Compliance Order. There is no evidence that the Respondent submitted any other documents to the Minister or his agents.

[22] The tenor of the documents sent by the Respondent to the Tax Service Office in Victoria, that is the "Registered Notice of Copyright" and "User Agreement", is that the Respondent is not subject to the provisions of the Act. On its face, the Act is a law of general application. There is no evidence that it does not apply to the Respondent.

[23] The Compliance Order was issued pursuant to section 237.1 of the Act. That provision allows the Minister to apply to a judge, on a summary basis, for the provision of any assistance,

information or document that is sought pursuant to sections 231.1 or 231.2 of the Act. According to subsection 231.2(1), the Minister may require any person to provide information for “any purpose related to the administration or enforcement” of the Act, including collection purposes.

[24] Mr. Tocher testified that the Respondent has a tax debt of approximately \$30,000.00. He also testified that his file contains various certificates from this Court. Although he did not elaborate on this, I understand his evidence to refer to certificates issued by the Minister pursuant to section 223 of the Act. Such Certificates, once deposited with the Court, enjoy the status of a judgment that may be enforced pursuant to the Rules; see *Canada v. Piccott* (2004), 326 N.R. 177 (F.C.A.).

[25] It appears to me that the Minister obtained the Compliance Order for purposes associated with the purposes of the Act. There is no evidence to explain non-compliance with the Order. The validity of the Compliance Order can only be challenged by legal process; see *Canada (Canadian Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892.

[26] The Respondent alone was the subject of the Compliance Order. Upon the evidence before me, he failed to obey it. He was the principal actor. By his failure to comply, he has disobeyed that Order. The documents that he submitted to the CCRA, that is the so-called Copyright Agreement and User Agreement, indicate an intention to not comply with the Compliance Order. I infer from these documents an intention of non-compliance; that satisfies the required elements of *mens rea*.

[27] In these circumstances, I am satisfied that the Minister has met the burden and the legal test described in *Lyons Partnership*. An Order for Contempt will issue.

[28] The next matter is the appropriate penalty. Rule 472 governs the imposition of a penalty that may be imposed when the Court has found a person to be in contempt and provides as follows:

<p>472. Where a person is found to be in contempt, a judge may order that</p> <p>(a) the person be imprisoned for a period of less than five years or until the person complies with the order;</p> <p>(b) the person be imprisoned for a period of less than five years if the person fails to comply with the order;</p> <p>(c) the person pay a fine;</p> <p>(d) the person do or refrain from doing any act;</p> <p>(e) in respect of a person referred to in rule 429, the person's property be sequestered; and</p> <p>(f) the person pay costs.</p>	<p>472. Lorsqu'une personne est reconnue coupable d'outrage au tribunal, le juge peut ordonner :</p> <p>a) qu'elle soit incarcérée pour une période de moins de cinq ans ou jusqu'à ce qu'elle se conforme à l'ordonnance;</p> <p>b) qu'elle soit incarcérée pour une période de moins de cinq ans si elle ne se conforme pas à l'ordonnance;</p> <p>c) qu'elle paie une amende;</p> <p>d) qu'elle accomplisse un acte ou s'abstienne de l'accomplir;</p> <p>e) que les biens de la personne soient mis sous séquestre, dans le cas visé à la règle 429;</p> <p>f) qu'elle soit condamnée aux dépens.</p>
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[29] The Minister seeks a fine of \$3,000.00, costs in the amount of \$2,000.00, together with the provision for a term of imprisonment if the Respondent fails to pay the fine and costs within a specified time. As well, the Applicant seeks the issuance of an order in the same terms as the Compliance Order, together with the imposition of a term of imprisonment if the Respondent fails to comply within a specified time. In effect, the Applicant is seeking the re-issuance of the May 9, 2005 Compliance Order with additional terms, that is the imposition of a prison term for failure to comply.

[30] In *Canadian Copyright Licensing Agency v. U-Compute*, 2005 FC 1644, the Court identified three factors to be considered in imposing a penalty for contempt, at paragraph 76:

76. In *Lyons Partnership, L.P. v. MacGregor*, [2000] F.C.J. No. 341, this Court summarized the relevant factors to be considered in framing a penalty. In assessing the penalty for contempt the Court should consider the gravity of the contempt, deterrence of similar conduct, any profit made from the contemptuous conduct, whether the contempt offence is a first offence, the contemtor's past conduct and the presence of any mitigating factors such as good faith or apology.

[31] In the circumstances outlined above, I am satisfied that a fine should be imposed upon the Respondent, as a sanction for his disobedience of the Court's Order of May 9, 2005. However, I am not persuaded that the fine should be as high as \$3,000.00, in the absence of evidence to support that amount. Reference to other cases where a \$3,000.00 fine was imposed does not mean that the same fine should be imposed here. I impose a fine of \$2,000.00.

[32] The Minister seeks costs in the amount of \$2,000.00. An award of costs is in the discretion of the Court; see Rule 400(1). In this case, I am satisfied that an award of costs in the amount of \$1,000.00 is appropriate.

[33] I am not persuaded that a further Order should be issued, as sought by the Minister, requiring the Respondent to provide information and documents within a specified time period, failing which a term of imprisonment could be imposed. The Compliance order of May 9, 2005 remains in full force and effect.

ORDER

THIS COURT ORDERS THAT:

1. The Respondent is found to be in contempt of the Order dated May 9, 2005, pursuant to Rule 466(1)(b) of the *Federal Courts Rules*, SOR/98-106;
2. A fine of \$2,000.00 is imposed upon the Respondent, payable within thirty (30) days of service upon him of this Order;
3. The Respondent is to pay costs in the amount of \$1,000.00 within thirty (30) days of service upon him of this Order;
4. If the Respondent fails to pay the fine of \$2,000.00 and costs of \$1,000.00 within thirty (30) days of being served with this Order, the Court imposes a sentence of fifteen (15) days imprisonment for default of payment of the fine and a sentence of fifteen (15) days imprisonment for default of payment of the costs, such sentences to run consecutively.

“E. Heneghan”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-687-05

STYLE OF CAUSE: THE MINISTER OF NATIONAL REVENUE v.
KEVIN WILLIAM MIDDLETON

PLACE OF HEARING: Vancouver, B.C.

DATE OF HEARING: February 14, 2006

**REASONS FOR ORDER
AND ORDER :** HENEGHAN J.

DATED: April 7, 2006

APPEARANCES:

David Everett

FOR THE APPLICANT

No Appearance

FOR THE RESPONDENT

SOLICITORS OF RECORD:

John H. Sims, Q.C.
Deputy Attorney General of Canada

FOR THE APPLICANT

Mr. Kevin William Middleton
Victoria, British Columbia

(Self-Represented) FOR THE RESPONDENT