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Federal Court



CANADA

Cour fédérale

Date: 20050128

Docket: T-2007-02

Citation: 2005 FC 146

Toronto, Ontario, January 28th, 2005

Present: The Honourable Madam Justice Heneghan

BETWEEN:

**MELVIN WANDERINGSPIRIT, DELPHINE BEAULIEU,
TONI HERON, RAYMOND BEAVER and SONNY McDONALD
in their capacity as COUNCILLORS OF THE SALT RIVER
FIRST NATION 195, elected August 30, 2002**

Applicants

and

**VICTOR MARIE uncontested Chief and NORMAN STARR
uncontested duly elected Band Counsel Member, NORA BEAVER,
DAVID GOWANS, CONNIE BENWELL, MICHEL BJORNSON, HARVEY
LEPINE, and DON TOURANGEAU, purportedly elected Band
Councillors at a meeting held November 3, 2002, and JEANNIE
MARIE-JEWELL, acting as Interim Band Manager**

Respondents

REASONS FOR ORDER AND ORDER

INTRODUCTION

[1] On September 19, 2003, an order was issued pursuant to the *Federal Court Rules, 1998*, SOR/98-106 (the "Rules"), upon the *ex parte* motion of Melvin Wanderingspirit, Delphine

Beaulieu, Toni Heron, Raymond Beaver and Sonny McDonald (the "Applicants"), ordering that Victor Marie, Norman Starr, Nora Beaver, David Gowans, Connie Benwell, Michel Bjornson, Harvey Lepine, Don Tourangeau, Jeannie Marie-Jewell, Tanya Tourangeau and Bruce L. Barry (the "alleged contemnors" or "the persons interested") appear before a judge of the Federal Court sitting at Vancouver, British Columbia on the 27th day of November, 2003 at 9:30 a.m. to show cause why they should not be held in contempt of court by reason of the various acts particularized in eleven paragraphs of the Order. Further, the Order provided that the named individuals be prepared to present any defence that they may have.

[2] The context for this Order is the application for judicial review commenced by the Applicants on December 3, 2002. In this Notice of Application, the Applicants sought declaratory and other relief relative to certain activities that had occurred in November 2002, in connection with the affairs of the Salt River First Nation 195 (the "SRFN"). In a decision reported as *Wanderingspirit et al. v. Marie et al.* (2003), 235 F.T.R. 106, aff'd. (2003), 312 N.R. 385 (F.C.A.), the Court allowed the application.

[3] The relevant facts can be stated briefly. In August 2002, an election was held by the SRFN for the election of chief and council. Victor Marie was elected chief. Norman Starr was elected a councillor. The Applicants were also elected councillors.

[4] On November 3, 2002, an election was purportedly held. The Applicants were voted out of office. They were purportedly replaced by Nora Beaver, David Gowans, Connie Benwell, Norman Starr, Michel Bjornson, Harvey Lepine and Don Tourangeau.

[5] Following the commencement of the application for judicial review, the Applicants sought the appointment of a Receiver Manager to look after the affairs of the SRFN. On January 10, 2003 an Order was issued in the following terms:

After discussing with parties and consent of all concerned with the interest of the Band and the handling of its affairs being of primary concern, the following was agreed and it is so ordered:

1. that the trust account of this Band presently being administered by the RBC Investments, Aboriginal Services in Winnipeg, Manitoba, remain frozen until further order of this Court or consent of all parties, save with respect to an amount owing for taxation, which sum may be paid by RBC Investments to the law firm of Dubouff & Edwards in trust, barristers and solicitors of Winnipeg, Manitoba.
2. that two (2) corporate bank accounts of 4491 NT Ltd. and 4992 NT Ltd. operating with the Bank of Montreal, Fort Smith, North West Territories, are hereby frozen until further order of this Court.
3. Various and other bank accounts which are being operated by the Band also at the Bank of Montreal, Fort Smith branch, North West Territories and being limited and are authorized to clear payments on the various accounts that pertain to payroll obligations and any and all other transactions should not be processed without the consent of counsel acting on behalf of the applicants and the respondents.

The matter is hereby adjourned to January 20, 2003, Vancouver Motions Day, at which time the Court shall determine whether or not it deems necessary to intervene with respect to appointing a Receiver Manager of the Band's affairs.

In the interim, counsel for both parties shall make their best efforts in order to assist in the payment of other ongoing requirements of the Band's business affairs. If unable to do so, the Court will entertain a further conference call.

[6] A further Order was made on January 17, 2003 and authorized the Bank of Montreal in Fort Smith to allow the processing of cheques issued by the SRFN and payable to those persons identified in a list that was attached.

[7] The purpose of these Orders was to protect the money of the SRFN. According to the decision of Justice Rouleau in *Wanderingspirit et al., supra*, the SRFN had received more than \$60,000,000.00 as part of the 2001 settlement of its Treaty Land Entitlement claim.

[8] Following adjudication of the application for judicial review in April 2003 and delivery of judgment, the trial judge ordered that the Order of January 10, 2003 remain in effect for thirty days, that is until the expiry of the appeal period. At paragraph 50 of *Wanderingspirit et al., supra*, the Court said the following:

On January 10, 2003, the Court ordered that a trust account being administered by RBC Investments, Aboriginal Services in Winnipeg, Manitoba be frozen until further order of this Court; it further ordered that two corporate bank accounts 4991NT Ltd. and 4992NT Ltd. Operating with the Bank of Montreal in Fort Smith, NT remain frozen until further order of this Court; it was also ordered that various other bank accounts operated by the Band also at the Bank of Montreal, Fort Smith Branch, NT be limited and authorized to clear payments that pertain to payroll and certain other transactions. This outstanding order is to remain in effect until the expiry of the appeal period, thirty days from the date of this order. Should any instructions of authorizations be required in this regard, the parties may apply to the Court and conference calls may be arranged in order that good governance of Band affairs can continue.

[9] On June 20, 2003, a further Order was issued, providing as follows:

IT IS HEREBY ORDERED THAT any party, and more particularly any member of the Salt River First Nation 195 office staff, who have in their possession documents, computer data, ledgers, bank statements or documents, books of minutes or anything in that nature rightfully belonging to the Salt River First Nation 195 return them forthwith; failure to comply with this Order, contempt proceedings may be initiated.

IT IS HEREBY FURTHER ORDERED THAT the travelling and living expenses for counsel for the applicants authorized by this Court's Order of 21-JAN-2003 be paid forthwith;

IT IS HEREBY FURTHER ORDERED THAT the Bank of Montreal at Forth Smith, NT, provide forthwith copies of all bank statements requested by the duly restored Band Council;

THOUGH unauthorized payments and cheques may have been honoured and paid without the authority of this Court, the Court must decline jurisdiction in these matters;

IT IS HEREBY FURTHER ORDERED THAT from Monday, 23-JUN-2003, only the following individuals are authorized signing officers of the duly elected Band Council of the Salt River First Nation 195: Chief Victor Marie, Norman Starr, Melvin Wanderingspirit, Delphine Beaulieu, Toni Heron, Raymond Beaver, Sonny McDonald.

All negotiable instruments must be executed before being honoured by at least three of the above named individuals, one of which must always be Chief Victor Marie.

[10] An appeal was taken from this Order and by a decision dated October 20, 2003 (A-286-03), the appeal, reported at (2003), 312 N.R. 395 (F.C.A.) was allowed. At paragraphs 16 to 18, the Federal Court of Appeal said the following:

16. Paragraph 50 purported to extend the interim order of January 10, 2003, until the expiry of the appeal period and allowed the parties to apply to the Court for any necessary instructions or authorizations. However, as discussed above, the motions judge did not have jurisdiction to extend an interim order once he had made a final order. Nor could he specify the signing authorities of the band as part of his final order. Once the motions judge had finally determined who were the rightful members of the Band Council, he had no jurisdiction to intervene in their exercise of the Council's powers, including the power to appoint signing officers.

17. As I have indicated, I fully appreciate that the motions judge was making a prudent attempt to have both sides in this acrimonious proceeding work together and, thereby, ensure that they only make the payments that should properly be made. However, I regret the motions judge lacked the jurisdiction to do so.

18. I would allow the appeal with costs. For greater certainty, the interim order of January 10, 2003, and the June 20, 2003, Order under appeal are no longer effective.

[11] The hearing of the motion for contempt following the issuance of the Order of September 19, 2003, was scheduled to begin on November 27, 2003, in Vancouver. It did not proceed at that time upon the request for an adjournment by some of the alleged contemnors. On December 4, 2003, the following order was issued:

UPON an order made by Gauthier J. dated September 19, 2003, requiring certain individuals to show cause why they should not be held in contempt of court and to appear before a judge of the Federal Court in Vancouver on November 27, 2003;

AND UPON the Direction of Blais J. dated November 24, 2003, stipulating that the parties be heard by telephone conference on November 27, 2003; in lieu of the show cause hearing, to discuss various matters;

AND UPON convening the telephone conference on November 27, 2003, in keeping with Blais J.'s Direction;

AND UPON receiving and considering the representations of those who participated in the telephone conference (see Annex);

THIS COURT ORDERS that:

1. The show cause hearing shall take place in Fort Smith, Northwest Territories, on a date to be fixed by the Judicial Administrator;
2. In the alternative, if the matter cannot be conveniently scheduled in Fort Smith, the hearing shall take place in Yellowknife, Northwest Territories, on a date to be fixed by the Judicial Administrator; and
3. The parties shall communicate with the Registry of the Federal Court, in writing, indicating their availability for the show cause hearing.

ANNEX

Chief Victor Marie
Cr. Norman Starr
Michelle Bjornson
Harvey Lepine
Jeannie Marie Jewell
Tanya Tourangeau
Salt River First Nation #195
(on their own behalf)

David Gowans (on his own behalf)

Connie Benwell (on her own behalf)

Nora Beaver (on her own behalf)

Kenneth W. Fitz
(McLennan Ross)
counsel for Don Tourangeau

Christopher Harvey, Q.C.
(MacKenzie Fujisawa)
counsel for Respondents in A-244-03
Appellants in A-286-03

Ian Blackstock
(Fasken Martineau DuMoulin)
counsel for Respondents in A-244-03

Jurgen Feldschmid
(Duboff Edwards)
counsel for Royal Trust/RBC Investments,
Aboriginal Services Winnipeg

[12] Ultimately, the motion was scheduled for hearing in Fort Smith, Northwest Territories on July 6 and 7, 2004. Victor Marie, Norman Starr, David Gowans, Connie Benwell, Michel Bjornson, Harvey Tourangeau and Jeannie Marie-Jewell appeared on their own behalf. With leave of the Court and the consent of Norman Starr, David Gowans, Connie Benwell, Michel Bjornson and Harvey Lepine, Ms. Jewell acted as their representative. Pursuant to Rule 119 of the Rules, Ms. Jewell, Victor Marie and Don Tourangeau represented themselves.

[13] Mr. Bruce L. Barry did not appear on July 6. He had sent a letter to the Registry of the Court in Edmonton advising that he would not attend in Fort Smith due to lack of funds to pay the airfare.

[14] Ms. Nora Beaver also contacted the Registry of the Court in Edmonton and requested to participate by teleconference. That request was denied.

THE EVIDENCE

[15] Five witnesses testified on behalf of the Applicants. They were Mr. Brad Marta, a liaison officer with the Bank of Montreal in Fort Smith, Ms. Natasha Tourangeau, a secretary with the SRFN Council in June and July 2003. Mr. Michael Beaver, a member of the SRFN, Ms. Barbara McArthur, finance officer with the SRFN in June and July 2004, and Mr. Ian Blackstock, a lawyer who had been involved in the litigation related to the underlying application for judicial review in this matter.

[16] Mr. Marta testified briefly about the process involved with the processing of cheques written to a payee when the payor has not authorized the payment. In such a case, the money is withdrawn from the payee's account. In the present case, this occurred and when the payee's account lacked sufficient funds, the Bank of Montreal sought recovery from the payee, that is the SRFN.

[17] Mr. Marta commenced his employment with the Bank of Montreal in Fort Smith in February 2003. He had some knowledge of the operations of the accounts of the SRFN. He

produced, as Exhibit 1, copies of sixteen cheques drawn on the accounts of the SRFN. These cheques bore dates between April 19, 2003 and June 19, 2003.

[18] He testified about the processing of the cheques and where they had been cashed. He also testified that all of these cheques were returned to the bank and were not honoured. He provided some explanations about the handling of returned cheques.

[19] Ms. Tourangeau was questioned about her knowledge of events in the band council office on June 12 and June 24, 2003. On June 12, she was present in the office. She said that she does not remember if her sister Tanya was in the office nor did she remember that a computer was removed that day from the office of Jeannie-Marie Jewell. However, she did remember when the computer was returned.

[20] Ms. Tourangeau did not remember the removal of files from the office of Ms. Jewell on June 12, 2003.

[21] On June 24, Ms. Tourangeau was in the band council office when the door to Mr. McArthur's office was kicked in. However, she testified that she did not see who kicked in the door; she did hear the noise of that activity.

[22] Mr. Michael Beaver, a member of the SRFN, was present in the band council office on June 12, 2003 for the purpose of "keeping an eye on things". On that day, Chief Victor Marie was in Edmonton .

[23] Mr. Beaver testified that Ms. Tanya Tourangeau, a sister of Ms. Natasha Tourangeau, went into the finance office and came out with a Dell Computer. The finance office at that time was occupied by Ms. Jeannie Marie-Jewell. He said that Ms. Tanya Tourangeau was accompanied by a man who also went into this office and came out with a box of files. Mr. Beaver testified that he heard Ms. Tanya Tourangeau tell her sister Natasha that she was going for a drive.

[24] Following this incident, Mr. Beaver went to see "Jim" and "Raymond", the latter a former Band Chief, to report what he had seen and heard. He also prepared a written report that he submitted to the local Royal Canadian Mounted Police (the "RCMP"). This report was entered as Exhibit 4. This report recounts the observations of Mr. Beaver.

[25] Ms. Barbara McArthur, finance officer with the SRFN, testified about her employment with the Band. She was initially hired in September 2002 and fired in mid-October of the same year. She was re-hired on June 18, 2003. Upon her return to work in June 2003, there was no finance computer in the band council office. The inventory process had to be undertaken manually. One of her first tasks was to re-establish order in the financial affairs of the band,

including an inventory of cheques and accounts payable. In the course of conducting her inventory of the cheques, Ms. McArthur discovered that some cheques were missing.

[26] Ms. McArthur testified about the usual process for issuing cheques by computer and a different process for issuing band-written cheques. In the absence of a computer upon her return to work on June 18, 2003, the cheques had to be issued by hand.

[27] She testified that on June 24, 2003 she went to work at around 9 a.m. She went out at about 10 a.m. for coffee. At that time, she would have locked the door to her office. Upon her return, some few minutes later, she found that the door to her office had been kicked in and the door frame was damaged. She wrote a letter to Acting Chief Raymond Beaver about the damage.

[28] Ms. McArthur also testified that she usually kept the door to her office, the finance office, locked at all times when she was absent, except when she went to the washroom. She acknowledged that, at various times, a number of people were present in the back office, adjacent to her own office.

[29] Subsequently, she learned from reviewing the cheques that she kept in her desk, that certain cheques were missing, that is cheques numbers 2049 to 2066 for the general account, and cheques numbered 1550 to 1562 for the core account. The cheques for these accounts were numbered sequentially and were usually, but not always, issued in sequence.

[30] Ms. McArthur reviewed Exhibit 1 and testified that all the cheques in this Exhibit were among the missing cheques, except cheque number 150 that had been written out in the name of Jeannie-Marie Jewell and cheque number 538 that had been issued in the name of Victor Marie.

[31] Ms. McArthur contacted the RCMP to report that her office had been broken into. She also wrote to the Bank of Montreal concerning the missing cheques.

[32] She testified that she was informed by the branch manager that some of the cheques had already been processed and that the bank would be consulting its lawyers to see what would be the consequences of that processing. Ms. McArthur testified that "we", that is the SRFN, would have to honour some of the cheques that had been processed, or the band's accounts would be frozen and no assistance would be provided by the bank until the cheques were honoured. She testified that the SRFN did honour some of the cheques that had been processed by the Bank of Montreal at a cost in excess of \$30,000.

[33] Ms. McArthur also testified that on July 16, 2003, the Dell computer was returned, together with some personnel files. However, financial and accounting information had been deleted from the computer and other "paper" information relating to payroll, bank statements and cancelled cheques. Ms. McArthur testified that the computer was subsequently turned over to the RCMP and remained in their custody, to her knowledge, at the time of this trial. She,

together with the employees of the band were able to reconstruct some of the financial information from copies of bank statements supplied by the bank. Copies of cancelled cheques were not provided by the bank.

[34] In the course of her testimony, Ms. McArthur referred to and quoted from her affidavit sworn on August 9, 2003, in support of the *ex parte* motion for the issuance of a show cause order. A copy of the affidavit was not entered as an exhibit.

[35] As well, Ms. McArthur referred to certain transcripts of cross-examination of Victor Marie and Tanya Tourangeau. These cross-examinations were conducted relative to the appeal undertaken by the Applicants from the Order of May 29, 2003, that is cause number A-286-03 in the Federal Court of Appeal.

[36] The final witness for the Applicants was Mr. Ian Blackstock, a barrister and solicitor with the firm of Fasken, Martineau Dumoulin, practising in Whitehorse, Northwest Territories. Mr. Blackstock had been involved with the litigation relative to this application for judicial review since its commencement, on behalf of the Applicants.

[37] Mr. Blackstock testified about the events leading up to the process for approval of issuance of cheques on behalf of the band, after the commencement of this application for judicial review, a step that was undertaken in response to the events of November 2002. The

first Order, that is the Order of January 10, 2003, required that counsel for both the Applicants and the Respondents consent to expenditures. The initial Order was made upon consent of the parties. The process required the submission of a requisition for payment and if agreeable to the parties, the requisition would be signed by their respective lawyers.

[38] Mr. Blackstock testified, briefly, as to the role of Mr. Bruce L. Barry in these proceedings. He said that he was an assistant or legal researcher to Mr. Robert Philip, former counsel for the Respondents in these proceedings. Mr. Blackstock said that Mr. Barry had been present at several of the hearings that had been conducted by teleconference and had also sent correspondence to his office on several matters. Mr. Blackstock had the opinion that Mr. Barry had a "very close involvement in the case".

[39] Mr. Blackstock further testified that he had the "impression" that Mr. Barry was apparently aware of the Court Order relating to the processing of cheques.

[40] Then Mr. Blackstock testified about correspondence that he had received concerning certain cheques that had been processed through the Bank of Montreal and other institutions without the signature of Toni Heron, an authorized signing officer. This letter was entered, with some other correspondence, as Exhibit 12.

[41] Mr. Blackstock testified about further correspondence with the Bank of Montreal relating to the processing of certain cheques for which payment had not been authorized. In that regard he produced a copy of a letter dated July 10, 2003; it was entered as Exhibit 13.

[42] A further letter, dated July 16, 2003 was produced by Mr. Blackstock. He testified that this was his file copy of a letter from Mr. Robert Philip, then counsel for the Respondents. This letter was entered as Exhibit 19. In this letter, Mr. Philip requested approval of certain payments, including payments to Jeannie Marie-Jewell and Victor Marie.

[43] Mr. Blackstock testified as well that the Bank of Montreal sought an agreement from the SRFN that the monies that had been paid out by the Bank in connection with certain cheques identified in the letter of July 10, 2003 would be repaid by the band if the Bank was otherwise unable to recover the funds. He testified that ultimately the band repaid the Bank of Montreal approximately \$31,000. In return, the Bank of Montreal assigned to the Band its claims against those individuals to whom payments had been made.

[44] Further, Mr. Blackstock testified that approval had not been given in respect of those cheques that comprise Exhibit 1. He said that he first became aware of those cheques upon receipt of the letter dated July 10, 2003, that is the letter from the solicitors for the Bank of Montreal. He testified that he received no requisition from Mr. Philip in connection with these cheques.

[45] The next area of questioning for Mr. Blackstock related to service of the “show cause” order issued by Justice Gauthier on September 19, 2003. A letter dated October 15, 2003, produced by Mr. Blackstock from his files, was entered as Exhibit 15. According to this letter, Mr. Blackstock forwarded Affidavits of Service to the Federal Court Registry in Vancouver for filing. These affidavits related to service of the Order of September 19, 2003 upon the eleven individuals named in that Order, that is the original Respondents to the application for judicial review, as well as Mr. Bruce L. Barry and Ms. Tanya Tourangeau. Mr. Blackstock produced copies of the affidavits of service from his office file for nine of the alleged contemnors, as well as a solicitor’s certificate of service relative to Mr. Barry. He obtained a copy of the affidavit of service relative to Mr. Tourangeau for the Registry of the Court in Vancouver. These affidavits were entered, as a bundle, as Exhibit 16.

[46] In response to the observation of the Court that in certain cases, the copies of the “show cause” orders that were attached as an exhibit to the affidavits of service were missing page 2 of that Order, Mr. Blackstock testified that he was satisfied that the documents that had been provided to the process servers were complete and in all respects complied with the requirements to serve the “show cause” order upon the individuals concerned. Mr. Blackstock then proceeded to testify about the steps undertaken in arranging service of the documents that were required to have been served in connection with the show cause order.

[47] He also addressed the practice in his office of carefully checking the documents that were required to be served in this case. He said that insofar as preparation of the affidavit of service was concerned, there was a clerical error in preparing the copies of the show cause order when that document was copied for the purpose of being attached as an exhibit to the affidavits of service.

[48] He testified that the document he was most concerned about was the copy of the order that was to be served and according to the practice in his office, this document would have been carefully checked to ensure that it was complete. However, he also testified that it was possible that page 2 of the show cause order was omitted from the documents to be served.

[49] Mr. Blackstock testified that following service of the show cause order, he received some communication from Mr. Barry, advising that he would not attend for the show cause hearing scheduled for November 27, 2003. He also received some correspondence from a lawyer on behalf of Mr. Don Tourangeau. He did not hear from the other concerned individuals.

[50] Mr. Blackstock was questioned by Ms. Jewel about his retainer by the Applicants and his fees. Upon objection from counsel for the Applicants to these questions, Mr. Blackstock asserted solicitor client privilege. The questions were ruled out as irrelevant.

SUBMISSIONS

[51] The Applicants argue that they have met the legal burden upon them to show that Victor Marie, Norman Starr, Nora Beaver, David Gowans, Connie Benwell, Michel Bjornson, Harvey Lepine, Don Tourangeau, Jeannie Marie-Jewell, Tanya Tourangeau and Bruce L. Barry have acted contrary to one or more of the Orders of this Court made on January 10, January 17, May 29 and June 20, 2003.

[52] Insofar as any question was raised about the sufficiency of service of the show cause order of September 19, 2003 upon Victor Marie, Norman Starr, David Gowans, Michel Bjornson, Harvey Lepine, Don Tourangeau, Jeannie Marie-Jewell and Tanya Tourangeau, the Applicants' submissions are simple.

[53] They rely on the evidence of Mr. Blackstock about his usual practice in taking care to ensure that documents that must be served are proper and complete when presented to the process server. They also submit that the fact that the persons concerned participated in the conference call before the Court at Vancouver on November 27, 2003 shows that they were aware of the hearing that had originally been scheduled for that date. In this regard, they argue that this Court can infer that page 2 of the show cause order must have been served upon the persons concerned because that page records the time and place of the hearing. According to the Applicants, the fact that the persons concerned were apparently aware of those details gives rise

to the reasonable inference that they were served with a full copy of the show cause order made on September 19, 2003.

[54] The Applicants argue that, on a balance of probabilities, they have established proper service of the show cause order.

[55] Turning to the merits of the matter, that is breach of the orders, the Applicants argue that the evidence of Mr. Marta and Ms. McArthur establishes the fact that cheques were issued contrary to the Orders of January 10, January 17, May 29 and June 20, 2003 that is without the consent of counsel for the Applicants and for purposes other than those identified in one or more of these Orders.

[56] The Applicants, relying on the evidence of Mr. Beaver, submit that they have shown that Victor Marie was involved in the removal of the computer and other records, from the finance office on June 12, 2003.

[57] As well, the Applicants rely on the evidence in Exhibits 8 and 9, that is the transcripts of the cross-examinations of Tanya Tourangeau and Victor Marie, to establish commission of the alleged acts of contempt.

[58] The alleged contemnors did not testify but exercised their right to make submissions in response to the arguments advanced on behalf of the Applicants. Ms. Jeannie Marie-Jewell spoke on behalf of Norman Starr, Connie Benwell, Harvey Lepine, Tanya Tourangeau and David Gowans, as well as on her own behalf. She complained, to begin with, about the *ex parte* application that had been made to the Court that led to the issuance of the show cause order of September 19. She argued that this manner of proceeding deprived the interested individuals of the opportunity of responding.

[59] She then said that only Victor Marie was given notice of the hearing in Fort Smith on July 6 and 7, 2003 and that the other persons had attended only as a matter of respect towards him as the Chief. She argued that this lack of notice about the hearing in Fort Smith breached their rights to receive notice of a hearing.

[60] Further, Ms. Jewell said that the alleged contemnors did not have time to respond to the evidence submitted by the Applicants. She also said that the commencement of contempt proceedings by the Applicants was, in itself, a contemptuous act. Ms. Jewell went on to say that the allegedly stolen cheques were not honoured by the bank.

[61] She then argued that there was no evidence of service of the show cause order as required by Rule 467(4) of the Rules. She said that the transcripts of evidence from another proceeding could not be admitted as evidence in this proceeding.

[62] Chief Victor Marie submitted that there was lack of evidence to show proper service.

[63] Mr. Don Tourangeau asked for double costs in the event that the Applicants were unsuccessful.

[64] Ms. Nora Beaver described the situation as a “quagmire of allegations with no evidence”. She said that she had not been served to attend in Fort Smith.

[65] Mr. Bruce Barry started by saying that he was not a party to this action. He then argued that this Court lacks jurisdiction to hear this motion for contempt due to lack of proper service of the show cause order, that certain counts in the show cause order were *res judicata* in light of the order of June 20, 2003, and that there was bias. In this regard he referred to rulings on the inadmissibility of an exhibit presented by Ms. Jewell to Ms. McArthur, the Court’s rulings that Mr. Blackstock did not have to answer any questions concerning payment of fees by the Applicants, and finally, systemic bias as demonstrated by the Court’s decision to hold this hearing in Fort Smith.

[66] Mr. Barry also argued that the Applicants had failed to discharge their burden of proof, that is to show what orders were in issue and that the alleged contemnors were in breach of those orders. He said that the Applicants could not rely on hearsay evidence. He, too, asked for costs.

[67] In reply, counsel for these Applicants argued that these three alleged contemnors, with the exception of Mr. Barry, all participated in the conference call on November 27, 2003. All persons, except Mr. Barry, asked that the hearing be held in Fort Smith, as appears from the Order of December 4, 2003.

[68] Counsel for the Applicants submitted that Exhibits 8 and 7, that is the transcripts of the cross-examination of Tanya Tourangeau and Victor Marie respectively, were admissible evidence because although filed in the Federal Court of Appeal, they are part and parcel of the contempt proceedings.

DISCUSSION AND DISPOSITION

[69] Two issues arise from this motion. Were the alleged contemnors properly served with the show cause order of September 19, 2003. If so, have the Applicants discharged their burden of showing, beyond a reasonable doubt, that the alleged contemnors are in contempt of the orders of this Court made on January 10, 2003, January 17, 2003, May 29, 2003 and June 20, 2003.

[70] Rule 467(4) of the Rules requires personal service of a show cause order upon an alleged contemnor and provides as follows:

(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.

[71] Personal service requires service of the complete order. In the present case, the affidavits of service that were entered as Exhibit 16, show a defect in that page 2 of the show cause order is not attached in the affidavits of service relating to all of the alleged contemnors, except the affidavits of service relative to Connie Benwell and Bruce L. Barry.

[72] The opening paragraph in these affidavits of service relating to Victor Marie, Norman Starr, Nora Beaver, David Gowans, Michel Bjornson, Harvey Lepine, Don Tourangeau and Jeannie Marie-Jewell contains the following statement:

On _____, 2003 at _____ o'clock, I served _____ with the Applicants' Motion Record and a brief of Authorities with respect to a contempt application and the Order of the Honourable Madam Justice Gauthier dated September 19th, 2003 by leaving a copy with that person at _____. Attached hereto and marked as Exhibit "A" to this my Affidavit are copies of the first page of the Motion Record and the Brief of Authorities and a copy of the Order of the Honourable Madam Justice Gauthier. [Emphasis added]

[73] The affidavits of service are incomplete. The purpose of these affidavits is to prove service of the documents referred to in the affidavits. The evidence of Mr. Blackstock concerning his usual practice in ensuring that the materials to be served are complete is not sufficient to establish that personal service was effected in this case. The fact that the alleged contemnors were available for a conference call on November 27, 2003 to request a postponement of the hearing scheduled for November 27, 2003 does not meet the obligation of proving personal service.

[74] I do not accept the Applicants' submissions that they have shown, on a balance of probabilities, that proper service was effected. The defect in the affidavit of service and resolution of any doubt as to whether the complete order had, in fact, been served could have been answered if the process servers had testified. However, they did not testify.

[75] Accordingly, the motion against Victor Marie, Norman Starr, Nora Beaver, David Gowans, Michel Bjornson, Harvey Lepine, Don Tourangeau and Jeannie Marie-Jewell is dismissed without prejudice.

[76] I am satisfied that Connie Benwell and Bruce Barry were properly served. The show cause order alleges that Connie Benwell, and others, authorized the issuance of a cheque dated on or about June 6, 2003 to Tanya Tourangeau without the consent of counsel for the Applicants, in breach of the Orders of January 10 and 17, 2003 and May 29, 2003.

[77] It is also alleged that Connie Benwell authorized and signed a cheque that was back dated from June 23, 2003 to April 23, 2003, contrary to the Order of June 20, 2003. Alternatively, in count 6 of the show cause order, it is alleged that Ms. Benwell issued a cheque to Victor Marie on April 25, 2003 without obtaining the consent of counsel for the Applicants, contrary to the Orders of January 10 and 17, 2003, and May 29, 2003.

[78] As for Bruce Barry, it is alleged at count 10 that he knowingly accepted a cheque signed by Victor Marie and Norman Starr or by Don Tourangeau and Connie Benwell after June 23, 2003, contrary to the Order of June 20, 2003. Alternatively, as set out in count 11, it is alleged that he knowingly accepted a cheque signed by Victor Marie and Norman Starr or by Don Tourangeau and Connie Benwell dated April 25, 2003 on June 19, 2003, without the consent of counsel for the Applicants and contrary to the Orders of January 10 and 17, 2003 and May 29, 2003.

[79] At this stage, it is necessary to ask if the Applicants have shown that their alleged contemnors had actual knowledge of the Orders in issue, that is the Orders of January 10 and 17, 2003, May 29, 2003 and June 20, 2003. In this regard, I refer to *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1990] 2 S.C.R. 217 and *Lyons Partnership, L.P. v. MacGregor* (2000), 186 F.T.R. 241.

[80] Ms. Benwell is a party to this application for judicial review. The Applicants argue that she had knowledge of the underlying Orders because she was represented by counsel at the time the Orders were issued and the knowledge of counsel can be imputed to her.

[81] Insofar as Mr. Barry is concerned, he is not a party to the application for judicial review. He is, however, a party to the contempt proceedings. In his case, the Applicants argue that due to his role as a research or other type of assistant to former counsel for the Respondents to the

application for judicial review, Mr. Barry can be deemed to have knowledge of the Orders in issue. Mr. Blackstock, a witness for those Applicants, testified that he had the “impression” that Mr. Barry had knowledge of the Orders, as illustrated by a letter sent by Mr. Barry from the law office of former counsel for the Respondents on June 4, 2003, entered as part of Exhibit 12.

[82] According to *Bhatnager, supra*, the party alleging contempt must prove actual knowledge of the order allegedly breached by the alleged contemnor. Further, the Rules permitting service of an order on a party’s solicitor do not establish knowledge of the order, by that party, for the purpose of grounding a finding of contempt. In some cases, a finding of knowledge by the client may be inferred.

[83] In *Apple Computer, Inc. v. Minitronics of Canada Ltd.*, [1988] 2 F.C. 265 (T.D.), the Court found that knowledge of an order can be inferred from conduct, even if an alleged contemnor has not been served with the order. Such conduct includes the commencement of an appeal from an order since such a step could only have been taken on instructions from the alleged contemnor.

[84] In this case, the Court file shows that on January 17, 2003, a motion was filed on behalf of the Respondents seeking an order to strike the application for judicial review and to vacate the Order of January 10, 2003. By Order dated January 20, 2003, that motion was dismissed.

[85] As well, the Court file in this proceeding shows that a Notice of Appeal was filed on May 30, 2003 in respect of the Order of the Court issued on May 29, 2003.

[86] In these circumstances, I am satisfied that Ms. Connie Benwell had knowledge of the Orders of January 10, 2003 and of May 29, 2003. She was one of the Respondents who sought to vacate the January 10, 2003 Order and who initially sought to appeal the May 29, 2003 Order.

[87] The next question is whether the Applicants have established breach of these Orders beyond a reasonable doubt. That burden is specifically identified in Rule 468 as follows:

468. In a case of urgency, a person may be found in contempt of Court for an act committed in the presence of a judge and condemned at once, if the person has been called on to justify his or her behaviour.

468. En cas d'urgence, une personne peut être reconnue coupable d'outrage au tribunal pour un acte commis en présence d'un juge et condamnée sur-le-champ, pourvu qu'on lui ait demandé de justifier son comportement.

[88] In this regard, the Applicants rely on the evidence contained in the transcripts of the cross-examinations of Tanya Tourangeau and Victor Marie entered as Exhibits 8 and 9, respectively. The alleged contemnors object to reliance upon this evidence because it is evidence that was entered in another proceeding, that is an appeal before the Federal Court of Appeal.

[89] Rule 470 governs the calling of evidence and further provides that an alleged contemnor is not obliged to testify, as follows:

470. (1) Unless the Court directs otherwise, evidence on a motion for a contempt order, other than an order under subsection 467(1), shall be oral.

470. (1) Sauf directives contraires de la Cour, les témoignages dans le cadre d'une requête pour une ordonnance d'outrage au tribunal, sauf celle visée au paragraphe 467(1), sont donnés oralement.

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

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

[90] In *Merck & Co., Inc. v. Apotex Inc.*, [1998] 3 F.C. 400 (T.D.), the Court found that an affidavit and cross-examination given by the alleged contemnor in another proceeding cannot be introduced at the show cause hearing where the alleged contemnor chose not to testify.

[91] I conclude that the evidence contained in Exhibits 8 and 9 is irrelevant for the purpose of establishing breach of the Orders of January 10, 2003 and May 29, 2003 by Ms. Benwell. These documents are evidence in another proceeding, that is an appeal in the Federal Court of Appeal. Contrary to the arguments of the Applicants, that is a separate proceeding. This evidence will not be considered.

[92] In these circumstances, what other evidence is before the Court that could show acts of contempt by Ms. Benwell? In my opinion, there is only Exhibit 1, that is copies of sixteen cheques totalling, by my calculations, \$127,572.88. Ms. Benwell's signature appears to be on cheque number 538, dated April 25, 2003, payable to Victor Marie in the amount of \$4,977.48.

[93] There is no evidence that this cheque was signed by Ms. Benwell after the date on the cheque, that is April 25, 2003. The fact that the cheque was negotiated on July 7, 2003 in Edmonton, Alberta, does not mean that the cheque was written after April 25, 2003, and more particularly, that it was written on or after June 23, 2003, as alleged in count 5. In these

circumstances, I find that the Order of May 29, 2003 was not breached by the issuance and signing of this cheque. I turn now to the Order of January 10, 2003.

[94] I am satisfied that Ms. Benwell had personal knowledge of the Order of January 10, 2003. That Order limited access to accounts operated by the SRFN at the Bank of Montreal at Fort Smith and in particular, required the consent of counsel for both the Applicants and the Respondents.

[95] The Applicants have tendered evidence, through Mr. Blackstock, concerning the manner in which consent of counsel was obtained. Mr. Blackstock also testified that the cheques identified in correspondence dated July 10, 2003, from the solicitor for the Bank of Montreal in Fort Smith, had not been approved by counsel for the Applicants. That letter, entered as Exhibit 13, refers to a cheque dated April 25, 2003, payable to Victor Marie in the amount of \$4,977.48.

[96] Count 6 of the show cause order relates to the Order of January 10, 2003, Ms. Benwell and a cheque dated April 25, 2003, and provides as follows:

6. In the alternative, if the cheque referred to in paragraph (5) was issued before June 23rd, 2003 Don Tourangeau and Connie Benwell violated the orders of Mr. Justice Rouleau dated January 10th and 17th, 2003 and May 29th, 2003 and are in contempt of court pursuant to subsection 466(b) by reason of issuing a cheque to Victor Marie dated April 25th, 2003 without obtaining the consent of counsel for the Applicants, contrary to the said orders.

[97] Cheque number 538 is drawn from account No. 1007 401. According to Exhibit 2, Ms. Benwell is a signing officer for this account. Exhibit 2 contains copies of the signature cards for

certain accounts maintained by the SRFN with the Bank of Montreal at Fort Smith. The signature card for account No. 1007 401 is dated November 6, 2002 and Ms. Benwell is identified as a Councillor.

[98] I am satisfied that the signature "Connie Benwell" on cheque number 538 is the same as the signature appearing on the signature card for account number 1007 401 found in Exhibit 2.

[99] I am satisfied that the Applicants have shown, beyond a reasonable doubt, that Ms. Benwell signed this cheque on or about April 25, 2003. Cheque number 538 is a computer generated cheque. According to the evidence of Ms. McArthur, this cheque was not one of those allegedly stolen from her office on June 24, 2003.

[100] Mr. Barry's situation is somewhat different. There is evidence that he assisted former counsel for the Respondents throughout the hearing of the application for judicial review and that he wrote, on at least one occasion, a letter from the offices of former counsel for the Respondents.

[101] Mr. Blackstock was the only witness who tendered evidence in relation to Mr. Barry. He testified that he had the "impression" that Mr. Barry was aware of the Orders in question.

[102] I am not satisfied that this is sufficient to show personal knowledge of the Orders by Mr. Barry. Whatever the role of Mr. Barry in the law offices of former counsel for the Respondents, it is clear that he was neither a legal representative of the Respondents nor a party to the application for judicial review, where knowledge of the Orders may be imputed. In my opinion, the Applicants were required to show that Mr. Barry had personal knowledge of the Orders here in issue and they have not discharged that burden. The motion is dismissed against him, again without prejudice.

[103] The alleged contemnors made submissions about insufficient service upon them of the notice of hearing in Fort Smith. They also, in the submissions of Ms. Jewell, said that they did not have time to defend their actions. Both matters require comment.

[104] In the first place, the alleged contemnors either appeared in person at Fort Smith on July 6, 2003 or contacted the Registry of the Court about the hearing date. In my opinion, this shows that they were all aware of the hearing date. The Order of December 4, 2003 specifically ordered the parties to communicate with the Registry of the Court, in writing, to indicate their availability for the show cause hearing, to be held in Fort Smith, at a date to be set.

[105] The alleged contemnors, with the exception of Mr. Barry, participated in the telephone conference on November 27, 2003 that led to the issuance of the Order of December 4, 2003.

[106] I turn now to Ms. Jewell's submissions that the alleged contemnors did not have time to defend their actions. Her submissions are a misrepresentation of the advice given to the alleged contemnors by the Court at the close of the Applicants' case at Fort Smith on July 7, 2004, as recorded in the transcript of the hearing on that date. Attached as an appendix and forming part of these Reasons are pages 167 to 178 inclusive, Volume 2 of the transcript of the proceedings held at Fort Smith on July 7, 2004.

[107] The alleged contemnors were informed that they were not obliged to testify, but could do so if they wished. They chose not to testify. Any facts that were raised in their closing submissions do not constitute evidence and have not been considered.

CONCLUSION

[108] The motion for contempt against Victor Marie, Norman Starr, Nora Beaver, David Gowans, Michel Bjornson, Harvey Lepine, Don Tourangeau, Tanya Tourangeau, Jeannie Marie-Jewell and Bruce L. Barry is dismissed, without prejudice.

[109] The action for contempt against Connie Benwell has been established in relation to the Order of January 10, 2003 and count 6 of the show cause order. I will hear submissions of the Applicants and Connie Benwell, on the matter of penalty, on March 2, 2005 at 2:00 p.m. Ottawa time, by videoconference. Counsel for the Applicants and Ms. Benwell are to confirm in writing

to the Court by February 25, 2005, their availability on that date and provide contact numbers; the Registry of the Court will make the necessary arrangements for the videoconference.

COSTS

[110] Mr. Don Tourangeau and Mr. Bruce Barry sought costs. Mr. Tourangeau requested double costs on a solicitor client scale and Mr. Barry asked for double costs against the Applicants in their own right, not as Councillors for the SRFN.

[111] I decline to make such orders. In the first place, Rule 400 of the Rules grants the Court full discretion in the matter of costs. Second, costs are generally not awarded to self-represented litigants and I see no reason to exercise my discretion otherwise.

[112] I reserve the issue of costs in relation to the Applicants.

ORDER

The motion for contempt against Victor Marie, Norman Starr, Nora Beaver, David Gowans, Michel Bjornson, Harvey Lepine, Don Tourangeau, Tanya Tourangeau, Jeannie Marie-Jewell and Bruce L. Barry, is dismissed, without prejudice and no order as to costs.

The motion for contempt against Connie Benwell in relation to the Order of January 10, 2003 is granted. Submissions on penalty will be heard by videoconference on March 2, 2005 at 2:00 p.m. Ottawa time, the Applicants and Ms. Benwell to communicate in writing with the Court by February 25, 2005, their availability on that date and to provide contact numbers.

The issue of costs for the Applicants is reserved.

“E. Heneghan”

J.F.C.

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THIS IS APPENDIX "A" TO THE REASONS
FOR ORDER AND ORDER FILED IN THIS MATTER,
PAGES 167-178 INCLUSIVE, VOLUME 2 TRANSCRIPT,
PROCEEDINGS AT FORT SMITH, NORTHWEST
TERRITORIES JULY 7, 2004

1 but you can hear argument by video-conference.
2 How about we come back here at do you
3 want fifteen (15) or twenty (20) minutes, Ms. Jewell?

4 MS. JEANNIE MARIE-JEWELL: Sure.

5 JUSTICE HENEGHAN: Well, what do you?

6 MS. JEANNIE MARIE-JEWELL: Fifteen (15)
7 minutes will be fine, thanks.

8 JUSTICE HENEGHAN: Fifteen (15), 10
9 after 6:00 then.

10

11 -- Upon recessing at 5:54 p.m.

12 --- Upon resuming at 6:15 p.m.

13

14 JUSTICE HENEGHAN: Ms. Jewell...?

15 MS. JEANNIE MARIE-JEWELL: Thank you, My
16 Lord. After discussions with the group, the concerns at
17 the fact that we have a day for evidence to be put forth
18 in this Court. Mr. Harvey made reference to, you know,
19 we might ask witnesses repetitive questions, or
20 whatever, but I don't think Mr. Harvey can think forme
21 what I'd like to ask.

22

23

24

So, we have decided that we would be
willing to submit to the Court written or oral
submission. We'd prefer to do an oral submission.

25

JUSTICE HENEGHAN: Now, we're talking

1 about the submission. When I use the word "submission,"
2 Ms. Jewell, I'm talking about argument.

3 MS. JEANNIE MARIE-JEWELL: That's
4 correct.

5 JUSTICE HENEGHAN: And argument comes
6 after evidence. So are you telling me that the
7 respondents are not testifying or are not going to call
8 any evidence?

9 MS. JEANNIE MARIE-JEWELL: That's
10 correct, because we just do not feel we will have
11 sufficient time.

12 JUSTICE HENEGHAN: Well, that's not a
13 good enough reason. If you feel that you -- what I've
14 said, and let me be very clear on this, what I've said
15 is that we have a day tomorrow that we can use for the
16 giving of evidence if the respondents choose to lead
17 evidence. I did not say that you only had one day to
18 give evidence. I said we have a day that we can use to
19 get started on the evidence.

20 If once we get started on the evidence,
21 and once we get started you may find that all the
22 evidence that you want to present goes in one day, and
23 if that is so, then all we have left to be concerned
24 about is the making of arguments.

25 If we start tomorrow with the evidence

1 and we don't finish the evidence, then we have to find
2 another day to finish the evidence. There's a big
3 difference, Ms. Jewell, between saying that you only
4 have one day to give evidence, and saying you have one
5 day to get started on the evidence.

6 Do you understand?

7 MS. JEANNIE MARIE-JEWELL: Yes, I do.

8 JUSTICE HENEGHAN: That I didn't say you
9 were only limited to one (1) day.

10 MS. JEANNIE MARIE-JEWELL: I understand
11 that, My Lord. However, the reality is we know that we
12 have one more day available. If we choose to go
13 evidence, we may find ourselves in the position where we
14 have a witness that's in the witness box and a day
15 concludes, and then it's more difficult to come back
16 into the process, and this is why we are asking that we
17 be allowed to do a written submission for argument,
18 preferably an oral submission for argument without
19 submitting any evidence.

20 JUSTICE HENEGHAN: Yes, but I'm not
21 leaving this courtroom and leaving anybody under the
22 misapprehension that they cannot present evidence
23 because of time constraints.

24 And if that is your thought, unspoken or
25 otherwise, I will clear that up right now. That there

1 will not be any such perception around here Either the
2 respondents, if you're telling me that the only reason
3 you would give up your right to testify -- even though
4 you're not obliged to testify -- if the only reason
5 you're going to give that up is because you feel you're
6 pressured by time, then that is just not acceptable.

7 Mr. Harvey...?

8 MR. CHRISTOPHER HARVEY: Yes, I agree,
9 and I appreciate Your Ladyship saying that. There's no
10 obligation to testify, but there's a right to testify,
11 and if the Court were not to accord that right to the
12 respondents, it would be very serious.

13 JUSTICE HENEGHAN: It would be a
14 miscarriage of justice.

15 MR. CHRISTOPHER HARVEY: Yes.

16 JUSTICE HENEGHAN: It would give rise to
17 all kinds of mischief, including challenges of unfair
18 pressure. I'm not going to be any way party to any such
19 idea, whether it is spoken or unspoken, and that being
20 the circumstance, this hearing will be adjourned. It
21 will not go forward tomorrow.

22 Now, let's talk, Ms. Jewell, about when
23 it will go forward, and when you and the respondents--
24 I will need some idea as to the time required for the
25 respondents to present their evidence. I don't need it

2 this minute, but I'm telling you I will need it.
3 What I do need to talk about today is
4 when we're going to resume it and where we're going to
5 resume it. You indicated a short while ago that
6 possibly the respondents would be willing to go to
7 Edmonton. I don't know whether that was canvassed ever
8 before in this hearing. We've been here, which is all
9 right.

9 It's part of the mandate of this Court to
10 go to a convenient location. It may be that Edmonton
11 will be more-convenient for the respondents in the
12 future than Fort Smith. I don't know. I need to hear
13 from you about that. I need to hear about time frames,
14 I need to hear from the respondents, I need to hear from
15 the applicants. So who's going to start?

16 MR. CHRISTOPHER HARVEY: MyLady, could
17 I just say this? First of all, the place. There is a
18 high community interest in this proceeding, and that
19 makes Fort Smith the most desirable place for sure, and
20 I wouldn't want my convenience or inconvenience to tip
21 the balance towards Edmonton. Certainly it's my
22 clients' interest to have the case here in the
23 community.

24 As for the -- we still haven't, it seems

tobe any evidence. Itseemed to me -- and if there

2 isn't going to be, then that makes things quite a bit
3 different in our future planning. But what Ms. Jewell
4 left it at was that Ms. Jewell being accorded the day
5 tomorrow to get started with the evidence, and I don't
6 see that she has yet said that she'll either take that
7 opportunity or not take it.

8 JUSTICE HENEGHAN: Well, I think she

9 said enough to cause me concern that there may be a
10 perception -- rightly, wrongly, or otherwise -- that
11 there may be a perception that the respondents are being
12 shortchanged in their choice to call evidence, and I
13 cannot be a party to that.

14 MR. CHRISTOPHER HARVEY: No. But, My

15 Lady, if I may say so, you made it quite absolutely
16 clear that there was no basis for that perception. And
17 having made that absolutely clear, there's no basic for
18 the perception, I would have thought the question could
19 then be asked now, are you going to call evidence or
20 not?

21 And if that question is asked, us having
22 cleared away the misconceptions, if that question having
23 been asked and answered, if the question is we elect not
24 to call evidence, then that makes our planning much
25 easier. I would have thought that before we leave today

1 we should have that determined, so that we really know
2 what we're planning for and what's in store.

3 JUSTICE HENEGHAN: Are you able to
4 answer that, Ms. Jewell? And if you're not, feel free
5 to tell me that.

6 MS. JEANNIE MARIE-JEWELL: My Lord,
7 first of all, I don't mean by any means to give you the
8 perception that we are not taking the opportunity of our
9 choice to present evidence to this Court because of time
10 restraints. I don't want you to feel we're slighting
11 the Court by any means. We respect this process.

12 When I went out and spoke to the group,
13 they felt that they felt comfortable, and I just want to
14 use the word "comfortable." I asked each of them, they
15 said they felt comfortable to be able to submit in a
16 written, strong written or present an oral argument to
17 this Court and to bring their points across without
18 giving evidence.

19 They would prefer that we could give an
20 oral submission, and we are basically stating clearly
21 for the Courts that for this next step in the process,
22 we will withdraw our right to submit in evidence, and *e
23 ask that we be given a time, a date, to be able to
24 present a written, preferably an oral, argument. Thank
25 you.

1 And that can be at the convenience of the
2 Court or we realize that you're busy next week.

3 We're not privy to your schedule, so in respect to the
4 decision in regards to the dates, that will be made -
5 although we do request that it will be in the near
6 future. We would appreciate if it's in the near future.

7 Thank you.

8 MR. CHRISTOPHER HARVEY: I wonder if we
9 could talk about tomorrow again. It's certainly nearest
10 future, and it's all fresh in our mind.

11 JUSTICE HENEGHAN: I have a question for
12 Ms. Jewell before you answer Mr. Harvey.
13 What do you mean when you say you

14 withdraw your right to submit evidence?

15 MS. JEANNIE MARIE-JEWELL: We do not
16 want to submit evidence on behalf of the respondents.

17 JUSTICE HENEGHAN: Is that decision
18 independent of any time constraints?

19 MS. JEANNIE MARIE-JEWELL: I am not --
20 I'm sorry, My Lord, I don't know if it's just the time
21 of the day, or what, but I'm not quite clear, I guess,
22 on understanding your question.

23 JUSTICE HENEGHAN: Respondents in this
24 proceeding are not obliged to testify. But if they want
25 to testify, they can do so. Are you telling me that the

1 group does not want to submit evidence, and when I say
2 that they're not obliged to testify, I mean that. The
3 individuals are not obliged to testify, but that does
4 not mean that they cannot lead other evidence if they
5 want to.

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6 Are you telling me that the decision not
7 to submit evidence on behalf of the respondents is made
8 without regard to any time constraints? If this was
9 Monday, Ms. Jewell, and we had the whole week in front
10 of us, would you still be telling me that the
11 respondents do not want to lead evidence? That's my
12 question.

13 MS. JEANNIE MARIE-JEWELL: That's
14 correct, My Lord.

15 JUSTICE HENEGHAN: That is correct? So
16 you're saying that the respondents don't want to lead
17 any evidence?

18 MS. JEANNIE MARIE-JEWELL: That's what
19 have been advised, yes.

20 JUSTICE HENEGHAN: Well, all right.
21 Who's here, Mr. Tourangeau is here, is that your
22 position?

23 MR. DON TOURANGEAU: My Lord.

24 JUSTICE HENEGHAN: Yes.

25 MR. DON TOURANGEAU: I don't wish to

1 give any evidence tomorrow or lead any evidence at all.

2 I have no evidence to lead.

3 JUSTICE HENEGHAN: That's fine.

4 MR. DON TOURANGEAU: I'm not under time
5 constraints or none of the sorts you mentioned.

6 JUSTICE HENEGHAN: Fine, I just want to
7 be clear.

8 MR. DON TOURANGEAU: No, I'm fully clear
9 also, My Lord.

10 JUSTICE HENEGHAN: Okay.

11 MR. DON TOURANGEAU: Thank you.

12 JUSTICE HENEGHAN: Chief Marie...?

13 CHIEF VICTOR MARIE: No, I don't want to.
14 give any evidence, My Lord. We'll keep it at that,
15 thanks.

16 JUSTICE HENEGHAN: Thank you. Mr.
17 Gowans ?

18 MR. DAVID GOWANS: No, My Lord, I don't
19 wish to any evidence.

20 JUSTICE HENEGHAN: Thank you. Who else
21 is here?

22 MS. CONNIE BENWELL: No, no evidence.

23 JUSTICE HENEGHAN: And your name, again,
24 please?

25 MS. CONNIE BENWELL: Connie Benwell.

1 JUSTICE HENEGHAN: Thank you.
2 MR. HARVEY LEPINE: Harvey Lepine.
3 JUSTICE HENEGHAN: Yes, sir?
4 MR. HARVEY LEPINE: No, I don't wish to
5 give any evidence.
6 JUSTICE HENEGHAN: Thank you. Is there
7 anybody else here? Tanya?
8 MR. MICHEL BJORNSON: No, Michel
9 Bjornson.
10 JUSTICE HENEGHAN: Sorry.
11 MR. MICHEL BJORNSON: Not a problem. I
12 don't wish to give any evidence.
13 JUSTICE HENEGHAN: Okay. Are you
14 speaking, Ms. Jewell, on behalf of the others for whom
15 you were speaking yesterday, those who are not here?
16 Mr. Starr, who was here yesterday and is not here now.
17 Is he in agreement with this position?
18 MS. JEANNIE MARIE-JEWELL: I haven't
19 consulted with Mr. Starr on this particular decision,
20 but generally he will agree with the group.
21 JUSTICE HENEGHAN: Okay. Now, we can
22 deal with the situation --
23 MR. CHRISTOPHER HARVEY: There's Ms.
24 Tanya Tourangeau. Tanya Tourangeau is not here, but I
25 think Ms. Jewell was --

1 JUSTICE HENEGHAN: Okay. Ms. Jewell,
2 are you speaking on her behalf too?

3 MS. JEANNIE MARIE-JEWELL: Yes. She, I
4 know she's sick today, but similar to Mr. Starr, I
5 haven't had verbal discussions with her, but I feel
6 confident that she will agree collectively with the
7 group.

8 JUSTICE HENEGHAN:
9 deal with what Mr. Harvey's proposal that we proceed
10 the oral argument?
11 tomorrow with

12 MS. JEANNIE MARIE-JEWELL:
13 would like to respectfully ask for a process that would
14 allow us for an oral submission, and this will allow for
15 us to be able to take into account all the exhibits and
16 what has been happening the last few days, and give us
17 time to develop our arguments to this Court.

18 So, therefore, we're respectfully
19 requesting that we be adjourned until either written or

20 JUSTICE HENEGHAN: But you've said you
21 want oral arguments, and I'm quite prepared to go along
22 with that. We'll may be doing it by way of
23 video-conference.

24 MS. JEANNIE MARIE-JEWELL: We are
25 agreeable to that.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-2007-02

STYLE OF CAUSE: Melvin Wanderingspirit et al v. Victor Marie
uncontested Chief et al

PLACES OF HEARING: Fort Smith, NT(July 6 and 7)
Edmonton, Alberta, Fort Smith, NT, Toronto, Ontario
British Columbia (July 15)

DATES OF HEARING: July 6, 7 and 15, 2004

**REASONS FOR ORDER
AND ORDER BY:** Heneghan J.

DATED: January 28, 2005

APPEARANCES BY:

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