Federal Court Cour fédérale

Date: 20180717

Docket: T-1608-17

Citation: 2018 FC 746

Ottawa, Ontario, July 17, 2018

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

ORDER AND REASONS

I. Nature of the Matter

[1] The Applicants seek an Order pursuant to Rule 467 of the *Federal Courts Rules*, SOR/98-106 [the Rules] that the Respondents are in contempt of Court for failing to comply with the consent Order of Justice Lafrenière issued November 10, 2017 [the November 10 Order].

[2] This decision follows a trial ordered by Justice Martineau on March 19, 2018 [the Show Cause Order], requiring the Respondents to appear before this Court to hear proof of their contempt of parts 1 and 4 of the Court's November 10 Order and to present any defence to their *prima facie* contempt.

[3] The Court heard from five witnesses, four for the Applicants and one for the Respondents, in Edmonton on June 13, 2018. It was suggested by counsel, and the Court agreed, that argument of the matter would take place after the hearing in the form of written submissions. Those were filed and have now been considered.

[4] For the reasons that follow, I find the Respondents in contempt of the November 10 Order, and in particular, of parts 1 and 4 as set out below.

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.

III. Chronology of facts leading to the November 10 Order

[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:
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> (a) calling Council Meetings;
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> (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:
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> (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.

[23] These reasons deal with the results of the hearing ordered by Justice Martineau.

VII. Issues

[24] The parties made written pre-hearing submissions on whether contempt is established, and on the appropriate sentence. However, prior to the hearing I drew the attention of counsel to

the Federal Court of Appeal's decision in *Winnicki v Canada (Human Rights Commission)*, 2007 FCA 52, where the Federal Court of Appeal criticized the practice of combining the contempt and sentence hearings, particularly where submissions on sentence may entail admissions or inferences of guilt by the alleged contemnor: see paras 12-16. The hearing before me was therefore bifurcated - the Court heard the evidence on the issue of contempt, and if contempt is found, the Court will hear and determine sentence at a later date.

[25] The Respondents do not dispute that the November 10 Order stated clearly and unequivocally what should and should not be done, therefore this requirement of the law of contempt is not in issue: *Carey v. Laiken,* 2015 S.C.C. 17, paragraph 33. Had it been, I would have found the November 10 Order stated clearly and unequivocally what should and should not be done.

[26] Specifically, the plain wording of paragraph 1 of the November 10 Order clearly and unequivocally prohibits the Respondent Gadwa from holding himself out to the public as a Councillor of the Kehewin Cree Nation and clearly and unequivocally prohibits the Respondent Gadwa from acting as if he were a Councillor of the Kehewin Cree Nation. Public is specifically defined in the clear and unequivocal language of paragraph 3 to include "members of the Kehewin Cree Nation" and also "indigenous, federal, provincial, territorial and municipal governments, their departments, employees and staff; individual and corporations doing business with the Kehewin Cree Nation".

[27] In addition, the plain wording of paragraph 4 of the November 10 Order clearly and unequivocally prohibits the Respondents Badger, Mountain and Watchmaker from calling their own Council Meetings and from attending any Council Meetings that are not either the regular

Tuesday Council Meetings or special or emergency Council Meetings called in accordance with paragraph 4(b) of the November 10, 2017 Order, with notice being given to all elected members of Council.

[28] In the result, the issues arising at this time are whether it is established beyond a reasonable doubt that: a) the Respondents had notice of the November 10 Order, and b) the Respondents are in contempt of Court pursuant to Rule 466(b) for failure to comply with the November 10 Order.

VIII. Legislation

[29] Rule 466(b) of the Rules states:

Contempt	**Outrage**
466 Subject to rule 467, a person is guilty of contempt of Court who	466 Sous réserve de la règle 467, est coupable d’outrage au tribunal quiconque :
…	…
(b) disobeys a process or order of the Court;	b) désobéit à un moyen de contrainte ou à une ordonnance de la Cour;

[30] Rule 467 sets out the process to be followed in a contempt hearing:

Right to a hearing

467 (1) Subject to rule 468, before a person may be found in contempt of Court, the person alleged to be in contempt shall be served with an order, made on the motion of a person who has an interest in the proceeding or at the Court's own initiative, requiring the person alleged to be in contempt

(a) to appear before a judge at a time and place stipulated in the order;

(b) to be prepared to hear proof of the act with which the person is charged, which shall be described in the order with sufficient particularity to enable the person to know the nature of the case against the person; and

(c) to be prepared to present any defence that the person may have.

Ex parte motion

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

Burden of proof

(3) An order may be made under subsection (1) if the Court is satisfied that there is a prima facie case that contempt has been committed.

Droit à une audience

467 (1) Sous réserve de la règle 468, avant qu'une personne puisse être reconnue coupable d'outrage au tribunal, une ordonnance, rendue sur requête d'une personne ayant un intérêt dans l'instance ou sur l'initiative de la Cour, doit lui être signifiée. Cette ordonnance lui enjoint :

a) de comparaître devant un juge aux date, heure et lieu précisés;

b) d'être prête à entendre la preuve de l'acte qui lui est reproché, dont une description suffisamment détaillée est donnée pour lui permettre de connaître la nature des accusations portées contre elle;

c) d'être prête à présenter une défense.

Requête ex parte

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

Fardeau de preuve

(3) La Cour peut rendre l'ordonnance visée au paragraphe (1) si elle est d'avis qu'il existe une preuve prima facie de l'outrage reproché.

IX. Contempt Proceedings

[31] Contempt proceedings are a very serious matter. The fundamental purpose of the Court's contempt power is to ensure respect for the judicial process so as to, in turn, secure the proper and effective functioning of the judicial system.

[32] The burden of proof in a contempt hearing is the same as that in a criminal trial; proof beyond a reasonable doubt: *Minister of National Revenue v Darrin Gray and 619947 NB Inc.*, 2018 FC 549 per Heneghan J at para 28:

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

[33] In *Canada (Minister of National Revenue) v Bjornstad*, 2006 FC 818, Dawson J, as she was then, stated, at para 4:

> [4] The fundamental purpose of the Court’s contempt power is to ensure respect for the judicial process so as, in turn, to secure the proper and effective functioning of the judicial system. In short, the rule of law requires that court orders be complied with.

[34] In *Louis Vuitton Malletier SA v Bags O’fun Inc.*, 2003 FC 1335, Dawson J, as she was then, set out the relevant principles at paras 6, 7, 8, 14 and 15:

> [6] Rule 466(*b*) provides that a person is guilty of contempt of Court who “disobeys a process or order of the Court”.
>
> [7] Relevant and applicable principles are:

> 1. The party alleging contempt has the burden of proving such contempt, and the alleged contemnor need not present evidence to the Court.
>
> 2. The constituent elements of contempt must be proved beyond a reasonable doubt.
>
> 3. In the case of disobedience of an order of the Court, the elements which must be established are the existence of the Court order, knowledge of the order by the alleged contemnor and knowing disobedience of the order.
>
> 4. *Mens rea* and the presence of good faith are relevant only as mitigating factors relative to the penalties that are to be imposed.
>
> See: Rules 469 and 470, and *Tele-Direct (Publications) Inc. v. Canadian Business Online Inc. (1998)*, 151 F.T.R. 271.

[8] Contempt proceedings are a very serious matter. The fundamental purpose of the Court's contempt power is to ensure respect for the judicial process so as to, in turn, secure the proper and effective functioning of the judicial system.

…

[14] In *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1990] 2 S.C.R. 217 the Supreme Court of Canada considered the requirement that one must have knowledge of an order before one can be found to be in contempt of that order. The Court wrote as follows at paragraph 16:

> On the cases, there can be no doubt that the common law has always required personal service or actual personal knowledge of a court order as a precondition to liability in contempt. Almost two centuries ago, in Kimpton v. Eve (1813), 2 V. & B. 349, 35 E.R. 352, Lord Chancellor Eldon held that a party could not be held liable in contempt in the face of uncontradicted evidence that he or she had no knowledge of the order. In Ex parte Langley (1879), 13 Ch. D. 110 (C.A.), Thesiger L.J. stated the principle as follows, at p. 119:
>
> > ... the question in each case, and depending upon the particular circumstances of the case, must be,

> > was there or was there not such a notice given to the person who is charged with contempt of court that you can infer from the facts he had notice in fact of the order which had been made? And, in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such a notice ought to prove it beyond reasonable doubt.
>
> More recently, this Court adverted to the knowledge requirement in contempt in Baxter Travenol Laboratories of Canada Ltd. v. Cutter (Canada), Ltd., [1983] 2 S.C.R. 388, per Dickson J. (as he then was), at pp. 396-97.
>
> [15] The Court went on to observe that knowledge is often proved circumstantially, and that “in contempt cases the inference of knowledge will always be available where facts capable of supporting the inference are proved: see Avery v. Andrews (1882), 51 L.J. Ch. 414”.

X. Analysis

[35] In the Applicants’ view, all four Respondents are in contempt because they breached paragraph 1 of the November 10 Order in a number of respects. First when they purportedly acted as Councillors and signed what purported to be, but was not, a BCR, dated January 31, 2018, and second when they signed a document entitled: “To: Kehewin Membership RE: General Election” in their purported capacity as “Kehewin Leadership” [the Notice Document] on or about the same date. These are Exhibits F and E respectively of the affidavit of William John referred to in Justice Martineau’s Show Cause Order of March 19, 2018 at paragraph 2.

[36] The Applicants also submit that Councillors Badger, Mountain and Watchmaker are in contempt for breaching the November 10 Order by calling for and attending a private meeting on

January 31, 2018, contrary to and in breach of paragraph 4 of the November 10 Order. In this respect, no one disputes this and I find beyond a reasonable doubt that there was no lawful Council Meeting held on January 31, 2018. Only Council, at a duly convened meeting, can exercise the powers of Council under the *Kehewin Cree Nation Custom Elections Act* to call elections, to call nomination meetings, to appoint Elections Officers. The evidence was that no notice of any Council Meeting for Wednesday, January 31, 2018 was sent to all elected members of Council as required by paragraph 4(b) of the November 10, 2017 Order. The evidence is clear that no Council Meeting was held in 2018 to call General Elections for March 2018 and appoint an Election Officer.

[37] In addition, I find beyond a reasonable doubt that no Council Meeting has been held since January 31, 2018 in conformity with paragraph 4 of the November 10 Order.

[38] The Applicants refer to *Long Lake Cree Nation v Canada (Minister of Indian & Northern Affairs)*, [1995] FCJ No 1020 per Rothstein J:

> 31 On occasion, conflicts can become personal between individuals or groups on Council. But Councils must operate according to the rule of law whether that be the written law, custom law, the *Indian Act* or whatever other law may be applicable. Members of Council and/or members of the Band cannot take the law into their own hands. Otherwise, there is anarchy. The people entrust the Councillors to make decisions on their behalf and Councillors must carry out their responsibilities in a way that has regard for the people whose interest they have been elected to protect and represent. The fundamental point is that Councils must operate according to the rule of law.

[39] The crux of the Respondents' pre-hearing submissions was that they had no knowledge of the November 10 Order at the relevant time and that the burden is on the Applicants to prove

the Respondents had such knowledge. Also in their written pre-hearing submissions, the Respondents took the position they had not received any email notification of the November 10 Order, adding that they had “disengaged their emails due to some unsolicited emails coming from various individuals.” In their written filings, the Respondents conceded they were aware that the Applicants made an application to the Court for such an Order, but they say they did not receive the November 10 Order.

[40] The Respondents filed no affidavit evidence in support of the submission that they had no knowledge of the November 10 Order. Also, the Respondents filed no affidavit evidence they had disengaged their emails. I hasten to add that they were under no duty to do so, nor indeed were they required to give evidence at all: they had the right to remain silent and put the Applicants to the proof of their alleged contempt.

[41] At the trial, the original position of Councillor Badger seemed to be that he had no notice of the November 10 Order, however as discussed below, I find he had. I note that in his oral evidence, Councillor Badger did not refer to disengaging his email; in the absence of any evidence or further submissions either at the hearing or in post-hearing submissions, in my view the Respondents have abandoned a defence based on lack of email notice.

A. *Knowledge of the November 10 Order*

[42] I have concluded that each of the Respondents had knowledge of the November 10 Order. There is no doubt that such knowledge may be inferred in the circumstances: *Carey v Laiken*, 2015 SCC 17 at para 34. I infer such knowledge beyond a reasonable doubt for the following reasons.

[43] First, and before the November 10 Order was even made, the Respondents consented to the precise terms of the November 10 Order. No allegation of professional misconduct is made against their counsel by the Respondents; undoubtedly it would be professional misconduct for counsel to accept a consent Order without first disclosing it to the client(s). There is no such evidence in this case. I do not believe counsel would consent to an Order without sharing its content with his clients which is of course what the Respondents are asking me to believe.

[44] Second, after the November 10 Order was made, the Applicants served the Respondents' counsel with the November 10 Order. Thereupon, Respondents' counsel specifically acknowledged receipt of the November 10 Order. Again, as a matter of professional conduct – particularly in the case of an injunction exposing his or her clients to contempt – I do not believe, and have no reason to believe, that Respondents' counsel did not send copies of the November 10 Order to the Respondents.

[45] Third, the Applicants emailed a copy of the November 10 Order to each of the Respondents, except Mr. Gadwa, using the same email addresses that the Respondents use to receive notices of Council business. The Respondents at one time alleged they had disengaged their emails; I am not satisfied with this assertion given three of them (Councillors Badger, Mountain and Watchmaker) are still Councillors needing to be in touch with their constituents. This allegation was not pursued either at the hearing (where Councillor Badger testified and said nothing in this respect) nor in follow up post-hearing submissions. I appreciate this may not apply to Mr. Gadwa who was at the time and is not a Councillor.

[46] Fourth, because copies of the November 10 Order were put in their respective mailboxes in the band office and those mailboxes were subsequently emptied. I am entitled to presume they

were emptied by the Respondents personally because there was no suggestion of interference with mail or mailboxes in the administrative offices. Again this may not apply to Mr. Gadwa who was not a Councillor.

[47] Fifth, the November 10 Order was posted widely at numerous prominent places on Kehewin property including the front and back doors of the band administration office, the doors of the finance department, both doors to the Rec Centre, at the store, and at the doors of the school, fire hall, health centre, daycare and Public Works buildings together with the reception area where copies remained until shortly before the hearing. I accept and the evidence is that copies were posted shortly after November 10, 2017, and further that copies of the November Order remained there until the day before the hearing. In my view, they would be difficult to miss because the pages of the November 10 Order were laid out separately so that the whole could be read without having to turn pages.

[48] Sixth, the November 10 Order was and remains posted on the community's newspaper/service open and available to the public, Lakeland Connect.

[49] Seventh, the November 10 Order, at the time and as of the hearing was still posted online at three different Facebook group sites used by Kehewin Membership namely Kehewin Information Network, Kehewin Opinion and Concerns, and Kehewin Voices.

[50] Eighth, the evidence was that the three Councillors, Badger, Mountain and Watchmaker attended Council meetings in the band administration offices on November 28 and December 12, 2017, and that Councillors Badger and Watchmaker attended further meetings in the Rec Center on January 15, 2018 and Council meetings in the band administration offices on January 18,

2018, and March 6, 2018 where they would have walked past the copies of the November 10 Order.

[51] Councillor Badger elected to give evidence, although, as noted, he was not required to. He was asked by his counsel several times and several different ways if he knew of the November 10 Order. He said he testified with difficulty because of the change in Chief, the change in Mr. Gadwa's position as Councillor, conflicting legal advice, and changes in both legal counsel and his personal circumstances. While Councillor Badger had a fairly specific recollection of the Order of Justice Zinn, and knew Justice Zinn's Order had expired, he could only say he had "a recollection" of the November 10 Order. Notably, Councillor Badger did not testify that he did not know of the November 10 Order. He did say he could not find an email sending it to him, which is beside the point. He did not testify that he had disengaged his email, as was stated in pre-hearing written submissions on his behalf. Asked by his counsel if, after he had full knowledge of the November 10 Order, he complied with it, he said he tried. He had every opportunity to say he did not know of the Order, but did not. In my respectful view, his answers were evasive on the critical point of his knowledge of the November 10 Order. I have considered his evidence and still conclude beyond a reasonable doubt that he knew of the November 10 Order.

[52] In post-hearing submissions filed by the Respondents, it is argued on the basis of Councillor Badger's evidence that the Respondents did not know there was no time limit on the November 10 Order. It is submitted they believed not only that there was a time limit, but that it had actually expired. This I was not the evidence given by Councillor Badger. The Respondents submit they are not legally trained and that they relied on verbal advice of their legal counsel

(different from counsel at the hearing). In my view this submission is not supported by the evidence. While Councillor Badger's evidence was confused, and at times evasive it did not support the Respondents' submission in this respect.

[53] In the same post-hearing submissions, the Respondents say that there is no evidence that any of the Respondents took the time to read the Order as posted in the community, and in any event even if they had, the submission is that they would not have understood it. They thought it would expire on November 14, 2010. I reject this submission as fanciful and speculative. Each of the Respondents is or was a Councillor. The Respondent, Mr. Gadwa was for many years the Chief of this First Nation. In my view, they are knowledgeable and sophisticated leaders in their community. There is no termination date in the November 10 Order; moreover, nothing in it suggests there would be a termination date in it. This argument makes little sense given that the reason behind making the November 10 Order was to continue the October 31 Order of Justice Zinn whish was set to expire in a few days: to make it "permanent" that is, so that it would not expire *unlike* the Order made by Justice Zinn.

[54] The Respondents further submit, generally, that "although certain actions were performed which breached the November 10, 2017 Order, these actions were not done to intentionally contravene the Order." In my view this submission may be relevant to sentence, but does not rebut the general presumption that a person intends the reasonable and natural consequences of his or her actions. In this connection I note as well that it is not necessary that an alleged contemnor intended to disobey the order: *Burberry Ltd. v. Ramjaun*, 2016 FC 1188, at paragraph 19, and see *ASICS Corp. v. 9153-2267 Quebec Inc.*, 2017 FC 5, at paragraph 33, in which it is stated: "[T]here is no additional requirement to establish 'contumacious' intent, that is to say, an

intention to disobey, in the sense of desiring or knowingly choosing to disobey the order or judgment in question.”

[55] I find beyond a reasonable doubt that the Respondents had the necessary *mens rea* and acted intentionally in respect of the breaches of the November 10 Order found herein.

[56] To reiterate, on the evidence, I find beyond a reasonable doubt that all four Respondents had actual personal knowledge of the November 10 Order.

B. *Was there contempt – i.e., breach of the November 10 Order by either of the Respondents?*

[57] This aspect of contempt must be established beyond a reasonable doubt in the case of each Respondent. I have concluded beyond reasonable doubt that each of the Respondents breached the November 10 Order, for the reasons set out below.

(1) Mr. Gadwa

(a) *Signing the false BCR*

[58] While Mr. Gadwa was reinstated as Councillor by Justice Strickland, whose decision of May 31, 2016 was upheld by the Federal Court of Appeal on October 4, 2017, the fact remains he was removed as Councillor by a unanimous decision of Council dated July 7, 2017. He did not appeal that decision.

[59] Even if he succeeds in his argument that he was Councillor because of the change in position of some members of Council, which I do not accept, the fact remains Mr. Gadwa was in breach of the Order of Justice Lafrenière dated November 10, 2017, by signing this BCR.

[60] In post-hearing submissions, counsel for the Respondents, fairly in my view, conceded that: “Mr. Gadwa continued to hold himself out as a councillor at a November 29, 2017 meeting and a January 31, 2018 meeting.” Mr. Gadwa’s counsel submits this demonstrates her client’s misunderstanding of the November 10 Order’s termination date which was not fixed. I am unable to accept this defence because it is entirely speculative in so far as Mr. Gadwa is concerned.

[61] I find beyond a reasonable doubt that the false BCR dated January 31, 2017, bears Mr. Gadwa’s signature on a line underneath which is printed the word “Councillor.” This BCR is on an official Indian and Northern Affairs Canada BCR form. It is Exhibit F to the affidavit of William John referred to in paragraph 1(b) of Justice Martineau’s Show Cause Order. The evidence that it is Mr. Gadwa’s signature was confirmed by many knowledgeable witnesses at the hearing. I find that by signing the false BCR, Mr. Gadwa unlawfully held himself out to the band members as if he were a Councillor of Kehewin, which he was not. On these bases, I find, beyond a reasonable doubt, that Mr. Gadwa is in contempt of paragraph 1(a) of the November 10 Order.

[62] I find beyond a reasonable doubt that Mr. Gadwa also breached paragraph 1(b) of the November 10 Order by acting as if he was a Councillor in signing the false BCR, dated January 31, 2018. I emphasize that he signed on a line beneath which is printed the word “Councillor.” This BCR is on an official Indian and Northern Affairs Canada BCR form.

(b) *Signing the Notice Document*

[63] I am also satisfied beyond a reasonable doubt that Mr. Gadwa breached paragraphs 1(a) and (b) of the November 10 Order by signing the Notice Document entitled “To: Kehewin Membership RE: General Election,” being Exhibit E to the affidavit of William John referred to in paragraph 1(b) of Justice Martineau’s Show Cause Order. This Notice Document purports to set a Nomination Date of March 14, 2018, and set a date for the Election for Chief.

[64] I find beyond a reasonable doubt that this Notice Document bears Mr. Gadwa’s signature; this was confirmed by witnesses at the hearing who recognized Mr. Gadwa’s signature. While not dated, it appears it was signed on or about January 31, 2018, along with the purported BCR of the same date.

[65] Mr. Gadwa signed this Notice Document which described all the signatories as being part of “Kehewin Leadership.” While on its face it is not established beyond reasonable doubt that the expression “Kewehin Leadership” exclusively applies to Chief and Councillors, I must also consider the contents of the Notice Document. In this respect, I find, beyond reasonable doubt that the actions purportedly taken by the Notice Document, namely the calling of and setting dates for an election, are exclusively reserved for the Council of this First Nation. I therefore find beyond a reasonable doubt that Mr. Gadwa breached paragraph 1(a) of the November 10 Order by signing the Notice Document and that by doing so he was “holding himself out to the public as if he were a Councillor.” I note that in the November 10 Order, “public” is defined to include band members, as quoted at paragraph 16 above.

[66] As to paragraph 1(b) of the November 10 Order, I am also satisfied beyond a reasonable doubt that by signing the Notice Document Mr. Gadwa "acted as if he were a Councillor." I have come to this conclusion beyond a reasonable doubt for the reasons set out in the preceding paragraph.

(c) *Annual General Meeting of the Tribal Chiefs' Child and Family Services East Society*

[67] There was uncontested evidence that Mr. Gadwa attended the Annual General Meeting of the Tribal Chiefs' Child and Family Services East Society on November 29, 2017. The evidence was also that only Chiefs and Councillors were entitled to vote at this meeting. Both Councillors Trevor and William John testified they saw Mr. Gadwa vote on decisions taken at this meeting. Councillor Trevor John testified that when he asked Mr. Gadwa at that Annual General Meeting if he was attending as an Elder or a Councillor, Mr. Gadwa's only response was a nervous laugh. I am asked to find beyond a reasonable doubt that in doing so Mr. Gadwa breached the November 10 Order, in that paragraph 1(a) of the November 10 Order prohibits Mr. Gadwa from "holding himself out to the public as if he were a Councillor of the Kehewin Cree Nation." On the evidence, I find beyond a reasonable doubt that Mr. Gadwa held himself out as a Councillor and thereby breached paragraph 1(a) of the November 10 Order by voting at the Annual General Meeting of the Tribal Chiefs' Child and Family Services East Society on November 29, 2017.

(d) *Summary – re Mr. 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) Councillors Badger, Watchmaker and Mountain

[69] Paragraph 4(b) of the November 10 Order forbids Councillors Badger, Mountain and Watchmaker from "attending any Council Meeting" other than regular 9:00 AM Tuesday meetings, unless a special or emergency meeting is called with particular formalities. Paragraph 4(a) of the November 10 Order prohibits the same Respondents from likewise "calling Council meetings."

[70] Therefore, a focus of this inquiry is the meeting of January 31, 2018, which I find was neither a special nor an emergency meeting; this is not disputed.

(a) *Attending unauthorized Council Meetings*

(i) The false BCR

[71] I find beyond a reasonable doubt that each of Councillors Badger, Mountain and Watchmaker breached paragraph 4(b) of the November 10 Order by signing the purported but false BCR dated January 31, 2018, just discussed in respect of Mr. Gadwa. Councillors Badger, Mountain and Watchmaker signed the BCR on a Department of Indian and Northern Affairs Canada form. Their signatures appear on lines under which the word "Councillor" is pre-printed.

[72] The signatures of these three Councillors were proved by the evidence led at the hearing. Their signatures were identified by those with reason to know what their respective signatures looked like, including other signing officers. While some doubt was raised with respect to Councillor Badger's signature on the Notice Document, but not on the BCR, Councillor Trevor John, who grew up with Councillor Badger identified it as Councillor Badger's signature. Moreover, Councillor Badger in cross-examination admitted it was his signature.

[73] In my view, in signing the purported but false BCR, Councillors Badger, Mountain and Watchmaker demonstrated that they attended a Council Meeting. I can see no other reasonable construction of them jointly signing a BCR to that effect, and doing so on an official Indian and Northern Affairs Canada form. Thus, in signing the BCR, each breached paragraph 4(b) of the November 10 Order in that each of Councillors Badger, Mountain and Watchmaker attended a Council Meeting they were prohibited to attend.

(b) *The Notice Document*

[74] I am also persuaded beyond a reasonable doubt that Councillors Badger, Mountain and Watchmaker violated paragraph 4(b) by signing the Notice Document in that they attended an unauthorized Council Meeting to do so. While on its face, it is not established that the expression "Kehewin Leadership" exclusively applies to Chief and Councillors, I must consider the contents of the Notice Document itself. In this respect, I find beyond a reasonable doubt that the actions purportedly taken and described by the Notice Document, namely the calling of and setting dates for an election, are exclusively reserved for the Council of this First Nation.

[75] It is obvious that by getting together and signing the false Notice Document, Councillors Badger, Mountain and Watchmaker were attending a Council Meeting.

[76] In my view, by signing the purported Notice Document, as was the case with the BCR, Councillors Badger, Mountain and Watchmaker demonstrated they had attended a Council Meeting. I can see no other reasonable construction of their joint signing of the Notice Document to that effect, and doing so on an official Indian and Northern Affairs Canada form. Thus, in signing the Notice Document each breached paragraph 4(b) of the November 10 Order in that each of Councillors Badger, Mountain and Watchmaker attended a Council Meeting that they were prohibited to attend.

[77] I appreciate and find that there was no Council Meeting *properly* called for January 31, 2018. However, all four Respondents including Councillors Badger, Mountain and Watchmaker signed the BCR, calling a nomination meeting for candidates for Council, an early general election for Council and an early general election for Chief. On this evidence, I find beyond a reasonable doubt that Councillors Badger, Mountain and Watchmaker attended a meeting at which, at the very least, they signed the BCR. They cannot rely on the fact there was no properly called Council Meeting to avoid the consequences of having attended an improperly called meeting at which they signed a false BCR.

(c) *Calling unauthorized Council Meetings*

[78] I am not satisfied beyond a reasonable doubt that either Councillors Badger, Mountain or Watchmaker breached paragraph 4(a) of the November 10 Order in having called an irregular

Council Meeting. The evidence does not establish to my satisfaction who called the meeting evidenced by the false BCR.

[79] It should be noted that the Community Information Meeting of January 31, 2018, appears to have been called after Court-assisted mediation earlier that month. Naturally, no wrongdoing arose from attending that meeting.

(d) *Summary – re Councillors Badger, Watchmaker and 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. *Mitigating Factors*

[81] The Respondents in their post-hearing submissions noted several "Mitigating Factors." Some repeat arguments already considered above, namely lack of understanding of the November 10 Order. Others refer to the ongoing and multiplication of litigation between these two groups of parties, without apparent end in sight. With respect, some of these submissions are not properly before the Court at this time because they speak to sentence. As discussed at the hearing, sentencing submissions will be the subject of an additional hearing in Edmonton to be scheduled by the Judicial Coordinator, unless the parties wish to rely on the record and written submissions.

[82] With respect to the litigation between the two sides, this is a case managed proceeding by Order of the Chief Justice of this Court. I will draw these Reasons to the attention of the Case Management Judge for consideration.

JUDGMENT in T-1608-17

THIS COURT'S JUDGMENT is that:

1. The Respondent Gadwa is in contempt of the November 10, 2017 Order of this Court in that he separately breached both paragraphs 1(a) and 1(b) of the said Order by signing the false Band Council Resolution dated January 31, 2018, being Exhibit F of the affidavit of William John referred to in Justice Martineau's Show Cause Order of March 19, 2018 at paragraph 1(b).
2. Mr. Gadwa is in contempt of the November 10, 2017 Order of this Court in that he separately breached both paragraphs 1(a) and 1(b) of the said Order by signing the Notice Document dated January 31, 2018, being Exhibit E of the affidavit of William John referred to in Justice Martineau's Show Cause Order of March 19, 2018 at paragraph 1(b).
3. Mr. Gadwa is in contempt of the November 10, 2017 Order of this Court in that he breached paragraph 1(a) of the said Order in voting at the Annual General Meeting of the Tribal Chiefs' Child and Family Services East Society on November 29, 2017.
4. The Respondent Badger is in contempt of the November 10, 2017 Order of this Court in that he breached paragraph 4(b) of the November 10 Order in attending a false Council Meeting at which he signed the false BCR being Exhibit F of the affidavit of William John referred to in Justice Martineau's Show Cause Order of March 19, 2018 at paragraph 1(b).
5. The Respondent Badger is in contempt of the November 10, 2017 Order of this Court in that he breached paragraph 4(b) of the November 10 Order in attending a false Council Meeting at which he signed the Notice Document being Exhibit E of the

affidavit of William John referred to in Justice Martineau's Show Cause Order of March 19, 2018 at paragraph 1(b).

6. The Respondent Mountain is in contempt of the November 10, 2017 Order of this Court in that he breached paragraph 4(b) of the November 10 Order in attending a false Council Meeting at which he signed the false BCR being Exhibit F of the affidavit of William John referred to in Justice Martineau's Show Cause Order of March 19, 2018 at paragraph 1(b).
7. The Respondent Mountain is in contempt of the November 10, 2017 Order of this Court in that he breached paragraph 4(b) of the November 10 Order in attending a false Council Meeting at which he signed the Notice Document being Exhibit E of the affidavit of William John referred to in Justice Martineau's Show Cause Order of March 19, 2018 at paragraph 1(b).
8. The Respondent Watchmaker is in contempt of the November 10, 2017 Order of this Court in that he breached paragraph 4(b) of the November 10 Order in attending a false Council Meeting at which he signed the false BCR being Exhibit F of the affidavit of William John referred to in Justice Martineau's Show Cause Order of March 19, 2018 at paragraph 1(b).
9. The Respondent Watchmaker is in contempt of the November 10, 2017 Order of this Court in that he breached paragraph 4(b) of the November 10 Order in attending a false Council Meeting at which he signed the Notice Document being Exhibit E of the affidavit of William John referred to in Justice Martineau's Show Cause Order of March 19, 2018 at paragraph 1(b).
10. A copy of these Reasons are to be provided to the Case Management Judge.

11. The Judicial Coordinator is asked to set a hearing date for submissions on sentence in this matter unless the parties wish to rely on the record and written submissions.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1608-17
STYLE OF CAUSE:	BRENDA JOLY, WILLIAM JOHN AND TREVOR JOHN v GORDAN GADWA, BENJAMIN MOUNTAIN AND VERNON WATCHMAKER
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	JUNE 13, 2018
JUDGMENT AND REASONS:	BROWN J.
DATED:	JULY 17, 2018

APPEARANCES:

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Loretta J. Pete Lambert	FOR THE RESPONDENTS

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