

Federal Court



Cour fédérale

**Date: 20230711**

**Dockets: T-2536-22  
T-2546-22**

**Citation: 2023 FC 940**

**Ottawa, Ontario, July 11, 2023**

**PRESENT: The Honourable Madam Justice Heneghan**

**BETWEEN:**

**TERRINA BELLEGARDE AND JOELLEN HAYWAHE**

**Applicants**

**and**

**SCOTT EASHAPPIE, SHAWN SPENCER, TAMARA THOMSON,  
AND CARRY THE KETTLE FIRST NATION**

**Respondents in the Underlying Application**

**SCOTT EASHAPPIE, SHAWN SPENCER,  
LORETTA PETE LAMBERT, BRADY  
O'WATCH, MORRIS PASAP, TONI  
ADAMS, TAMARA THOMSON, AND  
LUCY MUSQUA**

**Respondents in the Motion**

**REASONS AND ORDER**

[1] By a Notice of Motion filed on July 5, 2023, the Respondents seek an Order adjourning the “Show Cause Hearing” scheduled to be heard by Zoom videoconferencing on July 25 and July 26, 2023, pursuant to a “Show Cause” Order issued by Associate Judge Coughlan on June

23, 2023. The “Show Cause” Order was made pursuant to Rule 467 of the *Federal Courts Rules*, SOR/98-106 (the “Rules”), relative to the Order of Justice Grammond made on January 27, 2023.

[2] In that Order, Justice Grammond granted the Applicants’ motion for interim relief and stayed the removal of the Applicants from Council, on January 27, 2023.

[3] The Respondents also seek an Order that the “Show Cause Hearing” proceed in-person, preferably in the premises of the Court of King’s Bench in Regina, Saskatchewan, although a hearing in Saskatoon would be acceptable to them.

[4] The Respondents filed the affidavit of Ms. Tania Prettyshield, Band Manager with the Respondent, Carry the Kettle First Nation, in support of their Motion.

[5] Due to the late filing of the Respondents’ Notice of Motion, by an Oral Direction issued on July 7, 2023, the Applicants were dispensed with the requirement to file a responding motion record and were granted leave to make submissions at the hearing of the Motion. However, Counsel for the Applicants subsequently filed a responding motion record, including an affidavit from Ms. Terrina Bellegarde and written submissions, opposing the Respondents’ Motion.

[6] The Respondents seek an adjournment principally on the grounds that they were not consulted about the hearing date set by Associate Judge Coughlan and that two of the lawyers on record in this matter, Ms. Sonia Eggerman and Mr. Aziz Aboudheir, will be unavailable on July

25 and July 26, 2023 because they will be travelling. They say that the third lawyer on the record, Mr. Travis Smith, is a junior associate who “is not in a position to appear independently” on behalf of the Respondents.

[7] The Respondents also submit that there is no urgency about the “Show Cause Hearing”, relying in that regard upon the words of Associate Judge Tabib in her Oral Direction of March 3, 2023, when she declined to set down the Applicants’ motion for March 8, 2023. In that motion, the Applicants’ sought an urgent “Show Cause Hearing Order”, pursuant to Rule 467.

[8] The Respondents seek an in-person hearing on the grounds that the “Show Cause Hearing”, with its potential to impose near-criminal liability, is a matter of great importance to the membership of the Carry the Kettle First Nation, that senior members and Elders of the Carry the Kettle First Nation are interested in observing and they may lack access to and “proficiency” with electronic tools.

[9] Ms. Prettyshield offers the opinion that an in-person hearing, with simultaneous broadcasting, would “facilitate” greater attendance at the hearing.

[10] The Respondents included their letter of June 29, 2023, in their motion record as a “stand alone” document. It is not an exhibit to an affidavit. This letter is the Respondents’ informal request to the Court for an adjournment of the “Show Cause Hearing” that is scheduled for July 25 and July 26, 2023, and for an in-person hearing in the Court of King’s Bench in Regina, Saskatchewan.

[11] In this letter, the Respondents set out their reasons for requesting an adjournment. Among other things, those reasons include the lack of consultation about the hearing dates; that two lawyers on the record for the Respondents, that is Ms. Eggerman and Mr. Aboudheir are travelling on the hearing dates; that the Respondents prefer to appear in person; and that observation of the hearing by members of the First Nation, the public and the media would “be otherwise compromised” by a virtual hearing.

[12] In their letter of June 29, 2023, Counsel for the Respondents opined that the conduct of an in-person hearing in Edmonton would “frustrate” the ability of members to attend in person.

[13] The Respondents also included certain email exchanges with Ms. Orlagh O’Kelly, Counsel for the Applicants, on June 29, 2023, advising of their intention to seek an adjournment of the July 25 hearing and requesting her consent to same. Again, the emails were included as “stand alone” documents, unattached to any affidavit.

[14] The Respondents refer to the “Update #9 and Consolidated COVID-19 Practice Direction (October 24, 2022)” to argue that presumptively, any hearing of 3 hours duration or longer should proceed in person.

[15] The Respondents rely on Rules 36 and 3, of the Rules, in seeking an adjournment and an in-person hearing in Saskatchewan.

[16] The Applicants oppose both the request for an adjournment and the request for an in-person hearing in Saskatchewan. They submit that the matter should proceed as scheduled. While agreeable to an in-person hearing in Edmonton, Alberta, they do not consent to such a hearing in Saskatchewan, citing the related expenses.

[17] The first matter for consideration is the Respondents' request for an adjournment.

[18] Rule 36 applies to adjournments and provides as follows:

**Adjournment**

**36 (1)** A hearing may be adjourned by the Court from time to time on such terms as the Court considers just.

**Adjournment to fixed day**

**(2)** Where a hearing is adjourned to a fixed day, a party who appeared at the hearing is deemed to have had notice of the adjournment.

**Notice dispensed with**

**(3)** Where a party has failed to appear at a hearing, that party need not be served with notice of an adjournment of the hearing.

**Ajournement**

**36 (1)** La Cour peut ajourner une audience selon les modalités qu'elle juge équitables.

**Date déterminée**

**(2)** Lorsqu'une audience est ajournée pour reprendre à une date déterminée, toutes les parties qui ont comparu à l'audience sont réputées en avoir été avisées.

**Dispense de signification**

**(3)** Nul n'est tenu de donner avis de l'ajournement d'une audience à une partie qui n'a pas comparu à celle-ci.

[19] The Respondents initially submitted an informal request for an adjournment, by way of a letter dated June 29, 2023. By a Direction issued on June 30, 2023, Associate Judge Coughlan directed the Respondents to file a motion. Rule 36 requires that a motion be filed, not a letter.

[20] The Respondents are represented by Counsel. Counsel are “deemed” to know the Rules.

[21] Adjournment of a matter set for a fixed date requires the exercise of discretion by a Motions judge. Adjournments will only be granted in exceptional circumstances; see the decision in *Sawridge Band v. Canada*, [2007] 2 F.C.R. 773 (F.C.).

[22] Factors to be considered in adjourning a fixed-date hearing include prejudice to one or more parties; prejudice to the Court in losing time and personnel, including a judge who had been assigned to the hearing; and the public interest in the timely conclusion of litigation and use of court facilities.

[23] In my opinion, all three factors are met here.

[24] The “Show Cause Hearing” is an interlocutory step in the conduct of the application for judicial review. Loss of the two days set for the hearing will prejudice both the Applicants and the administration of the Court, in terms of scheduling its business.

[25] Even a virtual hearing requires the work of court personnel such as registry officers and in the case of a virtual hearing for a large audience, the participation of IT personnel.

[26] The lack of consultation by the Court in setting down the hearing for July 25 and July 26, 2023, is not fatal. According to an email dated June 29, 2023, from Mr. Travis Smith to Ms.

Orlagh O’Kelly, included in the Respondents’ Motion Record, the Respondents did not intend to appeal the June 23, 2023 Order of Associate Judge Coughlan.

[27] Travel plans of Ms. Eggerman and Mr. Aboudheir for July 25 and July 26, 2023 are not a sufficient reason to adjourn the hearing. There are no details about those travel plans. Lawyers sometimes need to adjust personal plans to discharge obligations to their clients. There was nothing said about travel by two of the lawyers until the Respondents submitted a letter on June 29, 2023.

[28] According to the website for MLT Aikins, the law firm representing the Respondents, is a “Western Canada” law firm with offices in Winnipeg, Regina, Saskatoon, Edmonton, Calgary, and Vancouver, staffed by more than 300 lawyers.

[29] In these circumstances, it seems to me that other lawyers can step in to handle the “Show Cause Hearing” if Ms. Eggerman and Mr. Abdouheir are unavailable.

[30] Counsel for the Applicants works in a small firm. While that status does not relieve her from compliance with the Rules and attendance for a fixed date hearing, she is subject to different constraints than Counsel for the Respondents.

[31] The Court operates on a fixed schedule. Adjourning the hearing dates of July 25 and July 26, 2023, will interfere with the operations of the Court. That is the most significant factor, in my opinion, for denying the request for an adjournment.

[32] Another important factor is the conduct of the Respondents since the issuance of the Order by Justice Grammond on January 27, 2023. There is no evidence that the Respondents have purged their contempt. Rather, according to the Reasons of Associate Judge Coughlan in her Order dated June 23, 2023, the alleged contemptuous conduct continues.

[33] The Motion for an adjournment is denied.

[34] I turn now to the request for an in-person hearing, preferably in Regina and alternatively, in Saskatoon. In this regard, the Respondents purport to rely on Rule 3 of the Rules which provides as follows:

**General principle**

**3** These Rules shall be interpreted and applied

**(a)** so as to secure the just, most expeditious and least expensive outcome of every proceeding; and

**(b)** with consideration being given to the principle of proportionality, including consideration of the proceeding's complexity, the importance of the issues involved and the amount in dispute.

**Principe général**

**3** Les présentes règles sont interprétées et appliquées :

**a)** de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible;

**b)** compte tenu du principe de proportionnalité, notamment de la complexité de l'instance ainsi que de l'importance des questions et de la somme en litige.



[35] The Covid-19 Practice Direction is a “Direction”. It is in the nature of information to the public, including lawyers, about the conduct of the business of the Court. It is not immutable. Directions have changed over time, and will continue to do so.

[36] The Practice Direction is subject to the power of the Court to manage its business. The “business” of the Court is to hear and decide the matters brought before it.

[37] The Court, as the result of the Covid-19 pandemic, has adapted the manner in which it operates, supplementing the “traditional”, by technology.

[38] The Practice Direction, relied on by the Respondents, addressed both the use of technology and the return to the Court to in-person hearings.

[39] The Court held its first “virtual” hearing by Zoom videoconference on April 14, 2020, in a motion in T-425-20.

[40] On September 7, 2021, the Court presided over the hearing of a motion by Zoom videoconference and Webinar with 8,000 registrants and more than 3,500 people observing the hearing. The lawyers were in Calgary, Ottawa, and Toronto; the Court was in St. John’s.

[41] There are other examples of how the Court handled contested motions and trials, by Zoom videoconference, during the early years of the Covid-19 Pandemic and resulting shutdowns.

[42] The Court operates under the “open Court” principle. It did so even in the early days of the Pandemic, with access granted to the public to attend and observe, either by teleconference or by Zoom videoconference.

[43] The membership of the Carry the Kettle First Nation is welcome to attend the “Show Cause Hearing”. The media are welcome to attend. Attendance can be facilitated by technology.

[44] A desire to attend in person is not equivalent to a “right” for personal attendance.

[45] Primarily, the Court must provide the opportunity to parties to pursue their litigation. The manner in which that happens is variable.

[46] Associate Judge Coughlan set the matter down for a virtual hearing, subject to any directions from the presiding judge. It is possible that the presiding judge may allow an in-person hearing but considering the location of the parties, the means of the parties, the large law firm with a presence in both Edmonton and Regina, the nature of the hearing where the burden lies upon the Applicants to prove the alleged contempt upon the criminal burden of proof – which means that the Applicants will be witnesses. The overwhelming convenience lies in favour of proceeding with a virtual hearing.

[47] A virtual hearing by webinar or webcast will best achieve the objectives of Rule 3.

[48] That manner of proceeding will allow many people to “attend”, virtually. Members of the Carry the Kettle First Nation and of the media have no active role in the “Show Cause Hearing”, they will be silent observers. They can adequately do that by logging into a Zoom videoconference or Webinar.

[49] The Applicants ask for costs upon this motion, in the amount of \$2,500.00, plus the disbursements related to this motion, in any event of the cause, payable forthwith.

[50] Pursuant to Rule 400(1) of the Rules, costs lie within the absolute discretion of the Court.

[51] I am satisfied that such an order for costs should be made.

[52] I note that a costs order made on January 19, 2023, against the Respondents in the underlying Application, remains outstanding and unpaid.

[53] Parties are entitled to representation by counsel of their choice. Counsel are professionally obliged to follow the instructions of the client. However, lawyers must be aware of their role as officers of the Court and avoid conduct that impedes the timely and fair conduct of litigation, including action upon instructions that verge on abuse.

[54] In the result, the motion will be dismissed, with costs payable forthwith to the Applicants in the amount of \$2,500.00, plus the disbursements related to this motion, in any event of the cause, pursuant to the discretion provided by Rule 400(1) of the Rules.

**ORDER in T-2536-22 and T-2546-22**

**THIS COURT ORDERS** that the motion is dismissed, with costs payable forthwith to the Applicants in the amount of \$2,500.00, plus the disbursements related to this motion, in any event of the cause, pursuant to the discretion provided by Rule 400(1) of the Rules.

“E. Heneghan”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKETS:** T-2536-22 AND T-2546-22

**STYLE OF CAUSE:** TERRINA BELLEGARDE AND JOELLEN  
HAYWAHE v. SCOTT EASHAPPIE, SHAWN  
SPENCER, TAMARA THOMSON, AND CARRY THE  
KETTLE FIRST NATION

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE

**DATE OF HEARING:** JULY 10, 2023

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

**DATED:** JULY 11, 2023

**APPEARANCES:**

Orlagh O'Kelly FOR THE APPLICANTS

Sonia Eggerman FOR THE RESPONDENTS  
Aziz Aboudheir

**SOLICITORS OF RECORD:**

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