SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: *Sleigh v. McLean*, 2017 NSSC 28

Date: 2017-01-30
Docket: SFHMCA-081857
Registry: Halifax

Between:

Andrew Sleigh

Applicant

v.

Roxanne McLean

Respondent

Judge:	The Honourable Justice C. LouAnn Chiasson
Heard:	October 27, 2016, in Halifax, Nova Scotia
Written Release:	February 2, 2017
Counsel:	Richard Bureau for the Applicant Gordon Gervais for the Respondent

By the Court:

[1] Mr. Sleigh filed an application on June 25, 2015. He sought to enforce the Order of Justice Gass issued December 17, 2014, and sought a finding that Ms. MacLean was in contempt of that Order. There were numerous issues which delayed the hearing of the application for a finding of contempt until October 27, 2016. Written submissions were forwarded by counsel in November, 2016.

[2] There are two counts before the court related to the contempt charge:

[3] **Count One**: Ms. MacLean is alleged to have breached paragraph 7 of the Order of Justice Gass which states:

> "The parties shall keep each other informed of the address and contact information in which the child is residing or staying while in their care."

[4] **Count Two**: Ms. MacLean is alleged to have breached paragraph 18 of the Order of Justice Gass which states:

> "Mr. Sleigh shall have videoconferencing with the child every Sunday from 6:00 p.m. to 7:00 p.m. eastern time and every Wednesday from 6:00 to 7:00 pm. Eastern time and such other videoconferencing as may be arranged from time to time between the parties. Attempts of such additional videoconferencing shall not require specific notice."

[5] Ms. MacLean was advised at various pre-trial conferences dealing with this matter that she had the right to remain silent as a contempt proceeding was a quasi-criminal process. She advised through her former counsel, Mr. Birkin Culp, that she wished to waive her right to remain silent and that she intended to make representations to the court. Four affidavits were filed on her behalf but Ms. MacLean did not make herself available for cross examination, either in person or by way of video conferencing.

[6] The court permitted Ms. MacLean to attend by video conference on April 4, 2016, and June 2, 2016. On both occasions Ms. MacLean could not properly participate by video conferencing as it had not been arranged by her or her counsel and the matter was adjourned. No request to participate by video conference was received on behalf of Ms. MacLean for the adjourned date of October 27, 2016.

[7] On October 27, 2016, Mr. Gordon Gervais, counsel for Ms. MacLean appeared on her behalf. He advised that Ms. MacLean would not be present for cross examination on her affidavits. Mr. Gervais indicated that Ms. MacLean would not be participating in the proceeding either in person or by any other means. At the commencement of the hearing Mr. Gervais advised the court that Ms. MacLean did not contest that she had not provided her address to Mr. Sleigh as directed in paragraph 7 of the Order.

[8] He stated:

> "In all fairness, there has to be a concession that paragraph 7 was not complied with at the date of the commencement of the application. That gets us down to the one count."

ISSUES:

[9] Is Ms. MacLean in contempt of the Order of Justice Gass issued December 17, 2014, for failing to provide her address and contact information?

[10] Is Ms. MacLean in contempt of the Order of Justice Gass issued December 17, 2014, for failing to ensure that the videoconferencing as set out in paragraph 18 of the Order occurred at the times specified?

LAW & DISCUSSION:

[11] Contempt applications are permissible pursuant to Civil Procedure Rule 89. They differ from other civil matters before the court as they are quasi-criminal in nature. The burden is proof beyond a reasonable doubt and the alleged contemnor has the right to remain silent.

[12] Civil Procedure Rule 89.09 confirms that:

> "A person against whom a contempt proceeding is started is entitled to the same disclosure, and to exercise the same right to remain silent, as a person against whom an information is laid under the Criminal Code."

[13] Ms. MacLean was advised of her right to remain silent. She chose to retain counsel to assist her- first Mr. Culp and later she retained Mr. Gervais. Mr.

Gervais was counsel of record at the time of the hearing on October 27, 2016, and remains Ms. MacLean's counsel of record for this proceeding. There has been no Notice of Intention to Act in Person nor has there been any Motion to Withdraw as solicitor of record pursuant to Civil Procedure Rule 33.11.

[14] The law related to contempt applications has been reviewed by our courts in a number of cases. Justice Saunders writing on behalf of the Court of Appeal in the case of *Godin v. Godin* stated in part at paragraph 47:

> … Many of these [fundamental principals of contempt] were explored by Justice Farrar in Soper v. Gaudet, 2011 NSCA 11 (CanLII). From that and the jurisprudence cited therein, we know (and I am here extracting those principles which are especially important in this case) that:
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> 1. finding a party in contempt falls within a trial judge's discretion;
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> 2. on appeal, the standard of review applied to the exercise of that discretion is one of reasonableness.
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> 3. we are not to substitute our own view for the judge's discretion unless we conclude that the judge erred in law; misapprehended material evidence; or produced a result which is obviously unjust;
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> 4. notwithstanding its civil nature, contempt of court is quasi-criminal;
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> 5. the standard of proof in contempt proceedings is proof beyond a reasonable doubt;
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> 6. the party alleging contempt has the burden of proof;
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> 7. in a case of civil contempt the following elements must be established beyond a reasonable doubt:
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> (i) the terms of the order must be clear and unambiguous;
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> (ii) proper notice must be given to the contemnor of the terms of the order;
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> (iii) there must be clear proof that the contemnor intentionally committed an act which is in fact prohibited by the terms of the order, and
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> (iv) mens rea must be proven which, in the context of civil contempt proceedings, means that while it is not necessary to prove a specific intent to bring the court into disrepute, flout a court order, or interfere with the due course of justice, it is essential to prove an intention to knowingly and wilfully do some act which is contrary to a court order."

[15] The element of *mens rea* was addressed by Justice Cromwell (J.A.) as he then was in the case of *TG Industries Ltd. v. Williams*, 2001 NSCA 105 (CanLII). At paragraph 7 of the decision he stated:

> "The core elements of civil contempt are knowledge of the order and the intentional commission of an act which is in fact prohibited by it. The required intention relates to the act itself, not to the disobedience; in other words, the intention to disobey, in the sense of desiring or knowingly choosing to obey the order, is not an essential element of civil contempt."

[16] In the case of *Godin, supra*, the court held at paragraph 70:

> [70] I fully appreciate the significance of the contempt power in a trial judge's arsenal as a ready means to maintain respect for the rule of law and to dispense even-handed justice to all parties. Nonetheless, it is a blunt instrument only to be wielded sparingly, in circumstances where no other sanction will do. Its penal consequences require a strict application of proper procedures. This critical balance is aptly described by Melissa N. MacKovski in Administering Justice: The Law of Civil Contempt, [2009] Annual Review of Civil Litigation 80:
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> > ... civil contempt may attract severe consequences. Court orders are meant to be followed and breaches in a civil context may result in criminal penalties. The contempt power remains an important tool in ensuring compliance with court orders which is fundamental to the rule of law and the fair and proper administration of justice. Without the ability to sanction for contempt, the dignity of the court and the integrity of the justice system are threatened. ... the use of the contempt power should be tempered and reserved for those cases where the breach is both serious and beyond a reasonable doubt. Otherwise the power itself risks being diluted. ....

[17] In the case of *Soper v. Gaudet* 2011 NSCA 11, the Court of Appeal overturned the finding of contempt. In that case the children continued to remain in the care of the Sopers and were not returned to Ms. Gaudet. The court found that the Order was not clear as to who was to transport the children at the conclusion of the Sopers' time. The Court of Appeal also found no evidence that the Sopers restrained the children from leaving their care nor that they encouraged the children to remain with them. The court found that the apparent lack of clarity in the Order resulted in the court overturning the finding of contempt against the Sopers.

[18] As such, the provisions of the Order which have been alleged to have been breached must be defined with precision so as to clearly define the parties' rights and responsibilities. In the absence of this precision, a contempt finding may not be sustainable. This direction must be given a contextual interpretation.

[19] In the context of family proceedings the level of precision related to custody and access orders must not result in voluminous orders to address every contingency possible. The reality is that this would be untenable in many cases and would frustrate the parties' understanding of the court's direction. This is a result that is counter to the purpose of clarity and should be avoided. A balancing of these objectives must therefore occur when an order is drafted.

[20] Although contempt is to be used sparingly, it must be used when circumstances dictate. People coming before this court must have some assurance that Orders respecting custody and access will be followed, and if not, that there will be consequences. There are administrative mechanisms in place for breaches related to financial provisions. Surely, the court must be able to enforce custody and access orders with the same degree of diligence.

[21] The court must also be mindful of the practical reality of families coming before us. There are finite resources- both financial and emotional. We must not be distracted from the paramount consideration of all custody and access matters- the best interests of the children. In certain circumstances, the best interests of the children will only be served when all parties know and respect the provisions of a court order. If the court order needs to be revised because of a material change in circumstances then the parties should receive a clear message that the way to achieve this is through further agreement of the parties or court order- not unilateral action in clear defiance of a court order.

[22] In reaching my decision in this matter I have also reviewed the more recent cases addressing issues arising when contempt is alleged including: Carey v. Laiken (2015), 2015 SCC 17, *Armoyan v. Armoyan*, 2015 NSSC 174; *Power v. Power* NSSC 258, and *G.(R.) v. L.(S.)* 2016 PESC 1.

FINDINGS:

[23] As to the first count, I find Ms. MacLean in contempt of the Order as it relates to paragraph 7 of the Order and specifically find that Ms. MacLean failed to provide her address and contact information to Mr. Sleigh. Counsel on behalf of

Ms. MacLean admitted to this finding at the time of the hearing on October 27, 2016. Additionally, I am satisfied that Mr. Sleigh has met the evidentiary burden on him to prove the three elements of contempt beyond a reasonable doubt.

[24] I have taken into account the admission of Ms. MacLean's counsel, as well as the affidavits and viva voce testimony provided by Mr. Sleigh. In particular, I refer to the evidence of Mr. Sleigh as contained in the following affidavits:

(a) Exhibit #2, paragraph 2

(b) Exhibit #2, paragraph 3;

(c) Exhibit #3, paragraph 37;

(d) Exhibit #4, paragraph 38;

(e) Exhibit #4, paragraph 42;

(f) Exhibit #4, paragraph 43;

(g) Exhibit #4, paragraph 44; and

(h) Exhibit #4, paragraph 46;

[25] Ms. MacLean was aware of the terms of the Order.

[26] Paragraph 7 of the Order is clear and unambiguous.

[27] Ms. MacLean failed to provide her address and contact information to Mr. Sleigh.

[28] Submissions on behalf of Ms. MacLean (made on November 14, 2016) were that the breach of the order was a "technical one… without consequence or detriment to the Applicant. The breach has been purged." The breach has been proven and the submissions relate more to the penalty phase of the contempt proceeding rather than the hearing of the contempt application on its merits.

[29] As to the second count, I do not find Ms. MacLean in contempt of the Order as it relates to paragraph 18. The case of *Soper v. Gaudet* clearly highlights the court's obligation when reviewing such allegations of contempt to be aware of any lack of clarity in the Order. Although the Order was specific as to date and time of the videoconferencing, the provision did not specify who was responsible for initiating the videoconferencing, nor was it specific as to the provision of the

equipment to enable the videoconferencing to occur, nor was it specific as to which party was responsible to correct any lapse in videoconferencing related to malfunction or repair of equipment.

[30] Ms. MacLean's counsel indicated that the videoconferencing is a form of access and, as such, the cost of this access was to be borne by Mr. Sleigh. Videoconferencing is one form of access and the responsibility to pay for this form of access is Mr. Sleigh's responsibility.

[31] I do not find Ms. MacLean guilty of the second count of contempt.

[32] The hearing with respect to sentencing will be scheduled forthwith. Submissions regarding sentencing, if any, must be filed on or before February 23, 2017.

Chiasson, J.