QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2015 SKQB 259**

Date: **2015 08 31**
Docket: QBG 1530 of 2014
Judicial Centre: Saskatoon

BETWEEN:

ROBERT DOUCETTE, representing MÉTIS NATION - SASKATCHEWAN,

Plaintiff
(Applicant)

- and -

GERALD MORIN, HELEN JOHNSON, DARLENE McKAY, LENNARD MORIN, BILL KENNEDY, GLEN McCALLUM, LELA ARNOLD, MICHAEL BELL, CHESTER HERMAN, EARL COOK, and DEREK LANGAN, as members of the Provincial Métis Council of the Métis Nation Legislative Assembly, and the PROVINCIAL MÉTIS COUNCIL OF THE MÉTIS NATION LEGISLATIVE ASSEMPLY,

Defendants
(Respondents)

Counsel:

James E. Seibel — for the plaintiff (applicant)
Jay D. Watson — for the defendants (respondents)

FIAT
August 31, 2015

SCHERMAN J.

Introduction

[1] It has come to this. Métis battling Métis, each in the name and for the

purported good of Métis Nation – Saskatchewan [MNS]. Today's Métis battles do not pit muskets, Sharp and Winchester rifles against government troops, military carbines and Gatling guns. Instead, the field of battle consists of partisan politicking and strategic posturing reinforced with court proceedings, Métis against Métis. The weapons of choice are injunction applications and contempt proceedings. To some, this may seem civilized compared to the battles of 1885. The veneer of civility is thin.

[2] That this should be happening in the land of Batoche, the cultural and aspirational centre of the Métis people's struggles, surely dishonours the memory of Riel, Dumont and all their compatriots.

[3] Today's Métis wars have their genesis in political struggles to control MNS. The factions each claim the MNS Constitution and the path of righteousness are on their side. Communications between the warring Doucette and Morin factions routinely cite constitutional responsibilities and close with words of "thanks" to the other and the phrase "God bless you and your family". These words mask less cooperative sentiments.

[4] The MNS Constitution contemplates, indeed dictates, that the affairs of MNS are to be governed by democratic processes. The reality is that the Constitution and its democratic processes and ideals have been ignored and subverted for years. Now, when it appears too late to save MNS, the parties ask the Court to intervene and provide a judicial solution. It has become increasingly apparent that seeking judicial remedies is simply part of each faction's strategic arsenal and that whatever remedy the Court provides or refuses to provide will not address the fundamental problems.

[5] The powers of the Court and the tools or remedies it has to work with are ill suited to solve a political conflict where democratic processes are abandoned and viewed as irrelevant except as a tool to castigate one's opponents. It is not

surprising that the Court's attempts to provide guidance, through specific orders, have not resulted in peace within MNS.

[6] The application now before me is to find members of the Morin faction in contempt of court for failure to implement my most recent order of April 6, 2015. It is clear to me that my decision, on this specific matter, will in no way lead to peace within MNS. All I can do is decide this application, according to law.

The Background to the Contempt Application

[7] The applicant, Robert Doucette, president of MNS, asks that I find each of the respondents to be in contempt of court for what it says is willful contempt arising from their failure to comply with my order of April 6, 2015. He asks that I fine or commit the respondents to jail for this contempt. In addition, he asks that I order:

(a) the respondents, as members of the Provincial Métis Council [PMC], to meet by telephone and set a time and place for a meeting of the Métis Nation Legislative Assembly [MNLA] to be held on or before July 26, 2015; and

(b) solicitor-client costs of the application against the respondents personally.

[8] The background facts relating to this application are set forth in my decisions of December 22, 2014, and April 6, 2015, reported at 2014 SKQB 421 and 2015 SKQB 98 respectively. To recap briefly:

(a) April 2013 – The Morin faction was asking Robert Doucette to call meetings of the PMC with agenda items to include a review of the Executive's administration of the financial affairs of MNS.

Robert Doucette, president of MNS, refused to do so, taking the position that the authority to call meetings of the PMC and to set its agenda lay with him or the executive of the PMC. He was prepared to call meetings of the PMC only when and pursuant to terms and/or an agenda set by him.

(b) May 5, 2013 – Faced with the Doucette faction having control of the executive of the PMC and, from their perspective, making financial and other decisions without disclosure to or accounting to the PMC, the Morin faction convened a meeting of the board of directors of Métis Nation - Saskatchewan Secretariat Inc. [Secretariat], the corporate operating entity for MNS. Through the board of directors of the Secretariat, they passed banking resolutions placing control of financial matters in the hands of members of the Morin faction. They then sought an interlocutory injunction requiring the banks to honour their banking resolutions. Laing J. held in a June 28, 2013 decision (*Métis Nation (Saskatchewan Secretariat Inc.) v Royal Bank of Canada*, 2013 SKQB 257, 425 Sask R 77) that the requirements for such an injunction were not met and dismissed the Morin faction application for the requested injunction.

(c) September 2013 – The Doucette faction, acting pursuant to a petition and in the name of the Secretariat, purported to call a meeting of the MNLA. This MNLA, held on September 7 and 8, 2013, purported to suspend the members of the Morin faction from the PMC and made significant amendments to the Constitution. The Morin faction viewed this MNLA as being unlawfully held and brought a motion to quash the meeting and

any resolutions resulting from it. By a decision of March 20, 2014, Keene J. held that the MNLA was not properly held since, under the Constitution, only the PMC could call an MNLA. He held that the suspension of any members of the PMC and the amendments to the Constitution were nullities and of no effect.

(d) May 23, 2014 – Robert Doucette began calling for a PMC meeting with the sole agenda item of setting a date for an MNLA. The Morin faction was not prepared to agree to this, insisting on the right to decide the agenda and seeking financial and other disclosures regarding past actions of the President Robert Doucette and the executive they viewed as necessary to report on to an MNLA.

(e) November 2014 – On November 1, 2014, the Minister of Aboriginal Affairs and Northern Development Canada [the Minister] suspended any funding of MNS citing its failure to hold constitutionally-mandated legislative assemblies. Robert Doucette, as a representative of MNS, brought an application seeking a mandatory injunction from the Court requiring the PMC to schedule an MNLA.

(f) December 22, 2014 – On an application brought in the name of MNS, but effectively authorized by Doucette, I ordered, *inter alia,* that a PMC meeting be scheduled, with the first item on the agenda be the setting of a place and date for an MNLA. While in part granting the order sought by the Doucette faction, I made it clear that it was the majority of the PMC who were entitled to set the agenda for PMC meeting. At the request of both counsel,

I reflected on the need for all parties to adhere to the requirements of the Constitution and to principles of the democratic process. I counselled that in the democratic process, the majority has an obligation to deliberate, *i.e.* when majority positions are imposed that they do so in good faith and only after full and fair debate.

(g) January 17, 2015 – The PMC passed a motion to hold an MNLA in Yorkton, Saskatchewan, on September 11 to 13, 2015, created finance and MNLA committees and adjourned the PMC meeting to future dates.

(h) February 20, 2015 – Robert Doucette made an application to the Court for a mandatory injunction requiring the PMC to set the time and date for the MNLA before March 31, 2015, on the basis that the decision of the Morin faction members of the PMC to fix the dates of September 11 to 13, 2015, was not a good faith and appropriate decision given the urgent funding needs of MNS and the necessity of an MNLA as a step in restoring federal funding. The application was not heard until March 30, 2015.

(i) April 6, 2015 – For the reasons expressed in my decision of this date (*Métis Nation - Saskatchewan v Morin*, 2015 SKQB 98), I ordered that:

> [30] ...
>
> a) If PMC has not instructed locals to ensure their delegate selection is in place for a shortly to be called MNLA, they shall do so forthwith;
>
> b) Any remaining organizational and preparatory matters for an MNLA shall be concluded on or prior

> to May 9 so that the appropriate notice of an MNLA can issue by no later than May 9, 2015;
>
> c) The PMC shall schedule and give appropriate notice for an MNLA which shall take place on or before June 19, 2015; and
>
> d) If and to the extent that any of the above stated timeframes can be advanced to an earlier date, PMC shall do so.

(j) June 16, 2015 – By application returnable this date, Robert Doucette asks the Court to find the respondent members of the Morin faction in contempt of court by reason of their failure to comply with my order of April 6, 2015. He also seeks other relief. For various reasons, including a request of Robert Doucette to adjourn the hearing of the application to permit him to file additional affidavit material, the matter did not come on for hearing until July 10, 2015.

The Law of Contempt

[9] As I stated above, I operate under no delusion that my decision on this specific matter will lead to peace or even a temporary truce within the Métis Nation. All I can do is decide the present application according to law. I start by stating the law with respect of contempt proceedings.

1. The Objective of the Law of Contempt

[10] Contempt, in this context, does not have a literal meaning. Whether a party is contemptuous of a court's logic or conclusions is irrelevant. The concern of the law of contempt is not an offence to the judge in question, but rather that the orders of a court must be enforced lest the rule of law cease to operate. In *Everywoman's Health Society (1988) Victoria Drive Medical Clinic Ltd. v Bridges*

(1989), 61 DLR (4th) 154 at 157 (BCSC) [*Everywoman's Health Society* (BCSC)], Wood J. described the objective of the law of contempt as follows:

> ... The fragility of the rule of law is such that none of us who seek to enjoy its benefits can be permitted the occasional anarchical holiday from its mandate, no matter how compelling or how persuasive may be the cause that such anarchy seeks to advance. Furthermore it is only through the rule of law that any meaningful, lasting or effective change can be wrought in the law. Thus it is that by seeking to change the law by deliberately disobeying it you threaten the continued existence of the very instrument, indeed the only instrument through which you may eventually achieve the end you seek. Such conduct is not only illegal, it is completely self-defeating.

[11] In "Criminal Contempt Procedure: A Protection to the Rights of the Individual" (1952) 30 Can Bar Rev 225 at 227, McRuer C.J. of the British Columbia Court of Appeal put it as follows:

> The fundamental principle underlying the law on contempt of court is that the administration of justice is carried on as a process of orderly government. It is in the interest of every member of society that the law should be respected. It is unnecessary to say that it can only be properly administered in a dignified and orderly manner. I say with emphasis that the law of contempt of court does not exist for the protection of judges but for the protection of the individual right of every citizen to an independent administration of justice free from influence or intimidation by improper conduct of any sort.

[12] In *Chicago Blower Corp. v 141209 Canada Ltd.*(1987), 44 Man R (2d) 241 (Man CA), the Manitoba Court of Appeal said:

> An injunction must be implicitly obeyed and every diligence made to obey it to the letter; those who do not obey it are guilty of contempt. It is a punitive jurisdiction of the court based on centuries of experience and founded on the sound principle that it is not for the good of the plaintiff or a party to the action but it is for the good of the public that orders of the court should not be disregarded. People should not place themselves in the position of assisting in breaches of valid court orders. See *Seaward v. Tatterson* [1897] 1 Ch. 545; [1895-99] All E.R. rep. 1127.

2. The Applicable Principles

[13] The law views as at least quasi-criminal any conduct that knowingly interferes with the administration of law. The standard of proof in all contempt proceedings has long been established to be proof beyond a reasonable doubt. The moving party has the evidentiary burden of proving beyond a reasonable doubt that the essential elements of contempt of court are present.

[14] In *United Nurses of Alberta v Alberta (Attorney General)*, [1992] 1 SCR 901 at 933, McLachlin J. (as she then was) said with respect to criminal contempt:

> To establish criminal contempt the Crown must prove that the accused defied or disobeyed a court order in a public way (the *actus reus*) with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens rea*). The Crown must prove these elements beyond a reasonable doubt. As in other criminal offenses, however, the necessary *mens rea* need be inferred from the circumstances. An open and public defiance of a court order will tend to depreciate the authority of the court. Therefore when it is clear that an accused must have known his or her acts of defiance will be public, it may be inferred that he or she was at least reckless as to whether the authority of the court would be brought into contempt. On the other hand, if the circumstances leave a reasonable doubt as to whether the breach was or should be expected to have this public quality, then the necessary *mens rea* would not be present and the accused would be acquitted, even if the matter in fact became public. ...

[15] In *MacMillan Bloedel Ltd. v Brown*, [1994] 7 WWR (4th) 259 (BCCA), Chief Justice McEachern of the British Columbia Court of Appeal stated:

> **90** In *Everywoman's Health Centre Society (1988) v. Bridges* (1990), 54 B.C.L.R. 273 (C.A.), at p. 293, Chief Justice McEachern set out the distinction between civil contempt and criminal contempt:
>
> > A civil contempt is one where the dispute is entirely between private parties which does not threaten the proper administration of justice. A criminal contempt is one where, because of the nature of the conduct in question, the issues transcend the interests of the parties, and the public has an interest in ensuring the proper administration of justice.

> **91** The act which constitutes civil contempt of court is the act of disobeying a court order. The mental element of civil contempt is that the obedience must have been deliberate or reckless, that is, the possibility that the act would be disobedient must have been foreseen and ignored.
>
> **92** Criminal contempt contains all the elements of civil contempt. In addition, the act of disobedience must have been undertaken in a public way; and the deliberate or reckless act of disobedience must have been undertaken with an intention that such a public act of disobedience would tend to depreciate the authority of the courts, or alternatively, with foresight that it might to do so and indifference to whether it to did so or not.

This distinction is cited with approval in *Potash Corp. of Saskatchewan Inc. v Barton*, 2000 SKQB 569, 201 Sask R 56.

[16] In *New Roots Herbal Inc. v W-7 Clay Inc.* (1999), 176 Sask R 144 (QB), aff'd (1999), 180 Sask R 140 (CA), it was held that in order for the Court to punish the breach of a court order as being contempt of court, the following elements must be proven beyond a reasonable doubt:

1. The terms of the order must be clear and unambiguous;
2. Proper notice must have been given to the affected parties;
3. Clear proof must exist that the terms have been broken; and
4. The appropriate *mens rea* must be present.

[17] It is well established that the doctrine of *strictissimi juris* applies to contempt proceedings; that is to say, there must be strict compliance with the rules and requirements wherever anything less than strict compliance might in any way prejudice the respondent. See *United Food and Commercial Workers (UFCW), Local 1400 v F.W. Woolworth Co. (c.o.b. Woolco)*, [1993] 2 WWR 657 (Sask QB). However, this case also stands for the proposition that procedural deficiencies which

have no effect on the ability of the respondents to know fully the case being alleged against them or their ability to respond, or which are not relevant to the merits, are not grounds to dismiss a contempt application.

[18] In *Tilden Rent-A-Car Company v Rollins* (1966), 57 WWR (NS) 309 (Sask QB), this Court held that in contempt proceedings where a man's liberty is at stake, strong evidence beyond a reasonable doubt is required to find the respondent guilty of violating a court order. Where the breach of an injunction is the result of an error in judgment rather than willful attempt, the court will not order committal but will merely order the party to pay costs incurred by the breach and by the application.

3. Procedural Requirements

[19] Counsel for the respondents appropriately acknowledges that although a copy of the order underlying these contempt proceedings was not personally served on each of the respondents; nonetheless, it was served on him as counsel and that each of the respondents had notice of the terms of the order. Further, while notice of the application for declaration of civil contempt was not served each of the respondents personally as required by Rule 11-26 of *The Queen's Bench Rules*, counsel acknowledges it was served upon him as counsel for each of the respondents, that they each have notice of these contempt proceedings and, through him, they have the opportunity to answer the charges against them. Thus, any procedural irregularity is waived, and the respondents indicate they are prepared to answer the charges of contempt of court on the merits.

The Applicant's Position

[20] The applicant's position is simple. He says that with full knowledge of this Court's order of April 6, 2015, the respondents failed to comply and, thus, are guilty of contempt. That they might have had collective or individual reasons for

failing to do what was ordered is irrelevant. It was clear from the order what they were required to do, and despite his attempts to get the PMC to assemble and make a decision in compliance with the order, Doucette says they failed to do so.

The Respondents' Position

[21] The respondents have individual reasons and collective explanations for why the order was not followed. Some of the individuals have health and other reasons for their failure to attend meetings and, as members of the PMC, to participate in the decisions necessary to implement the Court's order. I do not find it necessary to address individual reasons or defences to the charge. I will be making my decision on the basis of overarching considerations that relate to the respondents as a collective.

[22] The collective reasons or defences are essentially the following:

1. The requirement of a clear and unambiguous order has not been proven. The order is ambiguous in that it is directed to the PMC as a collective and, thus, the individual respondents cannot be held to have failed to comply with an order not directed to them personally.

2. The requirement of proof of the required *mens rea* or that the respondents deliberately or recklessly acted contrary to the order has not been proven beyond a reasonable doubt.

3. The respondents learned funding was not available within MNS or from the Federal Government to finance the cost of an MNLA and Robert Doucette refused to participate in the PMC meetings to pursue funding efforts and to organize an MNLA. They say that, by failing to cooperate, he effectively frustrated their efforts

to comply with the order and that the lack of funding made compliance impossible.

The Evidence

[23] Robert Doucette provided lengthy initial, supplementary and reply affidavits in which he recounts and documents efforts he says he took to schedule the PMC to fix a date for an MNLA as required by the Court's orders. His affidavits say he was willing to work with other members of the PMC, and he provides evidence of what he views as refusals by the respondents to attend meetings of the PMC that he was calling and their otherwise refusing to comply with the Court's order.

[24] The respondents have provided affidavits which tell a markedly different story. To distill these affidavits to their material elements, the evidence of the respondents is to the effect that:

1. Robert Doucette and the other members of the Doucette faction declined to participate in the work of the Finance Committee and the MNLA Organizing Committee established at the PMC meeting of January 17, 2015. At the January 17, 2015. PMC meeting, the report of Treasurer Gardiner indicated funds were available to cover the costs of committee work and to fund an MNLA.

2. The January 17 meeting was adjourned to March 15 and 16, 2015, to continue with outstanding agenda items. They say that at this time, it would have been possible to bring forward the date for the MNLA if the Doucette faction had cooperated in their organizational efforts but that Doucette did not respond to their repeated requests to send out notices for the March 15 and 16

resumption or provide requested information. Rather, they say President Doucette informed them he could not find any funds for committee work, there were no funds for in-person PMC meetings, and he brought his February 20 application for a court order to advance the scheduled MNLA date rather than working with the PMC.

3. When President Doucette failed to give notice of resumption of the PMC scheduled for March 15 and 16, 2015, Gerald Morin took it on himself to call for resumption of the PMC meeting by conference telephone. The Doucette faction did not attend this meeting. At this meeting, where there was a quorum, a motion was passed to resume the meeting the following week in Winnipeg rather than the previously scheduled March 15 and 16 dates. This they say they did because Métis National Council was then meeting in Winnipeg, and all members of the PMC were entitled to be in attendance with their expenses covered by Métis National Council. Such a meeting would have addressed any concerns about lack of funding for in-person PMC meetings.

4. On March 17, 2015, the Métis National Council met in Winnipeg and funded the attendance of all Saskatchewan PMC members who chose to attend. The respondents had anticipated an opportunity for a face-to-face meeting of the PMC at this time, but Robert Doucette failed to attend even though it was announced at Métis National Council that it had booked his flight and hotel room, the cost of which was lost by his non-attendance. By failing to attend this meeting of the PMC, the Morin faction says Robert Doucette frustrated their efforts to plan for the

MNLA and its financing. Rather, Robert Doucette brought his application of February 20, 2015, which was not heard by the Court until March 30, 2015.

5. Subsequent to the order of April 6, 2015, of this Court, Gerald Morin called MNLA and Finance Committee meetings for April 16, 21 and May 5, 2015. Leading up to these meetings, they could not get information from Robert Doucette and Treasurer Gardiner as to what funds might be available with MNS until a May 1 report of Treasurer Gardiner.

6. Efforts were made by the respondents to have Robert Doucette and other Doucette faction members attend the PMC meetings, but Robert Doucette insisted that due to lack of available funding, all PMC meetings would be by teleconference. He refused to call or attend face-to-face meetings. The respondents' position was that, given the issues involved and the anticipated lengthy meetings that would be required, face-to-face meetings were essential and would be more cost effective than everyone participating in day-long or longer conference call meetings.

7. On April 22, 2015, Robert Doucette gave email notice of a PMC teleconference meeting for May 1, 2015. Various individuals were insisting on a face-to-face meeting and noted that the January 17, 2015 PMC meeting had scheduled a reconvening of the PMC for May 8 and 9, 2015, which they viewed as contemplating a face-to-face meeting. No quorum assembled for the proposed May 1 meeting.

8. In the May 1, 2015, financial update provided by Treasurer

Gardiner, he reported that MNS had no staff, no funding and no salaries for the executive and that the only potentially accessible funds were a remaining $25,000 on a line of credit, $150 in a Bank of Nova Scotia account, $16,500 of funds available within Provincial Métis Holdco and $18,000 in a trust fund. Treasurer Gardiner had earlier provided a budget for an MNLA of $137,500.

9. On May 1, 2015, Robert Doucette provided by email what he described as official notice of a PMC meeting for May 8 and 9, 2015, but specifying the meeting would be by conference call. Again, many of the respondents insisted the meeting needed to be a face-to-face meeting. On May 8, 2015, Robert Doucette circulated an email that the PMC conference call meeting of May 8 was cancelled due to lack of a quorum. Robert Doucette then attempted to obtain agreement on a May 15 conference call meeting of PMC to set dates for an MNLA. There was no agreement, and once again, there was no quorum on May 15, 2015.

10. With no available funding, the committees made efforts to find funding, including meetings with representatives of Aboriginal Affairs and Northern Development Canada [AANDC]. They learned that the Minister's department would not provide funding for an MNLA, that the holding of an MNLA would not in and of itself result in the AANDC re-instituting funding for MNS and that the Minister's position was that future funding would require that MNS demonstrate transparent, accountable and democratic governance in accordance with the Constitution. Robert Doucette

did nothing in his role as president to participate in or support these efforts to obtain funding.

11. Throughout, Robert Doucette failed to reply to requests to reimburse Métis Local 7 which had been funding work of the MNLA and the Finance Committee. The respondents also say that Robert Doucette has refused to allow members of the Finance Committee access to MNS building or otherwise to provide required financial information.

12. On May 28, 2015, Vice President Gerald Morin sent out a notice that a meeting of the PMC would be held in Calgary on June 5, 2015. Prior to doing this, he requested President Robert Doucette to call a PMC meeting in Calgary so they could meet there as a PMC to discuss funding with AANDC. This meeting was to be held in conjunction with a Métis National Council General Assembly which each of President Doucette, Treasurer Gardiner and Secretary Henderson and other members of PMC were entitled to attend with their expenses being covered by the Métis National Council. Robert Doucette did not call the proposed PMC meeting, so Gerald Morin did. The Doucette faction did not attend any of the sessions of the Métis National Council, the Gerald Morin-called meeting of PMC or the meeting with AANDC. AANDC had wished to meet with the PMC to discuss funding.

13. The position of the respondents is that AANDC informed them in Calgary that if the PMC would pass motions supporting third party management and a forensic audit of MNS, it might consider

> the release of funding for ongoing work. Without the participation of the Doucette faction in discussions with AANDC, and the PMC funding ongoing work supported by a motion of PMC passing motions as indicated, funding was simply not available and, thus, they were frustrated in their efforts to comply with the court's order.

[25] Robert Doucette's position is that he disputes much of the evidence of the respondents and that all of the elements of contempt exist. He argues that my order of April 6, 2015, was clear and unambiguous, notice or knowledge of the order is acknowledged, and it is clear the terms of the order were not complied with by the respondents. He says the only reasonable inference to draw from the evidence, including circumstantial evidence, is that the respondents, with full knowledge of what was required by the April 6 order, deliberately chose to not do what was ordered.

Analysis

[26] In the unique circumstances of this case, I have concluded there are important factors that need to be addressed that have not, to the best of my knowledge, been considered in Canadian judicial authority to date. These considerations include:

1. Does the fact that my order of April 6, 2015, was in the nature of a mandatory, as opposed to prohibitory, order addressed to a collective body, the PMC, call for modification of the usual test for civil contempt?

2. Is the potential absence of "clean hands" or lack of good faith on the part of the applicant a relevant factor in deciding whether the

respondents are in contempt?

Once these considerations are addressed, I then need to consider the ultimate issue of whether contempt has been proven beyond a reasonable doubt.

1. Does the fact that my order of April 6, 2015, was in the nature of a mandatory, as opposed to prohibitory, order addressed to a collective body, the PMC, call for modification of the standard test for civil contempt?

[27] Cases of contempt for failure to obey orders of courts have generally arisen in the context of prohibitory injunctions, i.e. orders of the court prohibiting the continuation of certain actions. In this context, it has been held that claims of necessity or grounds for a conscientious objection to the court's order are not defences (see *MacMillan Bloedel Ltd. v Simpson* (1994), 113 DLR (4th) 368 (BCCA), and *Everywoman's Health Centre (1988) Victoria Drive Medical Clinic Ltd. v Bridges* (1990), 78 DLR (4th) 529 (BCCA) [*Everywoman's Health Society* (BCCA)]).

[28] Since a mandatory injunction or order requires positive action on the part of specified individuals or organization, different considerations may arise. Might circumstances which could variously be categorized as interference with performance, frustration of ability to perform or impossibility to comply operate to negative the required mental element of contempt? Counsel were unable to provide me with clear authority on this issue, and I have found only limited consideration of this issue in Canadian jurisprudence.

[29] The respondents argue that the initial January 19, 2015, decision of the PMC to schedule a September MNLA in Yorkton was an interim decision that was made on the basis of limited information available at the time. They say this date could potentially have been advanced based upon the work of the Finance and MNLA

committees and with cooperation of the Doucette faction. They say they received no cooperation and, indeed, their efforts to organize and schedule an MNLA were frustrated by active and passive resistance of Robert Doucette. They provide evidence and advance argument to support their position that the lack of cooperation and resistance occurred both before and following my order of April 6, 2015. They say that in the final analysis, despite steps actually taken by them to comply, the absence of any source of funding for the MNLA made compliance impossible as a practical matter.

[30] This position goes directly to the issue of whether the respondents' failure to comply with my order was deliberate or reckless. I have concluded that in the case of contempt applications with respect to a mandatory order or injunction, it is necessary to consider whether efforts to comply were frustrated by the actions of others and whether intervening circumstances could reasonably be viewed as making compliance impossible. If such circumstances exist, they are relevant and material to the question of whether the failure to comply with the Court's order was deliberate or reckless.

[31] Where contempt of a mandatory order is alleged, it is open to this Court to consider, by way of defence or answer, whether efforts to comply were frustrated by the actions of others or and whether intervening circumstances could reasonably be viewed as making compliance impossible. In my discussion below of proof beyond a reasonable doubt, I will weigh these considerations.

[32] The following decisions provide some guidance:

(a) In *Braun (Re)*, 2006 ABCA 23, 262 DLR (4th) 611, the Court held at paragraph 15:

> [15] ... [C]ontempt is premised upon deliberate

> non-compliance as opposed to arguable inability to comply ....

(b) In *Metaxas v Galaxias (The)* (1988), 19 FTR 104 (WL) [*Metaxas*], the defendants were unable to issue a certificate as required under the court order. The Court stated:

> [13] ... Though it has been established that they have disobeyed the Court order, I feel it necessary to examine the circumstances surrounding this non compliance [*sic*]. There are no limitations on the discretion of the Court; it may regulate its own process and decide in each case whether the party before it must be held in contempt.

Counsel for the defendants in *Metaxas* argued that any disobedience under the order was due to circumstances beyond the defendant's control. Upon accepting this evidence, the question for the Court was to determine whether the defendant's inability to comply was a valid defence to the contempt application. The Court determined an inability to comply with the order was a valid defence to the offence of contempt, stating:

> [18] I am satisfied that [the defendant] is in no position to obey and to make a finding of contempt would not in any way enhance the administration of justice or compel the Minister of Merchant Marine in Greece to acquiesce favorably. I should also add that the Minister was not a party to these proceedings.

The Court in *Metaxas* declined to make a finding of contempt as the defendant was in no position to obey the order and a finding of contempt would not in any way enhance the administration of justice.

(c) In *R v Perka*, [1984] 2 SCR 232 at 250, the Court in speaking with regard to the defence of necessity stated:

> ... At the heart of this defence is the perceived injustice of punishing violations of the law in circumstances in which the person had no other viable or reasonable choice available; the act was wrong but it is excused because it was realistically unavoidable.

(d) In *Carey v Laiken*, 2015 SCC 17, 382 DLR (4th) 577, the Court stated at paragraph 37:

> [37] ... [W]here an alleged contemnor acted in good faith in taking reasonable steps to comply with the order, the judge entertaining a contempt motion generally retains some discretion to decline to make a finding of contempt: see, e.g., *Morrow, Power v. Newfoundland Telephone Co.* (1994), 121 Nfld. & P.E.I.R. 334 (Nfld. C.A.), at para. 20; *TG Industries*, at para. 31. While I prefer not to delineate the full scope of this discretion, given that the issue was not argued before us, I wish to leave open the possibility that a judge may properly exercise his or her discretion to decline to impose a contempt finding where it would work an injustice in the circumstances of the case.

2. *Is the potential absence of "clean hands" or lack of good faith on the part of the applicant a relevant factor in deciding whether the respondents are in contempt?*

[33] Injunctive relief has its origin in the equitable jurisdiction of the common law courts and, thus, various principles applicable to equitable forms of relief may, depending upon the circumstances, be applicable. One often quoted principle of equitable relief is that he who seeks equity must come to the court with clean hands. However, as concluded by Robert J. Sharpe in his leading work, *Injunctions and Specific Performance*, looseleaf (Toronto: Canada Law Book, 2014) [*Injunctions*], at ¶1.1030 to ¶1.1070, the better statement of the principle is that wrongdoing or the lack of clean hands on the part of an applicant should not deprive the applicant of a remedy unless the wrongdoing bears directly on the appropriateness of the remedy and then the refusal of relief should be justifiable on some more precise basis than the "clean hands" maxim.

[34] Here, the present application is one step removed from the equitable remedy of the mandatory injunction. The applicant seeks to enforce the equitable remedy of a mandatory injunction by the use of contempt proceedings. Since the objective of contempt proceedings is to protect the rule of law, it may be argued that the motives of or wrongdoing by the applicant is irrelevant. Nonetheless, there is an equitable background to the application, and the applicants' alleged wrongdoing as it contributed to the frustration of or impossibility of the respondents to comply with my order is clearly before me.

[35] I adopt the view of Sharpe in *Injunctions* that that wrongdoing or the lack of clean hands on the part of an applicant should not deprive the applicant of a remedy unless the wrongdoing bears directly on the appropriateness of the remedy and that the refusal of relief should be justifiable on some more precise basis than the "clean hands" maxim. Here, argument that the applicant brings his application in a context where his hands are not clean should be assessed from the perspective of whether this is relevant to the objective of protecting the independent administration of justice and whether any alleged wrongdoing on his part is relevant to the respondents' position that Robert Doucette's actions frustrated their attempts or made impossible their compliance with the order.

Has contempt been proven beyond a reasonable doubt?

[36] To use analogies from criminal law, contempt is not an absolute, or even a strict, liability offence. The one exception to this may be when an individual is cited for contempt in the face of the court and is called upon to "show cause" why the court should not convict. In such cases, the evidentiary burden shifts to the alleged contemnor to "show cause" why he or she should not be found guilty of contempt. This analogy is similar to the evidentiary burden on an accused to show due diligence to comply with the statutory duty in strict liability offences.

[37] Where the contempt alleged is failure to comply with a court order, it is not enough to prove that the respondents were aware of an order and failed to comply. The law is clear that where the complainant is unable to prove the requisite intent beyond a reasonable doubt, the offence is not made out. Where the contempt in question relates to the more common prohibitory order, proof of knowledge and breach of the order may well be sufficient to permit the Court to draw the inference or conclusion that the breach was deliberate or reckless. That same inference is not so easily drawn when the contempt alleged is of a mandatory order. Where an individual or organization is ordered to perform a specific duty or act, a myriad of circumstances might prevent a person or organization from doing what they have been ordered to do. I have concluded above that evidence of frustration of efforts to comply or impossibility of compliance is properly to be considered when deciding whether the alleged contemnor(s) intentionally or deliberately failed to do as ordered.

[38] There is no burden of proof on the respondents. The evidentiary burden lies on the applicant throughout to prove the elements of contempt beyond a reasonable doubt. It necessarily follows that I must consider all relevant circumstances in deciding whether the respondents acted deliberately or recklessly in not complying with my order. To adopt the applicant's view that the only reasonable inference to draw from the fact that the respondents, as the majority faction within the PMC, with full knowledge of what the April 6 order required them to do, failed to schedule a PMC before June 19, 2015, would be to treat failure to comply as a strict liability offence. The law is clear it is not. I must be satisfied beyond a reasonable doubt that the specific intent of deliberate or reckless failure to comply was present.

[39] On how to apply the concept of reasonable doubt in the circumstances of this case, I see no good reason why the guidance of the Supreme Court of Canada in their well-known *R v W.(D.)*, [1991] 1 SCR 742, decision is not applicable. While the matter before me is civil as opposed to criminal contempt, the law is clear that,

nonetheless, all elements of the alleged contempt must be proven beyond a reasonable doubt.

[40] In *R v W.(D.)*, the Supreme Court of Canada gave trial judges important guidance regarding credibility and reasonable doubt in criminal trials. In *R v McKenzie* (1996), 106 CCC (3d) 1 (Sask CA), the Saskatchewan Court of Appeal adopted an expansion to the *R v W.(D.)* principles as provided by the British Columbia Court of Appeal in *R v H.(C.W.)* (1991), 68 CCC (3d) 146 (BCCA). In *R v McKenzie*, at page 5, the Saskatchewan Court of Appeal stated the guiding principles as follows:

> First, if you believe the accused, obviously you must acquit;
>
> Secondly, if, after a careful consideration of all of the evidence, you are unable to decide whom to believe, you must acquit;
>
> Thirdly, if you do not believe the evidence of the accused but you are left in reasonable doubt by it, you must acquit;
>
> Fourthly, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[41] The evidence presented by the applicant and the respondents is in conflict on many material issues. When evidence is in conflict, it is open to this Court to order a trial of the issues or *viva voce* hearings in an attempt to resolve the conflict on the evidence. Both parties advised me that they do not want that to occur and asked that I decide the matter on the evidence before me. Thus, I am left to decide the matter on the evidence before me.

[42] I have significant concerns about the role played and actions of Robert Doucette and others in the Doucette faction. The concerns I express do not constitute final findings of fact because as I have noted there is conflicting evidence and the

means to better resolve those conflicts on the evidence have not been pursued. However, the concerns I express arise from the evidence and are material to the issue of whether proof of contempt has been established beyond a reasonable doubt. Applying the *R v W.(D.)* approach, my concerns include the following:

1. The Doucette faction declined or refused to participate in the Finance and MNLA committees established at the January 19, 2015, PMC meeting despite being given opportunities to participate. Robert Doucette failed to cooperate in the efforts of these committees despite the fact that it was his obligation as president of MNS and a member of the PMC to work with other members of PMC and its committees. The obligation to implement the order of April 6, 2015, applied to all members of the PMC, and not just the respondents.

2. At the January meeting, Treasurer Gardiner informed the PMC that funds were available to hold an MNLA, but within a short period of time, Robert Doucette was advising the respondents that no funds were available to support the work of the committees.

3. Robert Doucette failed to cooperate in scheduling meetings of the PMC to implement my order; rather insisting that any meetings be on his terms; namely, not face-to-face and by conference call. Robert Doucette, as president, was not entitled to dictate when, where and how the PMC would meet. That was a decision the majority of the PMC was entitled to make, and even if that was not Robert Doucette's belief, his clear obligation as president, in the dire circumstances, was to do all he could to facilitate the

Court's order and the wishes of the majority as to how and when to meet. As president, he was not entitled to impose his edicts on the PMC. His obligation was to work with the PMC, giving it the information and support it sought to the full extent that he was capable of as president.

4. Robert Doucette made his second application on February 20, 2015, but the application was not heard until March 30. He did not, in that application or at the hearing, disclose to the Court that the financial situation was such that there were no financial resources available to fund the MNLA he sought. The failure occurred in a context where it appears he was well aware of the lack of funds, given his position that no funds were available to finance the work of the Finance and MNLA committees. The sharing of accurate information with the Court may have influenced the ultimate decision. Applicants for interlocutory relief have an obligation of full disclosure to the Court.

5. Robert Doucette failed to attend the meeting of the PMC set in conjunction with the Winnipeg meeting of Métis National Council where the attendance of all MNS PMC members was being funded by Métis National Council. The adjournment of the January 19 PMC meeting to March 16 and 17 and then by teleconference meeting to further adjourn to coincide with the Métis National Council meeting where all PMC members could attend with their expenses covered was eminently reasonable given Robert Doucette's position that no monies were available to fund face-to-face meetings and the desire of the majority for a face-to-face meeting.

6. Given the circumstances and his role as president, it appears *prima facie* that Robert Doucette's attendance at the scheduled PMC meeting in Winnipeg was a clear and compelling obligation. The entire PMC had an obligation to give effect to my April 6 order. No valid reason for failing to attend and cooperate in this or other meetings to give effect to my order has been provided. The *prima facie* conclusion I am left with is that he and his faction were boycotting this meeting to avoid the face-to-face meeting the majority wanted. This failure supports the respondents' position that Robert Doucette was acting actively and/or passively to frustrate the ability of the majority of PMC to act.

7. The Winnipeg meeting was scheduled for a date after he served his application seeking an order requiring an earlier MNLA be ordered and well before his application was heard. Attendance at this meeting and a cooperative, as opposed to an obstructive, approach may well have solved the problem. In any event, his duty as president and a member of PMC was to expend all reasonable efforts to solve problems in a cooperative manner and under democratic procedures, deferring to the will of the majority where required.

8. The lack of funding is not a valid reason Robert Doucette to have insisted that meetings be by telephone conference. Other members of PMC were prepared to attend PMC meetings without funding, and it was his obligation as president to attend in person when so requested. He was not entitled to refuse or decline to participate because he did not want a face-to-face meeting.

9. Although the Calgary meeting of June 5, 2015, was chronologically beyond a date where compliance with the deadlines of my order of April 6, 2015, was possible, the failure or refusal of Robert Doucette to fully participate is, in the circumstances, inexplicable and, *prima facie*, appears to be a continuing breach of his continuing duty as president and a member of PMC to cooperate and participate in all efforts to obtain funding for an MNLA.

[43] I have factored the concerns I have with respect to the lack of cooperation and active or passive resistance by Robert Doucette to the efforts of the respondents to comply into my analysis of whether deliberate or reckless failure on the part of the respondents has been proven beyond a reasonable doubt. I also factor in specific evidence of steps taken by the respondents to comply. This evidence includes the following:

1. On April 9, 2015, May Henderson, as secretary of PMC, sent a notice to all local presidents with a copy of my April 6 decision and referred to my direction that delegate selection be in place and in the last paragraph of the first page clearly contemplated an MNLA proceeding on June 19, 2015 – See Exhibit H to the affidavit of Darlene McKay of June 16, 2015.

2. An April 14, 2014, email from Gerald Morin schedules a joint meeting of the Finance and MNLA Committees for Thursday, stating, "The main focus of the meeting will be the planning, organizing and implementation of an MNLA prior to June 19, in accordance with the Justice Sherman [*sic*] decision." See Exhibit I to Darlene McKay's affidavit

3. April 16, 2015, manuscript notes of an MNLA and Finance Committee meeting where the second last page shows discussion of scheduling an MNLA for June 13 and 14 in Saskatoon. See Exhibit L to Darlene McKay's affidavit.

[44] The above noted documents promptly follow my decision of April 6, 2015, and disclose efforts being taken to implement my decision. While there was also discussion of appealing my decision, such consideration was is in no way inappropriate and cannot be interpreted as indicating a decision to not comply. Following these discussions, the respondents learned on or about May 1, 2015, that there were no funds available to finance an MNLA. Subsequently, the record discloses significant but unsuccessful efforts by the respondents to obtain government funding. The applicant failed to participate with the respondents in their efforts despite his position in MNS and the clear need for the Government agencies to see he was involved and supportive.

Conclusion

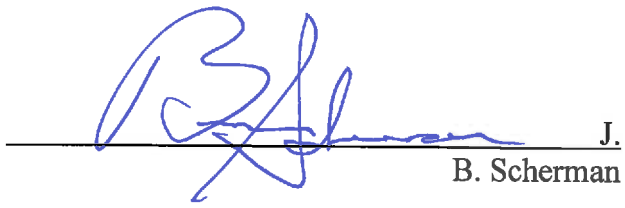
[45] In conclusion, I find that the applicant has failed to prove beyond a reasonable doubt that the respondents deliberately, intentionally and/or recklessly ignored my order of April 6, 2015. Rather, the evidence discloses some early efforts directed at compliance, which efforts became redirected to unsuccessfully seeking financing when the respondents learned on or about May 1, 2015, that funding was not available.

[46] While the respondents, as members of PMC, could still have technically complied with my order by passing a motion to schedule a PMC within the time period my order directed, I am unable to conclude that their focus on seeking sources of funding was either a deliberate or reckless decision to ignore my order. Indeed, in a

very real sense, it was more important that they take concrete steps to ensure that an MNLA could, in fact, happen as opposed to a *pro forma* motion to schedule an MNLA within the period I ordered. From their perspective circumstances, it was not unreasonable for them to conclude that it was impossible to comply with my order without funding being in place and to focus their efforts on seeking funding. I am not satisfied beyond a reasonable doubt that the respondents deliberately or intentionally chose to ignore my order nor that they recklessly ignored. Thus, I am unable to find contempt proven beyond a reasonable doubt.

Costs

[47] The respondents asked that I order their legal costs of this application, on a solicitor-client basis, be paid by MNS. In all of the circumstances, I think this is appropriate. If the legal costs of Robert Doucette, representing MNS, are properly payable by MNS, I think it also appropriate that the legal costs of the respondents incurred with respect to the performance of their role as members of PMC also be payable by MNS. The application was brought against them in respect of the performance of their duties as members of PMC. The application was unsuccessful. Nor am I able, apart from my core finding that contempt of court has not been proven, to find a basis to criticize their actions in regard to the matter at hand that would justify me not ordering a cost indemnity.



J.
B. Scherman