SUPREME COURT OF NOVA SCOTIA
Citation: National Bank of Canada v. Weir, 2010 NSSC 93

Date: 20100310
Docket: Hfx No. 307548
Registry: Halifax

Between:

National Bank of Canada — Plaintiff

and

Lowell R. Weir — Defendant

DECISION

Judge: The Honourable Justice Gerald R. P. Moir

Date of Hearing: January 20, 2010

Counsel: David G. Coles, Q.C., Martin-Pierre Boulianne, and Lyle Howe, articled clerk, for the plaintiff
W. Dale Dunlop and Scott Hughes, for the defendant

Moir, J.:

Introduction

[1] Last year the National Bank of Canada obtained a verbal order, which was followed by written order, against Lowell Weir. The orders restrained him from soliciting shareholders and fund managers to not execute proxies circulated by management for elections at the bank's annual meeting, and they required him to identify the shareholders and fund managers he had solicited.

[2] The bank obtained leave to bring a contempt proceeding from Justice Wright in connection with an alleged solicitation after the verbal order was made and an alleged failure to identify parties who had been solicited.

[3] I heard the contempt proceeding and reserved decision.

Governing Law

[4] Justice Murphy discussed the law of contempt at para. 42 to 46 of *Blackman v. CIBC Wood Gundy Financial Services Inc.*, [2009] N.S.J. 652 (S.C.). There is no need for me to repeat that here, except I will repeat the three principles Justice Murphy extracted at para. 42 from Justice Cromwell's decision in *TG Industries Ltd. v. Williams*, [2001] N.S.J. 241 (C.A.):

> (a) There is a long line of authority for the view that intention to disobey is not an element of civil contempt.
>
> (b) The elements of contempt must be proved beyond a reasonable doubt.
>
> (c) The Court should use its contempt power cautiously and with great restraint.

[5] Mr. Coles and Mr. Dunlop do not disagree on the law of contempt. With it in mind, I turn to the contentious issues, the facts and the interpretation of the orders.

The Order Against Mr. Weir

[6] The National Bank held an annual meeting in February, 2009. One week before the meeting the bank and Mr. Weir were before this court for an emergency motion by the bank.

[7] Mr. Weir is a party to various proceedings in connection with the failure of Knowledge House Inc., involving claims by him against the bank about the handling of investments in Knowledge House and claims by the bank against him for the balance of a margin account and an amount due on a note.

[8] Mr. Weir is also a shareholder of the bank and a vocal and public critic of its management. His criticisms relate to the bank's, or its subsidiaries', handling of investments in and issues arising from Knowledge House. Over the years, he has made proposals for inclusion in the management proxy circulars issued for the bank's annual meetings. In 2008, the Superior Court of Québec found Mr. Weir's proposals for the 2009 circular to be abusive, and the court gave the bank permission to omit them.

[9] The bank obtained a copy of a letter Mr. Weir delivered late in January, 2009 to a firm of fund managers who had authority to execute proxies solicited in a management proxy circular for the February annual meeting.

[10] The letter contained allegations against eight of the directors nominated for re-election. Chief Justice Kennedy found that at least one of the allegations was a misstatement. The letter contained a request not to execute the proxy solicited by management: "I ask you to...advise your portfolio managers to withhold the proxy votes for the above named directors." It soon became clear that Mr. Weir had sent similar requests to other shareholders or authorized managers.

[11] The bank moved for an order under s. 156.08 of the *Bank Act*. That section allows the court to provide any remedy, including "an order restraining the solicitation", in situations in which a material fact is misstated or omitted, or a misleading statement of material fact requires correction, in "a form of proxy, management proxy circular or dissident's proxy circular."

[12] Subsection 156.05(1) prohibits a proxy solicitation, which by s. 156.01 includes a "request...not to execute a form of proxy", that is not a management proxy circular in prescribed form or a dissident's proxy circular in prescribed form. The letter sent by Mr. Weir was treated by the Chief Justice as a dissident's proxy circular. As I said, he found the circular to contain a misstatement.

[13] The court allowed the bank's motion. It is necessary to see what the Chief Justice said in Mr. Weir's presence because the form of his order was not settled in writing until some days later, and one of the allegations of contempt concerns a communication made by Mr. Weir before then.

[14] The Chief Justice decided to require Mr. Weir to provide the bank with "a list of all of the individuals or organizations to whom he has sent letters...as to how they should exercise or not exercise their proxy". This was to be done "by 12 noon on Saturday, which is...tomorrow, February the 21st, 2009".

[15] He also decided "that there be no further distribution of communications of this nature".

[16] After discussion, he repeated the order "Now, I want to repeat the nature of the order. One, the communication, in any form, stops as of this moment. Two, the names of the individuals to whom communication in relation to the exercise of proxies has been accomplished will be given...by noon tomorrow."

[17] In discussion with Mr. Coles and Mr. Weir, the Chief Justice agreed that Mr. Weir was being required to disclose "whatever is necessary to [identify] who these communications were sent to in whatever form". It became clear that the order for disclosure extended to communications over the internet. The Chief Justice also made it clear during the discussion that the purpose of the order for disclosure was to give the bank an opportunity to respond to the misstatement in Mr. Weir's circular before the annual meeting.

[18] It is clear that the Chief Justice's decision amounted to a verbal order. I do not understand Mr. Weir to suggest otherwise.

[19] The order that was drawn up and eventually issued includes the following:

> IT IS ORDERED that effective at 4:00 pm on February 20th, 2009 and until the 2009 annual meeting of the shareholders of National Bank of Canada is closed, Lowell R. Weir is restrained from communicating in writing – including, but not

> limited to, by letters, facsimile transmissions, e-mails or internet postings – with any shareholder of National Bank of Canada or any person exercising the voting rights attached to shares in the share capital of National Bank of Canada, to solicit the exercise or non-exercise of proxy votes;
>
> IT IS FURTHER ORDERED that Lowell R. Weir prior to 12:00 pm Saturday, February 21st, 2009, disclose to counsel for the National Bank of Canada the identities of all persons contacted by Lowell R. Weir in writing, including, but not limited to, by facsimile transmissions, e-mails, or internet postings with the view of soliciting the exercise of proxy votes of shares of the National Bank of Canada.

Bank's Investigation of Internet Postings

[20] In January, 2009 the bank's Vancouver law firm, McCarthy Tétrault, wrote to the owner of a website, www.stockhouse.com, under the reference "Defamation of National Bank of Canada" demanding, among other things, removal of messages about the bank associated with eight user names from the site's blog. Seven more user names were added in correspondence sent in January, February, and March of 2009.

[21] Stockhouse cooperated with the bank. It took down messages that caused offence and it supplied the bank with the IP addresses that went with them.

[22] By May of 2009, the bank had identified almost eight hundred messages posted on the stockhouse blog between January, 2008 and March, 2009 to which the bank took offence. With the aid of court orders, the bank obtained the names of each person whose IP address was attached to an offending message. Mr. Weir was responsible for over a hundred of the messages.

Alleged Violation of Restraining Order

[23] In the days before the February 20, 2009 hearing, Mr. Weir posted, under various pseudonyms, numerous messages vilifying the bank on the stockhouse blog. These sometimes pretended to respond to one another, and sometimes they congratulate Mr. Weir on his battles with the bank.

[24] With that context in mind, we must examine the one message written after the verbal restraining order and before the annual meeting. After the hearing, Mr. Weir wrote in response to other messages. The reference was, "Are the NA execs on the 4th floor nervous?", apparently someone else's creation. Mr. Weir's message appears to be for a blogger who initiated the subject and who worked for, or pretended to work for, the National Bank. Mr. Weir responded:

> You are stupid to be working for those... . Quit now and keep your dignity. Besides you return as a hero when the stock is at $1.00. I hope most management are defeated and gone.

The last line can only be a reference to the elections at the annual meeting for which management had solicited proxies.

[25] At least one shareholder besides Mr. Weir read the message.

[26] There were no further postings by Mr. Weir before the annual meeting.

[27] Mr. Weir admits, in his affidavit, to posting the messages now attributed to him. I am satisfied beyond reasonable doubt that he posted the February 20, 2009 message after hearing this court's verbal order.

Alleged Violation of Disclosure Order

[28] Within a day, that is, before the deadline set by the Chief Justice, Mr. Weir delivered to the National Bank a list of persons to whom he had sent solicitations. The bank submits that he violated the order because he did not then, or later under

the written order, include www.stockhouse.com or the identities of those who read his messages on the blog at that site.

[29] Mr. Weir says in his affidavit, and I accept, that he does not know who viewed his messages and that he would have no ability to find out. He says too, and I also accept, "I did not contact anyone directly by internet posting."

Whether Mr. Weir Breached the Restraining Order?

[30] It has not been established beyond reasonable doubt that Mr. Weir breached the restraining order. The characterization of the February 20, 2009 blog message as such would be inconsistent with the verbal order and the law underlaying it. The blog message is outside both the spirit and the text of the verbal and written orders.

[31] The underlaying law is the *Bank Act*, s. 156.01 and s. 156.08. As discussed earlier, these give the court power to provide remedies for a misstatement in a dissident's proxy circular, which includes a circular containing a "request...not to

execute a form of proxy". The February 20, 2009 is not a solicitation. It requests nothing. In particular, it requests nothing about proxies.

[32] The order restrained Mr. Weir from making "further distribution of communications of this nature". That is, communications, in any form, "as to how they should exercise or not exercise their proxy". This is reiterated in the order that was settled after the blog message. Mr. Weir is restrained from communicating with shareholders "to solicit the exercise or non-exercise of proxy votes".

[33] The blog message continued Mr. Weir's strident, public criticism of bank management, but it said nothing about proxies and, in particular, it did not request that anyone refrain from executing the proxy solicited by bank management.

[34] The position of the National Bank of Canada on this subject would expand the orders as if they had been obtained on the narrow grounds for an interlocutory injunction in a defamation action. The orders were about proxies, not criticism.

Whether Mr. Weir Breached the Disclosure Order?

[35] It has not been established beyond reasonable doubt that Mr. Weir breached the order for disclosure. The characterization of the failure to disclose the blog messages as such is inconsistent with the verbal order, the written order, and the purpose underlaying them. It is outside both the spirit and the text of the orders.

[36] The Chief Justice's stated purpose was to give bank management an opportunity to respond to a misstatement in a dissident's proxy circular before the annual meeting. The blog messages are wholly different communications. They are public statements criticizing bank management. The bank was aware of the messages and able, if it chose, to provide a similar public response. This is a subject well outside the Chief Justice's stated purpose.

[37] The verbal order was for delivery of "a list of all of the individuals or organizations to whom he has sent [a communication, in any form] as to how they should exercise or not exercise their proxy". The written order was for disclosure of "the identifies of all persons contacted...with the view of soliciting the exercise of proxy votes."

[38] The written order applies to "persons contacted...by...internet postings", but it does not apply to a general audience on the internet. The order requires disclosure of "the identities of all persons contacted...with the view of soliciting the exercise of proxy votes". Under both the written order and the verbal order, Mr. Weir was required to identify a particular kind of person, one who had authority to execute the proxy solicited by bank management. That does not include communications to an amorphous internet audience.

[39] Further, the order cannot be interpreted to require the impossible. It does not require Mr. Weir to discover, let alone to disclose within twenty-four hours, the identities of people in the blog audience from time to time or to find out which, if any, held shares in the National Bank of Canada.

[40] Furthermore, the blog messages do not appear to me to contain any request about executing a proxy. Some describe Mr. Weir's campaign, but they are written as though a third party were reporting on his efforts. So they do not, themselves, make the request he was making to shareholders or fund managers. That is, they do not make a request of the kind that was the subject of the Chief Justice's orders.

Conclusion

[41] The National Bank of Canada has not met the burden for establishing civil contempt. The motion is dismissed. The parties may make submissions about costs in writing.

J.