

**The Hammer of Civil Contempt: Case Comments on *AMEC Foster Wheeler Americas Ltd. v. Attila Dogan Construction and Installation Co.*, 2016 ABQB 305 and *336239 Alberta Ltd. (c.o.b. Dave’s Diesel Repair) v. Mella*, 2016 ABCA 226**

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Introduction

Two recent Alberta cases, one from the Chief Justice of the Alberta Court of Queen’s Bench, ***AMEC Foster Wheeler Americas Ltd. v. Attila Dogan Construction and Installation Co.***, 2016 ABQB 305 (“***AMEC***”), and the other from our appellate court, ***336239 Alberta Ltd. (c.o.b. Dave’s Diesel Repair) v. Mella***, 2016 ABCA 226 (“***Dave’s Diesel***”), illustrate how effectively an application for civil contempt can be used as a hammer to, on the one hand, bring closure to a protracted legal proceeding, and, on the other, impose the sanction of imprisonment even though the underlying action is a civil suit for a debt in order to effect compliance with a court order. In ***AMEC*** a lawsuit seeking in excess of \$50 million was dismissed by N.C. Wittmann CJQB after litigation over a 9 year period as the respondent was found to be in civil contempt for failure to satisfy a court order compelling the posting of security for costs. In ***Dave’s Diesel*** F.L. Schutz JA refused to stay a three-month imprisonment of the debtor for failure to obey court orders requiring him to live within a stipulated financial amount, among other things, in view of the approximate \$2 million debt he owed to Dave’s Diesel, notwithstanding the argument that imprisonment could not be imposed for failure to pay debt. With these two recent cases as precedents, an application for civil contempt can act as a real hammer.

General Principles Regarding Civil Contempt

***Dave’s Diesel*** provides a helpful overview of the legal principles governing an application for civil contempt. ***Carey v. Laiken***, 2015 SCC 17 is cited as governing authority whereby the Supreme Court of Canada states: “It is well settled in Canadian common law that all that is required to establish civil contempt is proof beyond a reasonable doubt of an intentional act or omission that is in fact in breach of a clear order of which the alleged contemnor has notice...”<sup>i</sup> And further:

Judges have discretion in ordering sanctions for contempt, which must be proportionate to reflect the gravity of the offense and the personal culpability of the contemnor: ***Alberta Dental Assn v. Unrau***, 2001 ABQB 315 at para 20, 287 AR 391.

***Boily v. Carleton Condominium Corp.***, 2014 ONCA 574 at para 90, 121 OR (3d) 670, collates the factors relevant to the determination of an appropriate sentence for civil contempt: (a) the proportionality of the sentence to the wrongdoing; (b) the presence of mitigating factors; (c) the absence of aggravating factors; (d) deterrence and denunciation; (e) the similarity of sentences in like circumstances; and (f) the reasonableness of the fine or incarceration.<sup>ii</sup>

**AMEC** similarly provides an overview as to the law governing civil contempt, with N.C. Wittmann CJQB stating:

AMEC argues that the central idea is the Courts have a right to protect the dignity of their own proceedings and are entitled to discipline conduct that tarnishes, undermines or impedes the Court's role in society as the principal administrator of justice as well as the inherent power of the court. *ARC 10.52(3)* references the civil contempt power of the court in terms of non—compliance with a Court order “without reasonable excuse” other than an order for the payment of money. ...<sup>iii</sup>

Rule 10.52(3) provides:

(3) A judge may declare a person to be in civil contempt of Court if

(a) the person, **without reasonable excuse**,

(i) does not comply with an order, **other than an order to pay money**, that has been served in accordance with the rules for service of commencement documents or of which the person has actual knowledge,

(ii) is before the court and engages in conduct that warrants a declaration of civil contempt of court,

(iii) does not comply with an order served on the person, or an order of which the person has actual knowledge, to appear before the court to show cause why the person should not be declared to be in civil contempt of court,

(iv) does not comply with an order served on the person, or an order of which the person has actual knowledge, to attend for questioning under these rules or to answer questions the persons is ordered by the court to answer,

(v) is a witness in an application or trial and refuses to be sworn or refuses to answer proper questions, or

(vi) does not perform or observe the terms of an undertaking given to the court,

or

(b) an enactment so provides. (Emphasis added)

Rule 10.53 sets out possible punishments for civil contempt:

10.53(1) Every person declared to be in civil contempt of Court is liable to any one or more of the following penalties or sanctions in the discretion of the judge:

(a) imprisonment until the person has purged the person's contempt;

(b) imprisonment for not more than two years;

(c) a fine and, in default of paying the fine, imprisonment for not more than six months;

(d) if the person is a party to an action, application or proceeding, an order that

(i) all or part of a commencement document, affidavit or pleading be struck out,

(ii) an action or an application be stayed,

(iii) a claim, action, defense, application or proceeding be dismissed, or judgment be entered or an order be made, or

(iv) a record or evidence be prohibited from being used or entered in an application, proceeding or at trial.

(2) The Court may also make a cost award against a person declared to be in civil contempt of Court.

(3) If a person declared to be in civil contempt of court purges the person's contempt, the Court may waive or suspend any penalty or sanction.

(4) The judge who imposed a penalty or sanction for civil contempt may, on notice to the person concerned, increase, vary or remit the penalty or sanction.

**AMEC Foster Wheeler Americas Ltd. v. Attila Dogan Construction and Installation Co., 2016 ABQB 305**

AMEC partnered with the Turkish company of Attila Dogan in a joint venture to design and build a magnesium oxide plant in Jordan. The project was seriously delayed and the joint venture contract was terminated in 2002. In 2007, following an arbitration against the Jordanian plant owner, Attila Dogan filed a claim against AMEC seeking in excess of \$50 million in damages on the basis that AMEC was

responsible for the termination of the contract and for the losses on the project suffered by Attila Dogan. AMEC counterclaimed for the approximately \$12 million incurred in legal costs in the arbitration. Wittmann CJQB ordered security for costs payable by Attila Dogan in the amount of \$1.6 million in 2011 to be secured by way of letter of credit, and increased the amount of security in further orders.

In 2014 AMEC was successful in a summary judgment application on its counterclaim. Before the summary judgment application, Attila Dogan launched an unsuccessful application to further amend the statement of claim to assert undue influence and conflict of interest, but was unsuccessful, and this dismissal of its application to amend was upheld on appeal. Over the course of the lengthy litigation Attila Dogan changed counsel several times.

Attila Dogan failed to pay costs awarded against it on the various applications and appeals, and Wittmann CJQB ordered that if the costs were not paid by a designated time AMEC could draw on the letters of credit posted as security for costs. The letters of credit having been drawn down, Wittmann CJQB then ordered Attila Dogan to replenish the letters of credit in the amount of \$66,666.62. Attila Dogan failed to replenish these monies, declaring that it was in dire financial straits and that it had certain hurdles “for reasons out of its control” it could not overcome. In the result, notwithstanding that the amount of the letter of credit to be replenished was a relatively small amount vis-à-vis the total amount of costs secured,<sup>iv</sup> Wittmann CJQB found Attila Dogan to be in civil contempt, and struck the statement of claim.

AMEC brought its application to strike Attila Dogan’s claim on the primary ground that they had failed to post the security for costs required, and thus such dismissal was authorized under rule 4.23(1)(d). The application for dismissal on the basis of civil contempt was brought in the alternative. “AMEC submits the purpose of the contempt powers of the Court, namely that the justice system cannot function if Court Orders can be ignored or disobeyed without reasonable excuse and without penalties for violation:...”<sup>v</sup> With respect to remedies, “...AMEC points out that AD has not tendered a formal apology to the Court; that the breach was part of a pattern of ongoing conduct of AD; that it was done with full knowledge and understanding that a breach of a Court order was involved and that AD kept insisting through its legal counsel that it had the ability to renew, replenish or replace the [letter of credit] but

did not. AMEC therefore requests that AD be held in civil contempt [and] that the claim be struck or dismissed,..."<sup>vi</sup>

Attila Dogan argued, through a brief filed by its then counsel, that the amount owing to replenish the letter of credit was a small part of the total amount posted as security and thus the severe measure of striking of the claim should not follow. AMEC filed evidence by way of affidavit establishing that its assessment of costs to the end of questioning was \$717,000 in excess of what was secured by the letters of credit. Wittmann CJQB thereby being satisfied that AMEC had been prejudiced by the failure to replenish the letter of credit,<sup>vii</sup> Attila Dogan was found to be in civil contempt and its statement of claim ordered struck unless the \$66,666.62 was replenished by way of letter of credit within five business days. In the result the statement of claim was struck.

This case is of interest in that the Chief Justice of the Alberta Court of Queen's Bench explicitly chose not to strike a claim under the rule empowering a stay of proceedings until the security for costs ordered was provided,<sup>viii</sup> but rather chose to strike the claim upon a finding of civil contempt. This case is therefore compelling recent authority that the civil contempt power is a force to be reckoned with.

**336239 Alberta Ltd. (c.o.b. Dave's Diesel Repair) v. Mella, 2016 ABCA 226**

Mella and the corporate defendants were debtors of Dave's Diesel for more than \$2.2 million. In 2014 Dave's Diesel obtained an Attachment Order directing the defendants to limit their monthly expenditures to \$2000 and directing that they maintain and provide detailed monthly expenditure records. In 2015 Mella paid \$5000 into his bank account. This was found to violate the Attachment Order and the First Contempt Order was issued. Mella was ordered to repay the money wrongfully arrogated to himself and to provide detailed financial records, in breach of which fines would be incurred. In March, 2015, judgment was filed in favor of Dave's Diesel against all defendants by consent for \$2,269,757. Mella did not comply with the First Contempt Order and in 2016 the Court of Queen's Bench issued a Second Contempt Order for the ongoing contempt under the First Contempt Order and because of further acts of contempt, including emailing his clients telling them to refuse to pay the business entity subject to garnishment and that he would provide the same services with the same staff

through a separate entity not subject to garnishment, transferring \$3500 from his account to his wife's account to avoid garnishment, and instructing his tenant of his rental condominium to pay his wife, in order to avoid garnishment. On March 23, 2016 the Court of Queen's Bench imposed further sanctions and Mella was ordered to attend to show cause on June 24, 2016 why he should not be imprisoned. At the June 24, 2016 hearing a different judge imprisoned Mella for three months. At the time of the application before the Court of Appeal Mella was in prison purging his contempt.

Mella applied to the Court of Appeal for a stay of the order finding him to be in contempt and sanctioning him with imprisonment. One of the grounds in his Notice of Appeal was that the court erred in ordering that Mella be imprisoned if he failed to purge his contempt through payment of money because imprisonment was not an appropriate remedy for the failure to pay money.<sup>ix</sup> In the result the appellate court dismissed the stay application, holding that the lower court's findings that he had deliberately evaded enforcement was entitled to a high degree of deference, and that the three-month term of imprisonment was entirely proportionate and necessary. F.L. Schutz JA stated: "It is *not* Mella's failure to pay his civil debt to Dave's Diesel that underlies the contempt sanctions imposed; rather, his misconduct in continuing to flagrantly breach the court's orders is the reason contempt sanctions have been imposed."<sup>x</sup>

And further:

Rule 10.52(3)(a)(i) refers only to the payment of money. But, the rule does not exclude the use of the contempt power to punish Mella for defiance of, and to coerce his compliance with, a mandatory injunction explicitly limiting his household expenditures and requiring a proper accounting, nor does it preclude disgorgement as sanction. It is not determinative that the First Contempt Order requires that money or money's worth be paid because a court order that punishes and coerces is not the functional equivalent of payment by Mella to Dave's Diesel for ordinary debts – a critical distinction: ...

Fines and imprisonment are means of enforcing "compliance with the process of the court itself": *Johnson v. Schwalm*, 2006 CanLII 13771 at para 24, 2006 CarswellOnt 2620. Mella's imprisonment serves both as punishment and an incentive to purge his ongoing contempt: *Korean Data Systems Co v. Chiang*, 2007 ONCA 529 at para 11, 77 CPC (6<sup>th</sup>) 253.<sup>xi</sup>

Thus this recent appellate court decision is somewhat remarkable in that it affirms the power of an application for civil contempt which may in fact lead to a term of imprisonment, notwithstanding that the underlying action is for civil debt, if there is explicit breach of court orders.

## Conclusion

These two recent Alberta cases have been selected for comment as they illustrate the potential hammer of an application for civil contempt. On the one hand, in **AMEC**, protracted litigation was brought to an end and, on the other, in **Dave's Diesel**, the sanction of imprisonment was imposed for breach of court orders notwithstanding that the underlying action was for civil debt. These cases illustrate that the Alberta courts take civil contempt seriously and are prepared to impose stiff sanctions to compel the purging of contempt. An application for civil contempt is thus an efficacious remedy in the toolbox of the Alberta civil trial lawyer.

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<sup>i</sup> At para. 31

<sup>ii</sup> At paras. 34, 35

<sup>iii</sup> At para. 13

<sup>iv</sup> 3.7%, as set out in para. 20

<sup>v</sup> At para. 12

<sup>vi</sup> At para. 15

<sup>vii</sup> At para. 22

<sup>viii</sup> Rule 4.23(1)(c)

<sup>ix</sup> At para. 15

<sup>x</sup> At para. 24

<sup>xi</sup> At paras. 25, 26