Divisional Court File No. 648/15
Superior Court of Justice Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N :

THE CATALYST CAPITAL GROUP INC.

Plaintiff/
Moving Party

- and -

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants/
Responding Parties

BOOK OF AUTHORITIES

Motions to Extend Time for Leave to Appeal and Leave to Appeal
Returnable January 21, 2016

January 18, 2016

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2015 SCC 17, 2015 CSC 17
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Carey v. Laiken

2015 CarswellOnt 5237, 2015 CarswellOnt 5238, 2015 SCC 17, 2015 CSC 17, [2015] 2 S.C.R. 79, [2015] A.C.S. No. 17, [2015] S.C.J. No. 17, 251 A.C.W.S. (3d) 242, 332 O.A.C. 142, 382 D.L.R. (4th) 577, 470 N.R. 89, 66 C.P.C. (7th) 1, J.E. 2015-660

Peter W. G. Carey, Appellant and Judith Laiken, Respondent

McLachlin C.J.C., Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner JJ.

Heard: December 10, 2014
Judgment: April 16, 2015
Docket: 35597

Proceedings: affirming *Laiken v. Carey* (2013), 116 O.R. (3d) 641, 52 C.P.C. (7th) 144, 367 D.L.R. (4th) 415, 310 O.A.C. 209, 2013 CarswellOnt 11824, 2013 ONCA 530, E.E. Gillese J.A., M. Rosenberg J.A., Robert J. Sharpe J.A. (Ont. C.A.); reversing *Laiken v. Carey* (2012), [2012] O.J. No. 6596, 2012 CarswellOnt 17537, 2012 ONSC 7252, L.B. Roberts J. (Ont. S.C.J.)

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Kevin Toyne, John Philpott, for Respondent

Subject: Civil Practice and Procedure

Headnote

Judges and courts --- Contempt of court — Nature of offence

In course of litigation, L obtained broad ex parte Mareva injunction restraining client's assets — Solicitor obeyed client's instructions to return funds to client that he had earlier paid into solicitor's trust account — L's motion for order finding solicitor in contempt of injunction was granted — Solicitor's motion to re-open contempt hearing and set aside contempt finding was granted — Motions judge found that solicitor's new evidence raised reasonable doubt that his interpretation of Mareva injunction was deliberately and willfully blind — L's appeal was allowed and contempt finding was restored — Court of Appeal accepted that solicitor did not knowingly choose to disobey injunction, but found that it was unnecessary to establish this to find solicitor liable for civil contempt — Solicitor appealed — Appeal dismissed — Proof beyond reasonable doubt of intentional act or omission that was in breach of clear order of which alleged contemnor had notice was required to establish civil contempt — Contumacy,

being intent to interfere with administration of justice, was not element of civil contempt and lack of contumacy was not defence — Heightened fault requirement should not apply to individuals who cannot purge their contempt, to lawyers and to third parties — Existing discretion not to enter contempt finding and defence of impossibility of compliance provided better answers than heightened degree of fault where party was unable to purge his or her contempt — Motions judge erred in law to extent that she found that contumacious intent was required.

Judges and courts --- Contempt of court — Forms of contempt — Disobedience of court — Injunctions — Miscellaneous

In course of litigation, L obtained broad ex parte Mareva injunction restraining client's assets — Solicitor obeyed client's instructions to return funds to client that he had earlier paid into solicitor's trust account — L's motion for order finding solicitor in contempt of injunction was granted — Solicitor's motion to re-open contempt hearing and set aside contempt finding was granted — L's appeal was allowed and contempt finding was restored — Court of Appeal held that motions judge had erred in setting aside contempt finding — Court of Appeal accepted that solicitor did not knowingly choose to disobey injunction, but found that it was unnecessary to establish this to find solicitor liable for civil contempt, as he committed act that violated clear court order that he knew of — Solicitor appealed — Appeal dismissed — It would be illogical to interpret court order as allowing trustees of assets held for client's benefit to freely transfer those assets between accounts and even between jurisdictions, putting those assets beyond reach of court, so long as client retained beneficial ownership of assets — Such interpretation would run counter to plain language of order specifically prohibiting those with knowledge of it from "dealing with" client's assets — Solicitor's characterization of $500,000 in his trust account as "overpayment" of "reasonable legal fees" was artificial — Solicitor's other conduct showed that he understood that order was in full force and was binding on him.

Judges and courts --- Contempt of court — Forms of contempt — Disobedience of court — Injunctions — Liability of third persons

In course of litigation, L obtained broad ex parte Mareva injunction restraining client's assets — Solicitor obeyed client's instructions to return funds to client that he had earlier paid into solicitor's trust account — L's motion for order finding solicitor in contempt of injunction was granted — Solicitor's motion to re-open contempt hearing and set aside contempt finding was granted — L's appeal was allowed and contempt finding was restored — Court of Appeal held that motions judge had erred in setting aside contempt finding — Solicitor appealed — Appeal dismissed — There was not true conflict between order and solicitor's professional duties such that he had no option but to transfer trust funds back to client — Solicitor's assumed duty to guard solicitor-client privilege did not conflict with his duty to comply with order, as he only had to leave funds in his trust account, or he could have sought other

appropriate avenues — There was no legal or ethical duty that compelled solicitor to breach injunction by transferring trust funds back to client or that conflicted with obeying order.

Judges and courts --- Contempt of court — Practice and procedure — General principles

In course of litigation, L obtained broad ex parte Mareva injunction restraining client's assets — Solicitor obeyed client's instructions to return funds to client that he had earlier paid into solicitor's trust account — L's motion for order finding solicitor in contempt of injunction was granted — Solicitor's motion to re-open contempt hearing and set aside contempt finding was granted — L's appeal was allowed and contempt finding was restored — Court of Appeal held that motions judge had erred in setting aside contempt finding — Court of Appeal held that solicitor had inappropriately used second stage of contempt proceedings to attack motion judge's earlier findings, based on evidence he ought to have filed at first hearing — Solicitor appealed — Appeal dismissed — Neither Rules of Civil Procedure nor case law contemplated procedure motions judge followed — It was inappropriate for solicitor to use second stage of contempt proceedings to attack motions judge's findings and declaration of contempt — Once finding of contempt had been made at first stage of bifurcated proceeding, that finding was usually final, unless contemnor had subsequently purged contempt or new evidence was brought to light that was not available at initial hearing — Motions judge erred in exercising her discretion to permit solicitor to re-litigate initial contempt finding and erred in setting that finding aside.

Juges et tribunaux --- Outrage au tribunal — Nature de l'infraction

Dans le contexte d'un litige, L a obtenu, en l'absence de la partie adverse, une injonction de type Mareva formulée en termes larges visant à interdire le transfert des actifs du client — Avocat a exécuté les directives du client de lui retourner les fonds qu'il avait versés plus tôt dans son compte en fiducie — Requête de L visant à obtenir une ordonnance d'outrage au tribunal pour ne pas avoir respecté les termes de l'injonction a été accordée — Requête de l'avocat visant à rouvrir l'audience relative à l'outrage et annuler l'outrage a été accordée — Juge des requêtes a conclu que la nouvelle preuve introduite par l'avocat soulevait un doute raisonnable que son interprétation de l'injonction de type Mareva équivalait à un aveuglement volontaire et délibéré — Appel interjeté par L a été accueilli et l'ordonnance d'outrage a été rétablie — Cour d'appel a convenu que l'avocat n'avait pas consciemment choisi de contrevenir à l'injonction, mais a conclu qu'il n'était pas nécessaire pour arriver à ce résultat de rendre l'avocat coupable d'outrage civil — Avocat a formé un pourvoi — Pourvoi rejeté — Pour établir l'outrage civil, il était nécessaire de prouver hors de tout doute raisonnable que l'auteur présumé d'un outrage a intentionnellement commis un acte, ou omis d'agir, en violation d'une ordonnance claire dont il avait connaissance — Désobéissance, soit l'intention d'entraver l'administration de la justice, n'était pas un élément constitutif de l'outrage civil, et l'absence d'intention de désobéir ne pouvait pas être invoquée comme moyen de défense

— Exigence plus rigoureuse en matière de faute ne devrait pas s'appliquer aux individus qui ne peuvent pas faire amende honorable pour l'outrage, aux avocats et aux tiers — Pouvoir discrétionnaire actuel de ne pas tirer une conclusion d'outrage ainsi que le moyen de défense fondé sur l'impossibilité de se conformer conviennent davantage qu'un degré plus élevé de faute ne le ferait quand une personne n'est pas en mesure de faire amende honorable pour outrage — Juge des requêtes a commis une erreur de droit dans la mesure où elle a conclu que l'intention de désobéir était requise.

Juges et tribunaux --- Outrage au tribunal — Formes d'outrage — Désobéissance à un ordre du tribunal — Injonctions — Divers

Dans le contexte d'un litige, L a obtenu, en l'absence de la partie adverse, une injonction de type Mareva formulée en termes larges visant à interdire le transfert des actifs du client — Avocat a exécuté les directives du client de lui retourner les fonds qu'il avait versés plus tôt dans son compte en fiducie — Requête de L visant à obtenir une ordonnance d'outrage au tribunal pour ne pas avoir respecté les termes de l'injonction a été accordée — Requête de l'avocat visant à rouvrir l'audience relative à l'outrage et annuler l'outrage a été accordée — Appel interjeté par L a été accueilli et l'ordonnance d'outrage a été rétablie — Cour d'appel a estimé que la juge des requêtes avait commis une erreur en annulant l'ordonnance d'outrage — Cour d'appel a convenu que l'avocat n'avait pas consciemment choisi de contrevenir à l'injonction, mais a conclu qu'il n'était pas nécessaire pour arriver à ce résultat de rendre l'avocat coupable d'outrage civil, puisqu'il a posé un geste qui contrevenait à une ordonnance formelle du tribunal et dont il avait connaissance — Avocat a formé un pourvoi — Pourvoi rejeté — Il ne serait pas logique d'interpréter l'ordonnance du tribunal de manière à permettre aux fiduciaires des actifs détenus au bénéfice du client de les transférer librement d'un compte à un autre et même d'un lieu à un autre, et à ainsi les mettre hors de portée du tribunal advenant une procédure d'exécution, et ce, tant et aussi longtemps que le client en conservait la propriété effective — Telle interprétation irait à l'encontre du libellé clair de l'ordonnance interdisant précisément ceux en ayant connaissance d'« utiliser » les actifs du client — Avocat a qualifié le montant de 500 000 $ détenu dans son compte en fiducie de « versement excédentaire d'honoraires raisonnables », ce qui était artificiel — Autres agissements de l'avocat indiquaient qu'il comprenait que l'ordonnance était en vigueur et qu'il était lié par elle.

Juges et tribunaux --- Outrage au tribunal — Formes d'outrage — Désobéissance à un ordre du tribunal — Injonctions — Responsabilité d'une tierce personne

Dans le contexte d'un litige, L a obtenu, en l'absence de la partie adverse, une injonction de type Mareva formulée en termes larges visant à interdire le transfert des actifs du client — Avocat a exécuté les directives du client de lui retourner les fonds qu'il avait versés plus tôt dans son compte en fiducie — Requête de L visant à obtenir une ordonnance d'outrage au tribunal pour ne pas avoir respecté les termes de l'injonction a été accordée — Requête de l'avocat visant à rouvrir l'audience relative à l'outrage et annuler l'outrage a été accordée —

Appel interjeté par L a été accueilli et l'ordonnance d'outrage a été rétablie — Cour d'appel a estimé que la juge des requêtes avait commis une erreur en annulant l'ordonnance d'outrage — Avocat a formé un pourvoi — Pourvoi rejeté — Il n'y avait pas de véritable conflit entre l'ordonnance et les obligations professionnelles de l'avocat, de sorte qu'il n'avait d'autre choix que de remettre les fonds détenus en fiducie à son client — Obligation qu'a assumée l'avocat relativement au secret professionnel n'était pas incompatible avec son obligation de respecter l'ordonnance puisqu'il n'avait qu'à laisser les fonds dans son compte en fiducie ou recourir à d'autres solutions appropriées — Il n'y avait aucune obligation légale ou éthique qui l'obligeait à violer l'injonction en remettant les fonds en fiducie à son client ou qui était incompatible avec le respect de l'ordonnance.

Juges et tribunaux --- Outrage au tribunal — Procédure — Principes généraux

Dans le contexte d'un litige, L a obtenu, en l'absence de la partie adverse, une injonction de type Mareva formulée en termes larges visant à interdire le transfert des actifs du client — Avocat a exécuté les directives du client de lui retourner les fonds qu'il avait versés plus tôt dans son compte en fiducie — Requête de L visant à obtenir une ordonnance d'outrage au tribunal pour ne pas avoir respecté les termes de l'injonction a été accordée — Requête de l'avocat visant à rouvrir l'audience relative à l'outrage et annuler l'outrage a été accordée — Appel interjeté par L a été accueilli et l'ordonnance d'outrage a été rétablie — Cour d'appel a estimé que la juge des requêtes avait commis une erreur en annulant l'ordonnance d'outrage — Cour d'appel a estimé que l'avocat avait utilisé de manière inappropriée la deuxième étape de la procédure pour outrage pour contester les conclusions tirées précédemment par la juge des requêtes, à partir de la preuve qu'il aurait dû déposer lors de la première audition — Avocat a formé un pourvoi — Pourvoi rejeté — Ni les Règles de procédure civile ni la jurisprudence ne prévoient le recours à la procédure suivie par la juge des requêtes — Il n'était pas approprié de la part de l'avocat d'utiliser la deuxième étape de la procédure pour outrage pour contester les conclusions de la juge des requêtes et la déclaration d'outrage — Une fois qu'une conclusion d'outrage a été tirée à la première étape d'une procédure scindée, cette conclusion est habituellement définitive à moins que l'auteur de l'outrage n'ait par la suite fait amende honorable pour outrage ou qu'une nouvelle preuve qui n'était pas connue à l'occasion de l'audition initiale n'ait été introduite — Juge des requêtes a commis une erreur en exerçant sa discrétion pour autoriser l'avocat à remettre en cause la conclusion initiale et en annulant cette conclusion.

In the course of litigation, L obtained a broad ex parte Mareva injunction restraining the client's assets. The solicitor obeyed the client's instructions to return funds to the client that he had earlier paid into the solicitor's trust account.

L's motion for an order finding the solicitor in contempt of the injunction was granted.

The solicitor's motion to re-open the contempt hearing and set aside the contempt finding was granted. The motions judge found that the solicitor's new evidence raised a reasonable doubt that his interpretation of the Mareva injunction was deliberately and willfully blind.

L's appeal was allowed and the contempt finding was restored. The Court of Appeal held that the motions judge had erred in setting aside the contempt finding. The Court of Appeal held that the solicitor had inappropriately used the second stage of the contempt proceedings to attack the motion judge's earlier findings, based on evidence he ought to have filed at the first hearing. The Court of Appeal accepted that the solicitor did not knowingly choose to disobey the injunction, but found that it was unnecessary to establish this to find the solicitor liable for civil contempt, as he committed an act that violated a clear court order that he knew of.

The solicitor appealed.

Held: The appeal was dismissed.

Per Cromwell J. (McLachlin C.J.C., Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ. concurring): Proof beyond a reasonable doubt of an intentional act or omission that was in breach of a clear order of which the alleged contemnor had notice was required to establish civil contempt. Contumacy, being the intent to interfere with the administration of justice, was not an element of civil contempt and lack of contumacy was not a defence. A heightened fault requirement should not apply to individuals who cannot purge their contempt, to lawyers and to third parties. The existing discretion not to enter a contempt finding and the defence of impossibility of compliance provided better answers than a heightened degree of fault where a party was unable to purge his or her contempt. The motions judge erred in law to the extent that she found that contumacious intent was required.

It would be illogical to interpret the court order as allowing trustees of assets held for the client's benefit to freely transfer those assets between accounts and even between jurisdictions, putting those assets beyond the reach of the court, so long as the client retained beneficial ownership of the assets. Such an interpretation would run counter to the plain language of the order specifically prohibiting those with knowledge of it from "dealing with" the client's assets. The solicitor's characterization of the $500,000 in his trust account as an "overpayment" of "reasonable legal fees" was artificial. The solicitor's other conduct showed that he understood that the order was in full force and was binding on him.

There was not a true conflict between the order and the solicitor's professional duties such that he had no option but to transfer the trust funds back to the client. The solicitor's assumed duty to guard solicitor-client privilege did not conflict with his duty to comply with the

order, as he only had to leave the funds in his trust account, or he could have sought other appropriate avenues. There was no legal or ethical duty that compelled the solicitor to breach the injunction by transferring trust funds back to the client or that conflicted with obeying the order.

Neither the Rules of Civil Procedure nor case law contemplated the procedure the motions judge followed. It was inappropriate for the solicitor to use the second stage of contempt proceedings to attack the motions judge's findings and declaration of contempt. Once a finding of contempt had been made at the first stage of the bifurcated proceeding, that finding was usually final, unless the contemnor had subsequently purged the contempt or new evidence was brought to light that was not available at the initial hearing. The motions judge erred in exercising her discretion to permit the solicitor to re-litigate the initial contempt finding and erred in setting that finding aside.

Dans le contexte d'un litige, L a obtenu, en l'absence de la partie adverse, une injonction de type Mareva formulée en termes larges visant à interdire le transfert des actifs du client. L'avocat a exécuté les directives du client de lui retourner les fonds qu'il avait versés plus tôt dans son compte en fiducie.

La requête de L visant à obtenir une ordonnance d'outrage au tribunal pour ne pas avoir respecté les termes de l'injonction a été accordée.

La requête de l'avocat visant à rouvrir l'audience relative à l'outrage et annuler l'outrage a été accordée. La juge des requêtes a conclu que la nouvelle preuve introduite par l'avocat soulevait un doute raisonnable que son interprétation de l'injonction de type Mareva équivalait à un aveuglement volontaire et délibéré.

L'appel interjeté par L a été accueilli et l'ordonnance d'outrage a été rétablie. La Cour d'appel a estimé que la juge des requêtes avait commis une erreur en annulant l'ordonnance d'outrage. La Cour d'appel a estimé que l'avocat avait utilisé de manière inappropriée la deuxième étape de la procédure pour outrage pour contester les conclusions tirées précédemment par la juge des requêtes, à partir de la preuve qu'il aurait dû déposer lors de la première audition. La Cour d'appel a convenu que l'avocat n'avait pas consciemment choisi de contrevenir à l'injonction, mais a conclu qu'il n'était pas nécessaire pour arriver à ce résultat de rendre l'avocat coupable d'outrage civil, puisqu'il a posé un geste qui contrevenait à une ordonnance formelle du tribunal et dont il avait connaissance.

L'avocat a formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

Cromwell, J. (McLachlin, J.C.C., Abella, Rothstein, Moldaver, Karakatsanis, Wagner, JJ., souscrivant à son opinion) : Pour établir l'outrage civil, il suffit de prouver hors de tout doute raisonnable que l'auteur présumé d'un outrage a intentionnellement commis un acte, ou omis d'agir, en violation d'une ordonnance claire dont il avait connaissance. La désobéissance, soit l'intention d'entraver l'administration de la justice, n'était pas un élément constitutif de l'outrage civil et, par conséquent, l'absence d'intention de désobéir ne pouvait pas être invoquée comme moyen de défense. Une exigence plus rigoureuse en matière de faute ne devrait pas s'appliquer aux individus qui ne peuvent pas faire amende honorable pour l'outrage, aux avocats et aux tiers. Le pouvoir discrétionnaire actuel de ne pas tirer une conclusion d'outrage ainsi que le moyen de défense fondé sur l'impossibilité de se conformer conviennent davantage qu'un degré plus élevé de faute ne le ferait quand une personne n'est pas en mesure de faire amende honorable pour outrage. La juge des requêtes a commis une erreur de droit dans la mesure où elle a conclu que l'intention de désobéir était requise.

Il ne serait pas logique d'interpréter l'ordonnance du tribunal de manière à permettre aux fiduciaires des actifs détenus au bénéfice du client de les transférer librement d'un compte à un autre et même d'un lieu à un autre, et à ainsi les mettre hors de portée du tribunal advenant une procédure d'exécution, et ce, tant et aussi longtemps que le client en conservait la propriété effective. Une telle interprétation irait à l'encontre du libellé clair de l'ordonnance interdisant précisément ceux en ayant connaissance d'« utiliser » les actifs du client. L'avocat a qualifié le montant de 500 000 $ détenu dans son compte en fiducie de « versement excédentaire d'honoraires raisonnables », ce qui était artificiel. Les autres agissements de l'avocat indiquaient qu'il comprenait que l'ordonnance était en vigueur et qu'il était lié par elle.

Il n'y avait pas de véritable conflit entre l'ordonnance et les obligations professionnelles de l'avocat, de sorte qu'il n'avait d'autre choix que de remettre les fonds détenus en fiducie à son client. L'obligation qu'a assumée l'avocat relativement au secret professionnel n'était pas incompatible avec son obligation de respecter l'ordonnance puisqu'il n'avait qu'à laisser les fonds dans son compte en fiducie ou recourir à d'autres solutions appropriées. Il n'y avait aucune obligation légale ou éthique qui l'obligeait à violer l'injonction en remettant les fonds en fiducie à son client ou qui était incompatible avec le respect de l'ordonnance.

Ni les Règles de procédure civile ni la jurisprudence ne prévoient le recours à la procédure suivie par la juge des requêtes. Il n'était pas approprié de la part de l'avocat d'utiliser la deuxième étape de la procédure pour outrage pour contester les conclusions de la juge des requêtes et la déclaration d'outrage. Une fois qu'une conclusion d'outrage a été tirée à la première étape d'une procédure scindée, cette conclusion est habituellement définitive à

moins que l'auteur de l'outrage n'ait par la suite fait amende honorable pour outrage ou qu'une nouvelle preuve qui n'était pas connue à l'occasion de l'audition initiale n'ait été introduite. La juge des requêtes a commis une erreur en exerçant sa discrétion pour autoriser l'avocat à remettre en cause la conclusion initiale et en annulant cette conclusion.

APPEAL by defendant solicitor from judgment reported at *Laiken v. Carey* (2013), 2013 ONCA 530, 2013 CarswellOnt 11824, 116 O.R. (3d) 641, 310 O.A.C. 209, 367 D.L.R. (4th) 415, 52 C.P.C. (7th) 144 (Ont. C.A.), allowing plaintiff's appeal from judgment setting aside finding of contempt of court against solicitor.

POURVOI formé par un avocat défendeur à l'encontre d'une décision publiée à *Laiken v. Carey* (2013), 2013 ONCA 530, 2013 CarswellOnt 11824, 116 O.R. (3d) 641, 310 O.A.C. 209, 367 D.L.R. (4th) 415, 52 C.P.C. (7th) 144 (Ont. C.A.), ayant accueilli l'appel interjeté par le demandeur à l'encontre d'un jugement ayant annulé une ordonnance d'outrage au tribunal prononcée à l'encontre de l'avocat.

***Cromwell J.* (McLachlin C.J.C. and Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ. concurring):**

I. Introduction

1 Contempt of court proceedings against lawyers are rare; so are situations in which judges reverse their own previous findings. But this case, which gives the Court the opportunity to clarify some aspects of the common law of civil contempt of court, has both of these unusual elements.

2 The appellant, Peter Carey, is a lawyer who was the object of contempt proceedings for allegedly breaching the terms of an injunction. He was initially found in contempt by a judge of the Ontario Superior Court of Justice, but the judge revisited that finding and reversed it when the matter came back before her for consideration of the appropriate penalty. The Court of Appeal set the judge's second decision aside and found Mr. Carey in contempt. He now appeals to this Court, raising three questions:

> 1. To have committed contempt, did Mr. Carey have to intend to interfere with the administration of justice?
>
> 2. Was Mr. Carey in Contempt?
>
> 3. Was it open to the judge to set aside her initial finding of contempt?

3 I conclude that the Court of Appeal for Ontario was correct to answer the first and third questions in the negative and the second in the affirmative: to be in contempt, Mr. Carey did not need to intend to interfere with the administration of justice; Mr. Carey was in contempt and his

obligations to his client did not justify or excuse his breaching the injunction; and it was not open to the judge to set aside her initial finding of contempt. I would therefore dismiss the appeal with costs.

4 The factual and procedural context in which these issues arise is complicated and I will turn to that before getting into the legal analysis that has led me to these conclusions.

II. Background

A. Overview

5 The appeal arises out of Mr. Carey's alleged breach of a so-called *Mareva* injunction that enjoined any person with knowledge of the order from "disposing of, or otherwise dealing with" any assets of various parties, including Peter Sabourin for whom Mr. Carey acted. The injunction was issued in the course of litigation between the respondent, Judith Laiken, and Mr. Sabourin and related parties. Ultimately, Ms. Laiken obtained a judgment against Mr. Sabourin and his companies for roughly one million dollars and costs.

6 Following the conclusion of this litigation, Ms. Laiken brought contempt proceedings against Mr. Carey, who unquestionably had knowledge of the injunction. She alleged he had breached its terms by returning to Mr. Sabourin over $400,000 that Mr. Carey was holding in trust for him. These contempt proceedings have led to the appeal before this Court.

B. The Litigation Leading to the Injunction

7 Ms. Laiken retained Mr. Sabourin and his group of companies to conduct off-shore security trades on her behalf. To this end, she transferred approximately $885,000 to various bank accounts he and his businesses held. Ultimately, these funds were lost and, unsurprisingly, the business relationship between Ms. Laiken and Mr. Sabourin soured. In 2000, he sued her for $364,000, alleging a deficit in her margin account. She counterclaimed for over $800,000, alleging that he had defrauded her. Mr. Carey represented Mr. Sabourin and his business entities in these proceedings.

8 Ms. Laiken obtained an *ex parte Mareva* injunction from the Ontario Superior Court of Justice freezing the assets of the defendants to her counterclaim, including Mr. Sabourin. The injunction had broad terms. It prohibited, among other things, Mr. Sabourin and any person with knowledge of the order from "disposing of, or otherwise dealing with" any of Mr. Sabourin's assets: Order of May 4, 2006, by Campbell J. (see A.R., vol. I, at p. 2). The injunction also directed any person with knowledge of it to "take immediate steps to prevent the ... transfer" of the assets, including those held in "trust accounts" in that person's power, possession or control (*ibid.*). The Superior Court of Justice continued the injunction on multiple occasions with the understanding that the parties needed to work out between themselves variations to it to allow for payment of legal fees and living expenses. However, the injunction was never formally amended.

9 A few months after the initial order had been made Mr. Sabourin sent Mr. Carey a cheque for $500,000. No instructions accompanied the cheque and Mr. Carey could not reach Mr. Sabourin to obtain instructions. Pursuant to Law Society of Upper Canada by-law requirements, Mr. Carey deposited the cheque in his trust account, applying some of the money towards Mr. Sabourin's outstanding legal fees, since the parties had agreed that the injunction did not prohibit the payment of reasonable legal fees.

10 Mr. Sabourin later called Mr. Carey and told him to use the rest of the funds to settle the claims of creditors represented by Bill Brown, who had invested in the Sabourin entities. Mr. Carey advised Mr. Sabourin that he could not do that because making a payment to a third-party creditor would breach the injunction. Mr. Sabourin then instructed Mr. Carey to attempt to negotiate a settlement with Ms. Laiken.

11 A few days later, during a conference call with Messrs. Brown and Carey, Mr. Sabourin advised that Mr. Carey was holding some $500,000 in trust. The money, he said, was intended for Mr. Brown, but the injunction prohibited Mr. Carey from paying it to him.

12 Mr. Carey could not reach a settlement with Ms. Laiken's lawyers. At no point did he reveal to them the existence of the trust money. After the failed settlement negotiations, Mr. Sabourin instructed Mr. Carey to return the balance of the funds to him, which Mr. Carey did after deducting an amount to cover future legal fees. Mr. Carey transferred a total of $440,000 back to Mr. Sabourin in October and November 2006.

13 Early in 2007, Mr. Sabourin called Mr. Carey and terminated his retainer and instructed him to take no further steps until he had retained new counsel. Shortly after this call, Mr. Sabourin went out of business and vanished. Mr. Carey never received a notice of change of lawyers and remained counsel of record in the Laiken-Sabourin litigation.

14 Later that year, Mr. Brown obtained judgment against Mr. Sabourin and receivership over his assets and those of his companies. Advised of the trust funds that Mr. Carey had held for Mr. Sabourin, the receiver demanded that Mr. Carey provide a full accounting of these funds. Mr. Carey replied that he had received $500,000 from Mr. Sabourin, returned $440,000 and that just over $6,000 remained in the trust account. Mr. Carey indicated that he felt he could provide this information without violating any solicitor-client privilege, but he refused to provide additional information or documents that he thought might be privileged. A further court order required Mr. Carey to give a "full accounting of all funds" from Mr. Sabourin, which he provided.

15 In November 2007, Ms. Laiken obtained summary judgment dismissing Mr. Sabourin's claim against her and granting her over $1 million in damages and costs on her counterclaim for fraud.

C. The Contempt Proceedings

16 Ms. Laiken applied to have Mr. Carey found in contempt. She alleged that he breached the *Mareva* injunction by returning the $440,000 in his trust account to Mr. Sabourin. The series of decisions related to this motion led ultimately to the appeal before us.

17 In Ontario, civil contempt proceedings are governed by Rule 60.11 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Under this Rule, a party may move to obtain a contempt order: Rule 60.11(1). A judge, in dealing with such a motion, can "make such order as is just" and, following "a finding" of contempt, he or she may order the contemnor to be imprisoned, pay a fine, do or refrain from doing an act, pay just costs, and comply with any other order the judge considers necessary: Rule 60.11(5). Upon motion, "a judge may discharge, set aside, vary or give directions in respect of an order under subrule (5) ... and may grant such other relief and make such other order as is just": Rule 60.11(8).

18 The *Rules* do not prescribe the form of contempt proceedings. However, as a general rule, proceedings are bifurcated into a liability phase — where the case on liability proceeds and a defence is offered — and, if liability is established, a penalty phase. In contempt proceedings, liability and penalty are discrete issues: *College of Optometrists (Ontario) v. SHS Optical Ltd.*, 2008 ONCA 685, 241 O.A.C. 225 (Ont. C.A.), at paras. 72-75.

19 It is within this procedural framework that the Ontario courts considered Ms. Laiken's motion to find Mr. Carey in contempt of the *Mareva* injunction.

(1) The First Contempt Decision: Ontario Superior Court of Justice (Roberts J., 2011 ONSC 5892 (Ont. S.C.J.)

20 The motions judge found Mr. Carey in contempt and issued an order to that effect. She was satisfied beyond a reasonable doubt that the *Mareva* order was clear and that Mr. Carey "knowingly and deliberately breached" it by transferring the funds from his trust account to Mr. Sabourin (para. 42 (CanLII)). The motions judge ordered the parties to appear before her at a later date for another hearing. She stated she would take into account any further evidence and testimony the parties submitted in making any order under Rules 60.11(5) and 60.11(8).

(2) The Stay Application Decision: Court of Appeal for Ontario (Sharpe J.A., 2011 ONCA 757, 286 O.A.C. 273 (Ont. C.A. [In Chambers])

21 A judge of the Court of Appeal dismissed Mr. Carey's motion for a stay of the motions judge's order and any further proceedings pending appeal of that order. The court held that the contempt proceedings were not yet completed and that until they were, the Court of Appeal would not know relevant information, including whether the judge considered the contempt to be trivial or serious.

(3) The Second Contempt Decision: Ontario Superior Court of Justice (Roberts J., 2012 ONSC 7252, [2012] O.J. No. 6596 (Ont. S.C.J.)

22 When the matter resumed before the motions judge, Mr. Carey moved to reopen the contempt hearing. He filed new evidence, including an affidavit sworn by Alan Lenczner, Q.C., stating that by returning the money in excess of that required to cover legal fees, Mr. Carey had acted in a manner consistent with the practice of counsel generally. Mr. Carey also proffered his own testimony about what he perceived to be his professional obligations and his motivations in dealing with the trust funds.

23 The motions judge set aside her previous finding of contempt. Based on the new evidence, she doubted whether the terms of the order were clear and whether Mr. Carey's interpretation of it was deliberately and wilfully blind.

(4) The Appeal Decision: Court of Appeal for Ontario (Sharpe J.A. (Rosenberg and Gillese JJ.A. concurring), 2013 ONCA 530, 367 D.L.R. (4th) 415 (Ont. C.A.)

24 The Court of Appeal unanimously allowed the appeal and restored the initial contempt finding. The motions judge had erred, the Court of Appeal found, in setting it aside. Mr. Carey had inappropriately used the second stage of the contempt proceedings to attack the motions judge's earlier findings and based this attack on evidence he ought to have filed at the first hearing. While the appeal could have been resolved on these procedural grounds, the court went on to hold that the motions judge erred in finding Mr. Carey was not in contempt.

25 The Court of Appeal accepted that Mr. Carey did not desire or knowingly choose to disobey the order, but found that it is unnecessary to establish this in order to find him liable for civil contempt. Mr. Carey knew of a clear court order and he committed an act that violated it. This was sufficient to constitute civil contempt.

III. Analysis

A. First Issue: To Have Committed Contempt, Did Mr. Carey Have to Intend to Interfere With the Administration of Justice?

(1) Overview

26 At the initial contempt hearing, Roberts J. stated, in my view correctly, that "civil contempt consists of the intentional doing of an act which is in fact prohibited by the order": 2011 ONSC 5892 (Ont. S.C.J.), at para. 24 (CanLII). However, she subsequently set aside her earlier finding of contempt. She held:

> Based on Mr. Carey's oral evidence, because of the protracted history between Mr. Carey's clients and the plaintiff and the way that Mr. Carey viewed the merits of the plaintiffs claim, the unusual form of the May 4, 2006 Mareva Order, and the variations discussed and agreed upon between counsel, which were not set out in one document by formal amendment, I have a reasonable doubt as to whether the terms of the May 4, 2006 Mareva Order were completely clear to Mr. Carey, and I am not satisfied beyond a reasonable doubt that Mr. Carey's interpretation of the May 4, 2006 Mareva Order was deliberately and willfully blind.
>
> [Emphasis added; 2012 ONSC 7252 (Ont. S.C.J.), at para. 36.]

27 The Court of Appeal, however, held that it was an error of law to conclude that Mr. Carey could not be found in contempt because he did not deliberately breach the order. Ms. Laiken did not have to prove that Mr. Carey had "deliberately" breached the order or, as the court put it elsewhere in its reasons, to establish "contumacious intent": 2013 ONCA 530 (Ont. C.A.), at paras. 65, 62. The order clearly prohibited dealing in trust funds belonging to Mr. Sabourin, yet Mr. Carey knew of the order and he intentionally transferred the funds, an act that was contrary to the order. This is all that is required to establish the elements of civil contempt.

28 Before this Court, the parties devoted a substantial portion of their written submissions to the mental element of civil contempt. Mr. Carey's position is that in various circumstances — namely, where the alleged contemnor cannot "purge" his contempt, is a lawyer or is a third party to an order — proof of an intention to interfere with the administration of justice is required. In other words, in these circumstances contumacy or intent to breach the order is an element of the offence. Ms. Laiken frames the issue slightly differently. Rather than viewing the question as one turning on the elements of civil contempt, she submits that lack of contumacious intent is not a defence in civil contempt proceedings, regardless of the alleged contemnor's circumstances.

29 However framed, the issue boils down to the required intent for a finding of civil contempt. Canadian jurisprudence clearly sets out the requirements for establishing civil contempt, of which I provide an overview below. Contumacy — the intent to interfere with the administration of justice — is not an element of civil contempt and lack of contumacy is therefore not a defence. I do not accept Mr. Carey's position that a different rule should apply to individuals who cannot purge their contempt, to lawyers and to third parties.

(2) The Canadian Common Law of Civil Contempt

30 Contempt of court "rest[s] on the power of the court to uphold its dignity and process .... The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect": *U.N.A. v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 (S.C.C.), at p. 931. It is well-established that the purpose of a contempt order is "first and foremost a declaration that a party has acted in defiance of a court order": *Pro Swing Inc. v. ELTA Golf Inc.*, 2006 SCC

52, [2006] 2 S.C.R. 612 (S.C.C.), at para. 35, cited in *Bell ExpressVu Ltd. Partnership v. Torroni*, 2009 ONCA 85, 94 O.R. (3d) 614 (Ont. C.A.), at para. 20.

31 The common law has developed to recognize two forms of contempt of court: criminal contempt and civil contempt. The distinction, which the parties to this appeal accept, rests on the element of public defiance accompanying criminal contempt: see, e.g., *United Nurses*, at p. 931; *Canadian Transport (U.K.) Ltd. v. Alsbury*, [1953] 1 S.C.R. 516 (S.C.C.), at p. 522. With civil contempt, where there is no element of public defiance, the matter is generally seen "primarily as coercive rather than punitive": R. J. Sharpe, *Injunctions and Specific Performance* (2nd ed. (looseleaf)), at ¶6.100. However, one purpose of sentencing for civil contempt is punishment for breaching a court order: *Korea Data Systems Co. v. Chiang*, 2009 ONCA 3, 305 D.L.R. (4th) 655 (Ont. C.A.), at para. 117. Courts sometimes impose substantial fines to match the gravity of the contempt, to deter the contemnor's continuing conduct and to deter others from comparable conduct: Sharpe, at ¶6.100.

32 Civil contempt has three elements which must be established beyond a reasonable doubt: *G. (N.) c. Services aux enfants & adultes de Prescott-Russell* (2006), 82 O.R. (3d) 686 (Ont. C.A.), at para. 27; *College of Optometrists*, at para. 71; *Bhatnager v. Canada (Minister of Employment & Immigration)*, [1990] 2 S.C.R. 217 (S.C.C.), at pp. 224-25; *Jackson v. Honey*, 2009 BCCA 112, 267 B.C.A.C. 210 (B.C. C.A.), at paras. 12-13; *TG Industries Ltd. v. Williams*, 2001 NSCA 105, 196 N.S.R. (2d) 35 (N.S. C.A.), at paras. 17 and 32; *Godin v. Godin*, 2012 NSCA 54, 317 N.S.R. (2d) 204 (N.S. C.A.), at para. 47; *Gaudet v. Soper*, 2011 NSCA 11, 298 N.S.R. (2d) 303 (N.S. C.A.), at para. 23. These three elements, coupled with the heightened standard of proof, help to ensure that the potential penal consequences of a contempt finding ensue only in appropriate cases: *Bell ExpressVu*, at para. 22; *Chiang*, at paras. 10-11.

33 The first element is that the order alleged to have been breached "must state clearly and unequivocally what should and should not be done": *Prescott-Russell*, at para. 27; *Bell ExpressVu*, at para. 28, citing with approval *Jaskhs Enterprises Inc. v. Indus Corp.* [2004 CarswellOnt 4036 (Ont. S.C.J.)] 2004 CanLII 32262, at para. 40. This requirement of clarity ensures that a party will not be found in contempt where an order is unclear: *Pro Swing*, at para. 24; *Bell ExpressVu*, at para. 22. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning: *Culligan Canada Ltd. v. Fettes*, 2010 SKCA 151, 326 D.L.R. (4th) 463 (Sask. C.A.), at para. 21.

34 The second element is that the party alleged to have breached the order must have had actual knowledge of it: *Bhatnager*, at p. 226; *College of Optometrists*, at para. 71. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the wilful blindness doctrine (*ibid.*).

35 Finally, the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels: *Sheppard, Re* (1976), 12 O.R. (2d) 4 (Ont. C.A.). at p. 8. The meaning of this element is one of the main points in contention on appeal and I will turn to consider it in more detail momentarily.

36 The contempt power is discretionary and courts have consistently discouraged its routine use to obtain compliance with court orders: see, e.g., *Hefkey v. Hefkey*, 2013 ONCA 44, 30 R.F.L. (7th) 65 (Ont. C.A.), at para. 3. If contempt is found too easily, "a court's outrage might be treated as just so much bluster that might ultimately cheapen the role and authority of the very judicial power it seeks to protect": *Centre commercial Les Rivières ltée c. Jean bleu inc.*, 2012 QCCA 1663 (C.A. Que.), at para. 7. As this Court has affirmed, "contempt of court cannot be reduced to a mere means of enforcing judgments": *Vidéotron ltée c. Industries Microlec produits électroniques inc.*, [1992] 2 S.C.R. 1065 (S.C.C.), at p. 1078, citing *Daigle c. St-Gabriel de Brandon (Paroisse)*[1991] R.D.J. 249 (C.A. Que.). Rather, it should be used "cautiously and with great restraint": *TG Industries*, at para. 32. It is an enforcement power of last rather than first resort: *Hefkey*, at para. 3; *St. Elizabeth Home Society v. Hamilton (City)*, 2008 ONCA 182, 89 O.R. (3d) 81 (Ont. C.A.), at paras. 41-43; *Centre commercial Les Rivières ltée*, at para. 64.

37 For example, where 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.

(3) The Required "Intent"

38 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: *Prescott-Russell*, at para. 27; *College of Optometrists*, at para. 71; *Sheppard*, at p. 8; *TG Industries*, at paras. 17 and 32; *Bhatnager*, at pp. 224-25, Sharpe, at ¶ 6.190. The Court of Appeal followed this approach. As it noted, to require a contemnor to have intended to disobey the order would put the test "too high" and result in "mistakes of law [becoming] a defence to an allegation of civil contempt but not to a murder charge" (2013 ONCA 530 (Ont. C.A.), at para. 59). Instead, contumacy or lack thereof goes to the penalty to be imposed following a finding of contempt: para. 62; see also *Sheppard* and Sharpe, at ¶6.200.

39 The appellant submits, however, that in situations in which the alleged contemnor cannot "purge" the contempt, is a lawyer or is a third party to the order, the intent to interfere with the administration of justice must be proved. I understand this to mean that "the intention to disobey, in the sense of desiring or knowingly choosing to disobey the order" must be established: *TG Industries*, at para. 17. This is sometimes also referred to as "contumacious" intent.

40 The appellant submits that the mental element of civil contempt must address at least one of the two goals of civil contempt: securing compliance with court orders or protecting the integrity of the administration of justice. Finding a party in contempt where he or she cannot purge (either because the act that constituted the contempt cannot be undone or because a conflicting legal duty prevents compliance with the order) furthers neither of these goals absent some heightened mental element for contempt. Only if the person is shown to have had the intent to interfere with the administration of justice would one of these purposes — protecting the integrity of the administration of justice — be served.

41 I cannot accept this position. There is no principled reason to depart from the established elements of civil contempt in situations in which compliance has become impossible for either of the reasons referred to by the appellant. Where, as here, the person's own actions contrary to the terms of a court order make future compliance impossible, I fail to see the logic or justice of requiring proof of some higher degree of fault in order to establish contempt. The appellant's submission also overlooks the point that one of the purposes of the contempt power is to deter violations of court orders, thereby encouraging respect for the administration of justice. It undermines that purpose to treat with special charity people whose acts in violation of an order make subsequent compliance impossible. It seems to me that the existing discretion not to enter a contempt finding and the defence of impossibility of compliance provide better answers than a heightened degree of fault where a party is unable to purge his or her contempt for the reasons the appellant outlines: *Jackson* at para. 14; *Sussex Group Ltd. v. Fangeat* (2003), 42 C.P.C. (5th) 274 (Ont. S.C.J.), at para. 56.

42 The appellant correctly notes that civil contempt is quasi-criminal in nature, which he says justifies a higher fault element where contempt cannot be purged. But civil contempt is always quasi-criminal, so this provides no justification for carving out a distinct mental element for particular types of civil contempt cases. As I have already discussed, requiring contumacious intent would open the door to mistakes of law providing a defence to an allegation of civil contempt. It could also permit an alleged contemnor to rely on a misinterpretation of a clear order to avoid a contempt finding, which would significantly undermine the authority of court orders.

43 Further, adopting the appellant's proposal would in effect make the required mental element dependent on the nature of the order alleged to have been breached. Those who breach a prohibitory order would benefit from this heightened mental element disproportionately, due to subsequent

impossibility of compliance, as compared to those who breach a mandatory order, with which the alleged contemnor will be able to subsequently comply absent a conflicting legal duty. I see no principled basis for creating this distinction.

44 The appellant also submits that lawyers should benefit from a heightened fault requirement, but I do not agree. As the Court of Appeal recognized, reliance on legal advice does not shield a party from a finding of contempt: para. 61, citing *Mileage Conference Group of the Tyre Manufacturers' Conference, Re*, [1966] 2 All E.R. 849 (Eng. Restrictive Practices Ct.), at p. 862; *Canada Metal Co. v. Canadian Broadcasting Corp. (No. 2)* (1974), 48 D.L.R. (3d) 641 (Ont. H.C.), at p. 661, aff'd (1975), 65 D.L.R. (3d) 231 (Ont. C.A.). Still less should the law permit lawyers to escape a finding of contempt because they have, in effect, relied on their own legal advice.

45 As for third parties, the appellant points to some authority in the United Kingdom and Australia to the effect that intent to interfere with the administration of justice is a prerequisite for finding a third party in contempt: e.g., *Customs & Excise Commissioners v. Barclays Bank Plc*, [2006] UKHL 28, [2007] 1 A.C. 181 (Eng. H.L.), at para. 29; *Attorney General v. Punch Ltd.*, [2002] UKHL 50, [2003] 1 A.C. 1046 (U.K. H.L.), at para. 87; *Z Ltd. v. A.*, [1982] 2 W.L.R. 288 (Eng. C.A.), at p. 305; *Baker v. Paul*, [2013] NSWCA 426 (New South Wales S.C.), at para. 19. It has also been noted that "[i]t would appear that a higher degree of intention is required to make a non-party liable for contempt": Sharpe, at ¶6.210.

46 The short answer to this point is that, even accepting this line of authority, Mr. Carey is not in the same category as the third parties discussed in this line of authority. I would respectfully adopt as my own the following excerpt on this point from the reasons of Sharpe J.A. in the Court of Appeal:

> The solicitor-client bond creates a community of interest between Carey and Sabourin that is plainly distinguishable from the situation of a stranger to the litigation who is apprised of the court order. As an officer of the court, a solicitor of record is duty-bound to take scrupulous care to ensure respect for court orders. ... [A]s the solicitor of record in the case, Carey should be held to the same standard of compliance as his client who was a party. [para. 64]

(4) Conclusion

47 I conclude that "contumacious" intent was not required in this case, and to the extent that the judge at first instance found otherwise in overturning her earlier finding of contempt, she erred in law.

B. Second Issue: Was Mr. Carey in Contempt?

48 Mr. Carey submits that he was not in contempt, making two main points. He submits first that the payment of funds from his trust account to Mr. Sabourin was not a "transfer" within

the meaning of the order, either because beneficial ownership of the funds did not change or because it amounted to a permissible return of an overpayment of legal fees that informal variations to the order permitted. Second, he also says that his conduct complied with his solicitor-client obligations and that such compliance cannot be considered to have been in breach of the *Mareva* injunction. The existence of Mr. Sabourin's funds in his trust account attracted solicitor-client privilege and, as such, Mr. Carey was bound not to disclose that the funds were in his account. But, he submits, leaving the funds where they were and maintaining the privilege would have sheltered them from execution. He maintains that his only option that was consistent with both his professional obligations to his client and to the court was to return the funds to Mr. Sabourin as he did. The privileged nature of the funds precluded him from seeking advice about the proper course of action from the court.

49 Respectfully, neither of these points withstands careful scrutiny.

(1) The "Transfer"

50 Mr. Carey contends that there was no transfer of funds within the meaning of the order because there was no change in beneficial ownership when he returned them to Mr. Sabourin. As the Court of Appeal pointed out, the purpose of the order was to prevent dealings with Mr. Sabourin's assets that would defeat the court's process (para. 50). Mr. Carey's position, if accepted, would mean the order actually permitted trustees of assets held for Mr. Sabourin's benefit to freely transfer those assets between accounts and even between jurisdictions, putting those assets beyond the reach of the court in the event of execution, so long as Mr. Sabourin retained beneficial ownership of the assets. An interpretation of the order that permitted this would be illogical: it would clearly defeat the purpose of the order and would also run counter to the plain language of the order specifically prohibiting those with knowledge of it from "dealing with" Mr. Sabourin's assets. For these reasons, I cannot accept Mr. Carey's position.

51 Mr. Carey also submits that the return of the funds to Mr. Sabourin did not constitute a "transfer" within the meaning of the injunction because it amounted simply to returning an overpayment of reasonable legal fees, the payment of which was permitted by the informal variations to the order agreed to by counsel. Mr. Carey also contends that returning the overpayment was consistent with the standard of practice of the profession at the time. Moreover, if moving funds from the trust account to Mr. Sabourin did constitute a "transfer", then it actually corrected a violation of the order that would have occurred when Mr. Sabourin originally transferred funds to Mr. Carey and he deposited them in his trust account.

52 Mr. Carey's characterization of the $500,000 in his trust account as an "overpayment" of "reasonable legal fees" in the circumstances of this case is artificial in the extreme. Moreover, even if I were to accept that characterization (and I do not), the clear terms of this order still prohibited any transfer of those "excess" funds. Further, while the question of whether Mr. Sabourin's initial

transfer of the funds to Mr. Carey breached the order is not before us, I reject Mr. Carey's submission that if it were a breach, this justifies a subsequent violation of the order by returning the money to Mr. Sabourin.

53 In my view, Mr. Carey's submissions on this issue rely on alleged uncertainty where none in fact exists. The order clearly prohibited, as the Court of Appeal held at para. 49, dealing with money held in trust. Mr. Carey's other conduct showed that he understood that, even taking into account the variations informally agreed to by counsel to permit payment of legal and ordinary living expenses, the order was in full force and was binding on him. He unsuccessfully tried to vary the order to permit payments to third party creditors and he rightly declined, on the basis of the order, to carry out Mr. Sabourin's instructions to use the trust money to settle the Brown claims.

(2) Solicitor-Client Privilege

54 I am not persuaded by Mr. Carey's arguments before this Court that there was a true conflict between the order and his professional duties such that he had no option but to transfer the trust funds back to Mr. Sabourin.

55 I will assume, but not decide, that the existence of the funds was privileged at the time of the transfer. There are certainly arguments to be considered that the privilege never attached in the first place, or that it was waived by Mr. Sabourin's disclosure of the funds' existence to a third party adverse in interest, as Ms. Laiken submits was the case. Moreover, Mr. Carey's claim in this litigation that the funds' existence was privileged is undermined by his disclosure of that fact in response to a request from the receiver in the unrelated litigation for a full accounting of trust funds, a disclosure which he indicated he believed could be made without even any danger of violating any privilege. Mr. Carey wrote:

> ... I believe I can provide you with the following information without danger of violating any privilege: on September 21, 2006 our firm was provided with a cheque for $500,000.00 from Peter Sabourin. Subsequently, on October 25, 2006, at the request of Mr. Sabourin, we returned $400,000.00, by way of four (4) Bank Drafts, payable to Mr. Sabourin. On November 30, 2006 we returned another $40,000.00 to Peter Sabourin. The balance of the monies were kept in the Trust account and used to pay legal fees resulting in the balance that is currently in our account. [Emphasis added; Letter from Mr. Carey to receiver, November 1, 2007; A.R., vol. IV, at p. 145.]

56 Be that as it may, Mr. Carey's assumed duty to guard solicitor-client privilege did not conflict with his duty to comply with the order. To fulfill both, he needed only to leave the funds in his trust account once they had been deposited there. In doing so, he would have respected any obligations arising from solicitor-client privilege to maintain the confidentiality of the funds and he would have abided by the terms of the *Mareva* order not to transfer funds held in trust for Mr. Sabourin.

57 In my view, leaving the funds in his trust account would not have conflicted with other asserted professional obligations. Mr. Carey expressed concern that if he left the funds where they were, he would be assisting in shielding them from execution in the event that Ms. Laiken succeeded in her action against Mr. Sabourin. This position is not only illogical, but ironic in view of the fact that returning them certainly had that effect. It is true that had Mr. Carey retained the funds, a conflict might have developed at the point when Ms. Laiken obtained judgment against Mr. Sabourin. Then Mr. Carey might have had an ethical dilemma on his hands: how would he comply with any solicitor-client privilege obligations (assuming the existence of the funds in trust was privileged), with the *Mareva* order and with any duty to avoid assisting his client in evading execution arising from the judgment? But it is not an answer for Mr. Carey to say that he breached the order so that he would avoid the possibility of a future ethical dilemma.

58 Accepting that Mr. Carey believed — albeit mistakenly — that there was a true conflict, there were other appropriate avenues open to him other than making a unilateral decision to breach the order. The unilateral approach that he adopted gave no weight to the important principle that "a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed": *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.), at p. 599. See also *Paul Magder Furs Ltd. v. Ontario (Attorney General)* (1991), 6 O.R. (3d) 188 (Ont. C.A.), at p. 192: "It is elementary that so long as ... an order of the court remains in force it must be obeyed."

59 For one thing, Mr. Carey could have obtained a determination about whether the existence of the funds in trust was covered by solicitor-client privilege. Only if it was would a true conflict potentially exist. He himself at one point thought that information about the funds' existence could be released without any danger of violating solicitor-client privilege. He could have asked his client to waive any privilege over the existence of the funds. Had his client agreed, that would have put an end to any potential future conflict. Mr. Carey also could have sought a variation of the order or direction from the court on an *ex parte* and *in camera* basis. But there is no evidence that Mr. Carey took or even considered taking any of these steps.

60 In any event, we do not need to make any final pronouncements on what Mr. Carey should have done instead of unilaterally deciding to give the money back. One thing is crystal clear: there was no legal or ethical duty that compelled Mr. Carey to breach the injunction by transferring the trust funds back to Mr. Sabourin or that conflicted with obeying the order. Although I accept that Mr. Carey did not breach the order maliciously or with the intent to interfere with the administration of justice, the law does not require that he have done so in order to satisfy the elements of civil contempt.

C. Third Issue: Was It Open to the Motions Judge to Set Aside Her Initial Contempt Finding?

61 The Court of Appeal held that the motions judge erred in setting aside her initial contempt finding. Neither the *Rules* nor the case law contemplates the procedure the motions judge followed. The interests of justice are best served when the principle of finality is respected. Mr. Carey used the second stage of the proceedings to attack the motions judge's findings and declaration of contempt. This was inappropriate. (paras. 30-2)

62 The court identified two qualifications to the general rule that a contempt finding at the first hearing is final. First, Rule 60.11 contemplates that a judge may set aside a finding of contempt if the contemnor purges the contempt, since the contempt proceedings have secured compliance with the court order. Second, contempt proceedings are subject to the standard principles that allow parties to reopen findings in exceptional circumstances to permit consideration of fresh evidence or new facts that were not before the court at the first hearing.

63 The appellant submits that the Court of Appeal was wrong for two principal reasons: Rule 60.11(8) grants the court discretion to set aside a contempt finding and the quasi-criminal nature of civil contempt proceedings demands that judges retain discretion to set aside a finding on the basis of new material evidence. The appellant submits that the motions judge properly exercised her discretion to set aside the contempt finding in this case.

64 I do not accept these submissions and I agree with the Court of Appeal, for substantially the reasons it gave.

65 The starting point is that, in civil contempt proceedings, once a finding of contempt has been made at the first stage of a bifurcated proceeding, that finding is usually final. As the Court of Appeal stated, "[a] party faced with a contempt motion is not entitled to present a partial defence [at the liability stage] and then, if the initial gambit fails, have a second 'bite at the cherry'" at the penalty stage (para. 32). This would defeat the purpose of the first hearing. This is what the judge at first instance erroneously permitted Mr. Carey to do.

66 Without exhaustively outlining the circumstances in which a judge may properly revisit an initial contempt finding, I agree with the Court of Appeal that he or she may do so where the contemnor subsequently complies with the order or otherwise purges his or her contempt or, in exceptional circumstances, where new facts or evidence have come to light after the contempt finding was made.

67 Although the motions judge was concerned that refusing to consider the new evidence would lead to a miscarriage of justice, I agree that neither Rule 60.11 nor the case law permitted her to revisit her earlier finding in the circumstances of this case. Rule 60.11(8) allows a judge, on motion, to "discharge, set aside, vary or give directions in respect of an order under subrule (5) or (6) and ... grant such other relief and make such other order as is just". Relying on the Court of Appeal's comments in its stay decision, the motions judge thought that there was no need

to "reopen" Ms. Laiken's motion for contempt, as it was not yet completed: 2012 ONSC 7252 (Ont. S.C.J.), at para. 8. I agree with the Court of Appeal that the motions judge misinterpreted this aspect of the stay decision. The Court of Appeal correctly held that in these circumstances, the motions judge erred in exercising her discretion to permit Mr. Carey to relitigate the initial contempt finding and erred in setting that finding aside.

IV. Disposition

68 I would dismiss the appeal with costs.

Appeal dismissed.

Pourvoi rejeté.

End of Document

TAB 2

See para. 27

2006 CarswellOnt 10335
Ontario Court of Appeal

G. (N.) c. Services aux enfants & adultes de Prescott-Russell

2006 CarswellOnt 10335, 2006 CarswellOnt 3772, [2006] W.D.F.L. 3456, [2006] W.D.F.L. 3484, [2006] O.J. No. 2488, 148 A.C.W.S. (3d) 82, 214 O.A.C. 146, 271 D.L.R. (4th) 750, 29 R.F.L. (6th) 92, 82 O.R. (3d) 669, 82 O.R. (3d) 686

Les Services aux Enfants et Adultes de Prescott-Russell v. N.G. et al.

P.S. Rouleau J.A., R.A. Blair J.A., R.J. Sharpe J.A.

Heard: February 2, 2006
Judgment: June 22, 2006
Docket: CA C41394, C41386

Proceedings: Affirmed, 2004 CarswellOnt 260 (Ont. S.C.J.)

Counsel: Gérald E. Langlois, Q.C., for appellant, Les Services aux Enfants et Adultes de Prescott-Russell
Christine LaCasse, for Marie-Claude Bélanger
Julie Bergeron, for respondent, N.G.
Jocelyne Paquette-Landry, for respondent, C.M.

Subject: Family; Family; Civil Practice and Procedure

Headnote
Family law

Judges and courts

R.A. Blair J.A.:

[UNOFFICIAL TRANSLATION. All quoted material translated unless otherwise indicated.]:

Nature of the appeal

1 Do different criteria apply to a finding of contempt of court under the child protection regime set forth under the *Child and Family Services Act*, R.S.O. 1990, c. C.11 ("the Act")? The court has been asked to rule on an appeal which raises this issue in reference to an order declaring the Prescott-Russell Services to Children and Adults ("Services") and Marie-Claude Bélanger guilty of contempt of court. Madame Bélanger is a child protection worker employed by Services.

2 Justice Charbonneau initially heard a motion filed by Services seeking an order that the child of N.G. and C.M. — who was 2 years old at the time — required protection and should be placed under the care of Services as guardian acting for the Crown, without any visiting rights of the parents. The case was heard over a 5-day period. Upon conclusion of the trial, on October 24, 2003 at approximately 5:30 pm, the Honourable Justice declared that the child required protection, but ordered the child returned to the custody of the parents subject to supervision by Services for a 12-month period and a series of strict conditions.

3 After having heard the decision, the lawyer for Services raised the issue of return of the child. She asked the justice whether Services could make an assessment of the parents' home and if possible "to be granted a period of several days to allow us to complete our assessment and thereafter to return the child to his parents". Justice Charbonneau dismissed this motion and ordered Services to place the child with the parents no later than the following day, on October 25. However, there was no transcript of his reasons, nor any written order which contained the judge's decision. Thus, Services and Madame Bélanger had to react to the order in accordance with their understanding of the reasons handed down from the bench. The appeal raised the question as to whether the order was sufficiently unambiguous as to what Services and Madame Bélanger were required to do or refrain from doing.

4 Under the circumstances which I am going to describe, the child was not placed with his parents prior to October 28. N.G. and M.C. filed a motion seeking an order of contempt of court against Services, Madame Bélanger and Micheline Surprenant. The chambers judge rendered his order on January 16, 2004 [128 A.C.W.S. (3d) 1130]. He declared that Services and Madame Bélanger were guilty of contempt of court. He dismissed the motion with respect to Madame Surprenant.

5 In my view, the appeal should be granted upon the following grounds.

The Facts

6 During the trial on the motion for an order that the child be declared as requiring protection, the principal concerns of Services and the court were the alcoholism of the parents and their tendency towards acts of domestic violence when they were in an intoxicated state. There was no emphasis placed on the condition of the home. The justice was convinced that the needs of the child could be satisfied if he were handed over to the parents, provided he was supervised by Services in compliance with appropriate conditions. Four of the seven conditions imposed by the

judge were specifically related to the alcohol problems of the parents. The fifth allowed Services permission to have access to the child at any time, with or without notice. The sixth required the parents to provide Services with the required consents to allow them to obtain information which they deemed appropriate from any medical, therapeutic or other professional. The seventh simply defined the supervisory period as being 12 months in duration.

7 Immediately following the rendering of the October 24, 2003 order, representatives of Services asked the parents for permission to inspect their home. The parents refused permission to inspect. Rather, they spent the evening at a restaurant to celebrate their victory.

8 The following morning, on October 25, another social worker told Services that she saw N.G. and C.M. in the restaurant the previous evening with an empty bottle of wine in front of them. Further to this information, concerned that the parents had recommenced drinking, and without any knowledge of the condition of the home of the parents — N.G. and C.M. allegedly lived in a shed, according to information (erroneous) received by Services — Madame Bélanger and Madame Surprenant visited the home of the parents without bringing the child, at 9:00 am on October 25. Madame Bélanger stated in her supplementary affidavit that she "certainly hoped to find a proper home in order to be able to return the child in compliance with the order". However, they deemed the home to be inadequate.

9 In her first affidavit, Madame Bélanger stated:

> 5. During our visit, we observed that there were no diapers, car seat, high chair or "booster" and no toys. When I asked the parents where the bed for the child was, they responded "the bed is in the shed". The father went out to retrieve the mattress from the shed and he returned with an old damp mattress filled with black mould and holes.

10 Furthermore, Madame Bélanger made certain other observations during the visit. The chambers judge listed them:

> a) The parents were wearing the same clothes as the previous day;
>
> b) The parents had drawn and tired features, red eyes and hoarse voices;
>
> c) She asked the parents whether they had consumed alcohol and they responded in the negative;
>
> d) The father became verbally aggressive and the mother told him to remain silent;
>
> e) Madame Bélanger was of the view that the dwelling was unhygienic, inadequate and unsafe for a two-year old child because:
>
> (i) there was mould around windows, in the fridge, on the walls and the floors;

(ii) two windows were broken, one of them with a hole big enough to put your hand through and within reach of the child;

(iii) there were piles of dishes accumulated on the counter and in the sink;

(iv) there was dirty laundry in a corner of the bedroom and the bathroom;

(v) there was an odour of humidity in the dwelling;

(vi) the cupboards and drawers of the kitchen were broken and there were nails sticking out;

(vii) there was no safety latch-type hook;

(vii) a pail of paint and paint remover had been left on the floor;

(viii) the refrigerator contained no fresh food, and some of the food was mouldy;

(ix) the floor was very dirty; and

(x) there were bed sheets in the windows.

11 The parents dispute most of these accusations.

12 Madame Bélanger was aware of the order of the Honourable Mr. Justice Charbonneau. However, she explained in her supplementary affidavit,

> I could not however, in all good conscience, place a child in a home where his safety was compromised or where the bare necessities for a young child were absent: a clean bed, "booster", diapers, food, toys etc.

13 She decided to consult her custody supervisor at Services. They decided not to return the child, but rather to proceed with a "technical" apprehension of the child provided for under subparagraph 37(2)(b) of the *Child and Family Services Act*. This was referred to as a "technical" apprehension because the child was still in the custody of Services and had not yet been returned to the parents. Madame Bélanger stated that her decision was based on a safety assessment carried out at that time, which was attached as exhibit 1 in support of her affidavit. The assessment discloses most of the factors already mentioned. It also refers to the risk assessment norms issued by the Ministry.

14 Finally, Madame Bélanger left a letter with the parents listing the conditions to fulfil prior to return of the child. The list included the following:

a) mattress + appropriate bed + cover for the child;

b) fresh food for a two-year old child;

c) repair the two broken windows;

d) store dangerous articles and cleaning products in a place outside the reach of the child (e.g. plastic bags, bleach, paint remover, paint, corrosive products, knives, razors, medication, etc.);

e) functional fire extinguisher and smoke detector;

f) obtain articles for the child (e.g. furniture, toys, laundry, baby seat, booster or high chair);

g) complete house cleaning of the home (e.g. remove mould on windows, floors, refrigerator and other places, wash floor, clean dishes ...);

h) cupboard doors and drawers to repair;

i) *or* find another appropriate lodging with a bedroom for the child.

Contact the child protection worker, Marie-Claude Bélanger, when the changes have been made so that I may carry out a new inspection of the premises and continue with the process of returning Y to your domicile.

15 During the weekend and the Monday and Tuesday that followed, the parents purchased a child's bed, a booster and various other accessories, and carried out certain renovations of their home. On Tuesday morning, October 28, their lawyer advised Services that the parents had carried out the improvements. Services decided not to proceed with an application for protection and returned the child to the parents. Madame Bélanger returned the child that afternoon.

16 In the meantime, the parents filed a motion for contempt of court on October 28. The motion was served on Services and Madame Bélanger, but it is not clear from the record whether the motion was served prior to or after the decision to return and the actual return of the child.

17 The chambers judge declared Services and Madame Bélanger guilty of contempt of court. He came to the conclusion that Madame Bélanger acted in good faith and that she "undoubtedly believed that she had to disobey the order so as to protect the child". But he was of the view that the subjective good faith of the interveners was not sufficient. He was convinced that the order was clear and unequivocal, that Services and Madame Bélanger had voluntarily disobeyed the order in a deliberate manner and that the evidence demonstrated contempt beyond a reasonable doubt.

Analysis

18 Generally, the chambers judge committed no error in his analysis of the law applicable to contempt of court. He adequately and sufficiently described the relevant principles and the criteria necessary to convince the court and recognised in principle the requirement to exercise caution prior to making any order for contempt of court, particularly within the context of the regime of child protection.

19 However, with respect, it appears to me that the chambers judge committed three errors in his reasons. First of all, he erred in coming to the conclusion that his order was clear and unequivocal. Secondly, he should not have come to his conclusions based on contradictory evidence presented by way of affidavits. Finally, with respect to these errors and the aforementioned principle that caution should always be exercised under such circumstances, the chambers judge — even if he declared that he was aware of the principle — did not implement it in this matter.

20 In view of these errors and the context surrounding contempt in the present matter, I will briefly review the case law concerning contempt of court.

Contempt of court: general comments

21 The classical definition of contempt is attributed to Lord Russell of Killowen in *R. v. Gray*, [1900] 2 Q.B. 36 at page 40 [English in original]:

> Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court.

22 For a more recent summary, see *B.C.G.E.U. v. British Columbia (AG)*, [1988] 2 S.C.R. 214, 53 D.L.R. (4th) 1. In this judgment, Chief Justice Dickson stated [English and French in original]:

> In some instances the phrase "contempt of court" may be thought to be unfortunate because, as in the present case, it does not posit any particular aversion, abhorrence or disdain of the judicial system. In a legal context the phrase is much broader than the common meaning of "contempt" might suggest and embraces "where a person, whether a party to a proceeding or not, does any act which may tend to hinder the course of justice or show disrespect to the court's authority", "interfering with the business of the court on the part of a person who has no right to do so", "obstructing or attempting to obstruct the officers of the Court on their way to their duties" — See *Jowitt's Dictionary of English Law*, vol. 1, 2nd ed., at p. 441.
>
> Dans certains cas, l'expression « outrage au tribunal » peut être considérée comme malheureuse parce que, comme en l'espèce, elle ne traduit aucune aversion, aucune

répugnance ni aucun dédain particuliers à l'égard du système judiciaire. Dans un contexte juridique, l'expression a une portée beaucoup plus large que ne le sous-entend le sens courant du mot « outrage » et englobe [TRADUCTION] « la situation où une personne, qu'elle soit ou non partie à une procédure, accomplit un acte qui peut tendre à empêcher que la justice suive son cours ou qui témoigne d'un manque de respect pour l'autorité de la cour », [TRADUCTION] « l'ingérence par une personne qui n'en a pas le droit dans les affaires de la cour » et [TRADUCTION] « le fait d'entraver ou de tenter d'entraver les officiers de justice dans l'exercice de leurs fonctions » — voir *Jowitt's Dictionary of English Law*, vol. 1, 2nd ed., à la p. 441.

23 In the present matter, the disputed conduct falls under the category of an act which aims to obstruct or to interfere with the legal procedure of the courts. There is no issue in this matter of any aversion, abhorrence or disdain of the judicial system by the appellants.

24 There is a difference between criminal contempt and civil contempt. The latter requires non-compliance with judgments, orders or other court proceedings. Criminal contempt targets rather words or deeds which are tantamount to an obstruction of justice or demonstrate an intention of so doing. There is a public dimension to criminal contempt, i.e. public ills, whereas civil contempt implies the concept of private ills. See: *Poje v. British Columbia*, [1953] 1 S.C.R. 516, [1953] 2 D.L.R. 785; *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, 89 D.L.R. (4th) 609. Furthermore, criminal contempt is characterised by a gesture or act of public defiance. As explained by the Supreme Court of Canada in *United Nurses of Alberta* at page 933 [English and French in original]:

> While publicity is required for the offence, a civil contempt is not converted to a criminal contempt merely because it attracts publicity but rather because it constitutes a public act of defiance of the court in circumstances where the accused knew, intended or was reckless as to the fact that the act would publicly bring the court into contempt.
>
> Bien que l'infraction doive avoir un caractère public, l'outrage au tribunal ne devient pas criminel du simple fait qu'il attire la publicité, comme le soutient le syndicat, mais plutôt parce qu'il constitue un acte public de transgression à l'égard de la cour dans des circonstances où l'accusé savait que ce comportement porterait publiquement outrage au tribunal,en avait l'intention ou ne s'en souciait pas.

25 The motion in the present matter was filed pursuant to rule 31 of the *Family Law Rules*, O. Reg. 114/99. Thus, we are dealing with civil contempt based on non-compliance with a court order. It is not alleged that Services or Madame Bélanger are guilty of criminal contempt.

26 However, notwithstanding the civil nature of the contempt, contempt of court is quasi-criminal. Thus, the onus of proof is the same as in criminal matters, i.e. beyond a reasonable doubt. Furthermore, the burden remains with the party alleging contempt. See *Bhatnager v. Canada*

(Minister of Employment and Immigration), [1990] 2 S.C.R. 217 at 224, 71 D.L.R. (4th) 84; *Rogacki v. Belz* (2003), 67 O.R. (3d) 330, 232 D.L.R. (4th) 523 (C.A.), at para. 32.

Criteria

27 The criteria which apply to a finding of guilt of contempt of court are well established. A three-part test has to be met. Firstly, the order which has not been complied with must clearly and unequivocally set forth what must be done or not done. Secondly, the party who disobeys the order must have done so in a deliberate and voluntary manner. Thirdly, the evidence must establish contempt beyond a reasonable doubt. It is clear than any doubt must be resolved in favour of the person or the entity alleged to have violated the order. See *884772 (c.o.b. Team Consultants) v. SHL Systemhouse Inc.*, [1993] O.J. No. 1488 (QL) at paragraph 18, 41 A.C.W.S. (3d) 505 (Ct., Gen. Div.); *Children's Aid Society of Ottawa-Carleton v. C.B.*, [2003] O.J. No. 1451 (QL), 121 A.C.W.S. (3d) 1043 (S.C.J.); *Children's Aid Society of Ottawa-Carleton v. D.S.* (2001), 22 R.F.L. (5th) 14 (Ont. S.C.J.); *L.J. v. G.B.*, [2000] O.J. No. 3030 (QL) (S.C.J.); *Melville v. Beauregard*, [1996] O.J. No. 1085 (QL) at para. 13, 62 A.C.W.S. (3d) 127 (Ct., Gen. Div).

Contempt within the context of child protection

28 There is very little case law in Canada on contempt of court within the context of the regime of child protection. I share the opinion of Justice Linhares de Sousa, expressed in *Children's Aid Society of Ottawa v. D.S.*, [2001] O.J. No. 4585 (QL), 110 A.C.W.S. (3d) 87 (S.C.J.), that an order rendered under such a regime enjoys no special status. She stated [English in original]:

> ... I could find no legislative or jurisprudential authority for concluding that a child protection order enjoys a special status over any other order of this Court that would exempt such an order from being subject to contempt proceedings.

29 However, there are aspects of such a situation which raise special difficulties. It is possible that child protection agencies and workers face conflicts between court orders and their statutory obligations in relation to the protection and best interests of the child. It is therefore necessary to exercise particular caution in such situations: *Salloum v. Salloum* (1994), 154 A.R. 65 (Alta. Q.B.) at page 69; *Children's Aid Society of Ottawa-Carleton v. D.S.* (2001), 22 R.F.L. (5th) 14 (Ont. S.C.J.).

30 In relation to the difficulties to which child protection workers encounter generally, Madame Justice L'Heureux-Dubé stated in *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519, 191 D.L.R. (4th) 1, at paragraph 100 [English and French in original]:

> ... [C]hild protection workers are inevitably called upon to make highly timesensitive decisions in situations in which it is often difficult, if not impossible, to determine whether a child is at risk of imminent harm, or at risk of nonimminent but serious harm, while the

child remains in the parents' care. The challenging task facing child protection workers was also recognized by Lord Nicholls in his speech for the majority in *In re H. (Minors) (Sexual Abuse: Standard of Proof)*, [1996] A.C. 563 (H.L.), at p. 592:

> I am very conscious of the difficulties confronting social workers and others in obtaining hard evidence, which will stand up when challenged in court, of the maltreatment meted out to children behind closed doors. Cruelty and physical abuse are notoriously difficult to prove. The task of social workers is usually anxious and often thankless. They are criticised for not having taken action in response to warning signs which are obvious enough when seen in the clear light of hindsight. Or they are criticised for making applications based on serious allegations which, in the event, are not established in court. Sometimes, whatever they do, they cannot do right.

les préposés à la protection de l'enfance doivent inévitablement prendre des décisions à des moments très critiques où il est souvent difficile, voire impossible, de déterminer s'il existe pour l'enfant un risque immédiat de préjudice ou un risque non immédiat mais sérieux lorsqu'il demeure sous la garde de ses parents. Le défi que les préposés à la protection de l'enfance doivent relever a également été reconnu par lord Nicholls dans ses motifs au nom des juges majoritaires dans *In re H. (Minors) (Sexual Abuse: Standard of Proof)*, [1996] A.C. 563 (H.L.), à la p. 592:

> [TRADUCTION] Je suis très conscient des difficultés qu'éprouvent les travailleurs sociaux et d'autres intervenants lorsqu'ils cherchent à obtenir des éléments de preuve tangibles, solides en cas de contestation devant les tribunaux, établissant les mauvais traitements que subissent des enfants en privé Il est notoirement difficile de prouver la cruauté et la violence physique. La tâche des travailleurs sociaux est habituellement angoissante et souvent ingrate. On les critique parce qu'ils n'ont pas pris de mesures devant des signes avant-coureurs qui semblent assez évidents après coup. Ou encore on les critique parce qu'ils ont présenté des demandes fondées sur de graves allégations dont le bien-fondé n'est pas finalement établi devant le tribunal. Parfois, peu importe ce qu'ils font, ils ont tort.

31 In short, there is no difference between the principles and criteria which apply to contempt of court within the context of the child protection regime and those which apply in any other area. Where the order under review is clear and unequivocal, the subjective good faith of the child protection worker alone — even where the worker believes he or she is acting in the best interests of the child — is not sufficient to justify non-compliance with the order. As the chambers judge stated:

> The court is not omniscient and has no monopoly of wisdom when it comes to ruling on what is in the best interests of the child. It is highly possible that an intervener or parent will not

> agree with the decision of the court. This disagreement may be in good faith and based on very sound reasons. Notwithstanding all that, court rulings have to be respected and obeyed because the collectivity has democratically decided to vest the court with the mandate of ruling upon such issues. The survival of our democratic society and public order hinges upon this. If not, we would be faced with anarchy.

32 That being said, and taking into account the complexities of the workload of child protection officers and the dynamics of their need to react, often instantaneously in highly agonising circumstances, the court should always exercise caution and deference prior to reaching a finding that someone is guilty of contempt of court.

33 I will now consider the situation in the matter before us.

Is the order clear and unequivocal?

34 In my view, the transcript of the exchange between the chambers judge and the solicitor for Services during the hearing which gave rise to the order in question does not clearly and unequivocally demonstrate that the child protection officers were in fact prohibited from taking any action.

35 Here is what the judge stated following the motion filed by Services to grant them several days prior to returning the child for the purpose of carrying out an assessment of the parents' home:

> You are aware that the trial is over. Services can always resort to the usual procedures. If they don't agree, they can appeal etc. The order is that the child must be placed with the parents. Naturally, Services can visit and can reassure themselves that everything is going well. It is certain that the parents — it is in the interest of the parents to co-operate with Services to demonstrate that they have a place to receive him etc. It is now late Friday night and I am not going to necessarily say that we have to race to find the child within two minutes and to return him but it has to be done no later than tomorrow. The home can be viewed but not for the purpose of determining whether it is correct or not correct, or anything of that sort. I assume that the parents are in a home and that they will be able — but if they bring the child to a place which doesn't have proper facilities for children or where it is dangerous for a child or anything like that. But that is not contingent upon the past. That depends on the future and it will be up to Services but I cannot — and without that the debate will be endless.
>
> [My underlining]

36 After having discussed certain questions with the lawyers, the judge concluded his reasons with the following:

> Thus the respondents shall continue their therapy in a conscientious manner at the Ontario East Drug Dependency Services.
>
> Furthermore, I would like to say — to return to this point, the child must be placed with the parents and that cannot wait. As I told you, if due to the time and all that we can — it's better to carry out the transfer tomorrow morning you can do so tomorrow morning in the worst case scenario, but I would like to reiterate that the order has been handed down. Do we understand each other?
>
> [My underlining]

37 In fact, it is clear in these reasons that Services were to return the child the next day. But it is not at all clear that Services were prohibited from visiting the home of the parents in advance. The judge stated: "The order is that the child is to be placed with the parents. *Naturally, Services can visit and can ensure themselves that everything is going well ... The home can be viewed*". According to him, the parents lived in a home and could take care of the child. However, the judge implied that Services retained the right to protect the interests of the child. He added: "but if they bring the child to a place which doesn't have proper facilities for children or where it is dangerous for a child or anything like that. But that is not contingent upon the past. That depends on the future and it will be up to Services ...".

38 In other words, Services could not continue their dispute against the parents with respect to the child, based on reasons from the past — alcoholism, etc. However, if it were demonstrated that the parents resided in "a place which doesn't have proper facilities for children" or in a place which is "dangerous for a child", Services would not be prohibited from reacting based on circumstances.

39 As I have already mentioned, there is no transcript of the reasons nor written order which sets forth the justice's ruling in detail. Consequently, Services and Madame Bélanger had to react to the order in accordance with their understanding of the reasons handed down from the bench. The above-mentioned transcript demonstrates its ambiguity. In fact, as noted by Judge Chadwick in *SHL Systemhouse Inc.*, *supra*, any doubt has to be exercised in favour of the person accused of contempt. With all due respect, it would appear that the chambers judge principally relied on the last portion of his grounds cited in paragraph 36 above, but that he did not fully appreciate the ambiguity of the excerpt cited at paragraph 35. By not appreciating the ambiguity of his reasons, he erred in not allowing the accused the benefit of a reasonable doubt arising out of this ambiguity. Any such ambiguity has to be resolved in favour of the person or entity accused of having breached the order: see *Telus Communications v. Cherubin*, [2005] O.J. No. 5534 (QL), 144 A.C.W.S. (3d) 465 (S.C.J.).

40 The ruling of the chambers judge that Services and Madame Bélanger breached the order in a voluntary and deliberate manner arises directly out of his finding that the order was clear and

unequivocal. But the order was not clear and unequivocal. One cannot conclude that Services and Madame Bélanger acted against the order in a voluntary and deliberate manner in view of the fact that even the justice himself stated "Naturally, Services can visit and ensure that everything is going well ... The home may be viewed."

41 Once Madame Bélanger arrived at the home of the parents and discovered circumstances which presented a potential danger for the safety and security of the child, she had to react in accordance with duties prescribed by law. She decided to proceed with a "technical" apprehension of the child pursuant to sub-paragraph 37(2)(b) of the Act. Maîtres Bergeron and Pacquette-Landry concede that Services could have brought the child with them when they visited the parents' home and, after having conducted their assessment, could have then carried out the apprehension. An order for contempt of court should not be based on any such procedural defect, in my view.

42 The foregoing is sufficient to decide this appeal and to quash the order of the chambers judge. However, I would like to deal with certain other errors prior to concluding.

Contradictory evidence by way of affidavits

43 The chambers judge ruled that Services and Madame Bélanger attempted to continue "the argument which had been conducted heatedly during the five days of trial and which had been decided by the court in favour of the parents". In his view, the decision of Madame Bélanger and her supervisor not to return the child "was in large part based on allegations which were fully known and analysed at the time of the trial". Thus, he was sceptical of the testimony of Madame Bélanger in relation to her concerns that the child was being placed where his security was compromised or where he did not have the bare necessities for a young child. Specifically, the chambers judge dismissed the statement made by Madame Bélanger in her affidavit, that she hoped "certainly to find adequate lodging in order to be able to return the child", or her version of what she saw when she arrived at the parents' home.

44 The chambers judge placed the accent on several factors mentioned by Madame Bélanger which he considered irrelevant as they fell within the context of the earlier dispute between the parents and Services. In particular, he referred to the observations of Madame Bélanger concerning the use of alcohol by the parents, the refusal of the parents to allow an assessment of the home immediately following trial, the refusal to undergo any alcohol and drug testing on the Saturday morning, and the fact that the father became aggressive. The chambers judge minimised concerns of Madame Bélanger in relation to the lack of security and the lack of the bare necessities for the child in the parents' home, in favour of evidence of the parents that there was no problem and that everything had been exaggerated.

45 The problem lies in that all the evidence before the court was filed by way of affidavit. Nobody testified in open court. The court should not rule on contradictory facts under such circumstances, which require a trial to decide the issues. Here, the court was seized with an accusation of contempt

of court — a quasi-criminal proceeding — where the applicant has to establish the guilt of the respondent beyond a reasonable doubt.

46 Consequently, with all due respect, the chambers judge erred in law in ruling on contradictory facts alleged in the affidavits of Madame Bélanger and the parents.

Legitimate excuse

47 The same error underlies the finding of the chambers judge with respect to the defence of legitimate excuse. In fact, the judge determined that Madame Bélanger had no reasonable and probable motives to believe that the elements of sub-paragraphs (a) and (b) of paragraph 40(7) of the Act existed.

48 Sub-paragraph 40(7) states as follows:

> (7) A child protection worker who believes on reasonable and probable grounds that,
>
> (a) a child is in need of protection; and
>
> (b) there would be a substantial risk to the child's health or safety during the time necessary to bring the matter on for a hearing under subsection 47 (1) or obtain a warrant under subsection (2),
>
> may without a warrant bring the child to a place of safety.

49 The chambers judge stated:

> [42] Since the respondents proceeded without a warrant, they have to comply with the provisions of sub-paragraph 40(7). The worker has to have reasonable and probable grounds for believing that the elements of sub-paragraphs (a) and (b) of the paragraph exist. *The subjective good faith of the worker is not sufficient. An objective criterion applies. Where all the conditions set forth at sub-paragraph 40(7) exist, the child protection worker is justified in not following the directions of the court.* However, within the context of an application for contempt of court, the reasonable and probable grounds alleged by the worker should not be based on the same facts which were before the court at trial, but rather on new and objectively important facts.

50 The chambers judge consequently recognised that the appellants could rely upon the defence of legitimate excuse in a similar case to the matter before us. Indeed, there may be circumstances where the child protection worker would be justified in not following the directions of the court. I share his view that the subjective good faith of the child protection worker alone is not sufficient to prove the defence and that there have to be objective criteria. In the present matter, the objective

criteria are contained in the conditions set forth at paragraph 40(7) of the Act. Other objective criteria may apply depending upon the circumstances.

51 It is unnecessary, however, to determine the scope of this defence in order to resolve this appeal. As I have already mentioned, the chambers judge came to the conclusion that Madame Bélanger based her decision not to return the child on facts related to the former dispute between Services and the parents, and not on circumstances affecting the health and security of the child. Consequently, in his view, she had no legitimate excuse.

52 However, to arrive at this conclusion, the chambers judge had to rule on questions of fact by choosing between contradictory facts alleged within contradictory affidavits. He should not have done so within the context of this application, which concerns contempt of court.

Caution and the necessity to exercise deference

53 Finally, under the heading of "caution", the chambers judge made the following comments, with which I generally agree:

> [58] As already stated, the court should exercise caution before declaring an individual or company guilty of contempt. This is a power which should only be used where the proper administration of justice demands it. It should never be lost from view in the present context that the overriding objective is that of protecting children. Furthermore, the court is well aware that interveners such as Madame Bélanger have a difficult task and that too often their workload is enormous, not to say excessive. Madame Bélanger undoubtedly believed that she had to disobey the order to protect the child.
>
> [62] Everyone would agree that the child protection regime under part III of the Act can only function where court orders are strictly observed. It is an area which particularly lends itself to anti-social behaviour due to the nature of the issues at stake and the great emotions that any order triggers among concerned parties. It is essential for this entire legislative scheme, and consequently to ensure the best interests of children who are governed by the regime, that the highest respect be granted to court orders. If, for example, a child protection worker or society could ignore a court order based on the mere belief that the order is contrary to the interests of the child, the entire legislative scheme is compromised.

54 However, in the present matter, the order does not clearly and unequivocally state that Madame Bélanger and Services were not entitled to undertake a visit in advance in order to ensure that the home environment was appropriate and that there was no danger for the child. If Madame Bélanger were entitled to visit, she was entitled to react — under legitimate circumstances — in compliance with her statutory duties. Thus, it is uncertain that she ignored the order. Under such circumstances, in light of the contradictory facts and particularly taking into account the context of

the protection of children, the chambers judge should have exercised greater caution and deference prior to declaring Services and Madame Bélanger guilty of contempt of court in the present matter.

Conclusion

55 Upon the aforementioned grounds, I would allow the appeal, quash the order for contempt of court and dismiss the motion of the parents seeking to obtain such an order.

56 Neither Services nor Madame Bélanger are seeking costs of the event. Therefore, the Court makes no order for costs.

End of Document

TAB 3

See para. 17

Indexed as:

Toronto Transit Commission v. Ryan

IN THE MATTER OF The Labour Relations Act, 1995
AND IN THE MATTER OF a Direction of the Ontario Labour Relations Board, which was filed and entered in this Court as Number 96-CU-113161
Between
Toronto Transit Commission, applicant, and
Sid Ryan, John Kennedy and Nick DeCarlo, respondents

[1998] O.J. No. 51

37 O.R. (3d) 266

41 C.L.R.B.R. (2d) 21

50 O.T.C. 46

76 A.C.W.S. (3d) 729

1998 CanLII 14635

Court File No. 97-RE-7431

Ontario Court of Justice (General Division)

Ferrier J.

Heard: October 27, 1997.
Judgment: January 15, 1998.

(17 pp.)

Contempt -- Defences -- Particular defences -- Invalidity of order disobeyed -- What constitutes contempt -- Requirement of clear and unambiguous orders -- Orders -- Statutory requirements.

This was a motion by the respondents Ryan, Kennedy and DeCarlo to dismiss the applicant Ontario Labour Relation Board's application for a finding that they were in contempt of an order. The Board issued a Direction prohibiting the respondents from encouraging persons to picket designated areas on Toronto Transit Commission property.

The Board's decision was filed and entered with the court. The Commission alleged that the respondents failed to comply with the Direction. The respondents argued that there were procedural defects in the registration of the decision and in the notice of application and that the Direction was so unclear and ambiguous as to be unenforceable by contempt proceedings.

HELD: The motion was allowed and the application for the contempt finding was dismissed. The Commission failed to comply with section 102 of the Labour Relations Act by failing to file the Direction exclusive of the reasons for it. In the absence of strict compliance with statutory requirements, the order was a nullity incapable of enforcement by the court. The application was defective in failing to set out the date of the acts alleged to constitute the contempt. A notice of motion in a contempt proceeding had to set out the particulars of the alleged contempt, included the date of the acts, sufficient to identify the particular acts alleged to constitute the contempt. In the absence of the dates, the notice lacked the allegations of a concrete fact of a nature to identify the particular acts complained of. The notice was sufficient with respect to the relief claimed. In obiter, the Court agreed with the respondents' submissions concerning the ambiguity of the Direction.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982. Labour Relations Act, ss. 83, 100, 102. Labour Relations Act Regulations, Regulation 684. Ontario Rules of Civil Procedure, Rule 59.

Counsel:

John C. Field and Anne A. Slivinskas, for the applicant.
Chris G. Paliare and Richard P. Stephenson, for the respondent, Sid Ryan.
Howard Goldblatt and Judith McCormack, for the respondents, John Kennedy and Nick DeCarlo.

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1 **FERRIER J.**:-- This is an application by the Toronto Transit Commission (the "TTC") for an order finding the respondents Sid Ryan, John Kennedy, and Nick DeCarlo in contempt of the Direction of the Ontario Labour Relations Board dated October 24, 1996, which was filed and entered in this court as Court File No. 96-CU-113161.

2 The Ontario Labour Relations Board (the "Board") in a decision dated October 24, 1996, found that the organizers of the "Days of Protest", including Ryan, had orchestrated and participated in a scheme to cause persons to picket premises and work places of the TTC and to shut its operations down on October 25, 1996. This conduct was found by the Board to constitute a violation of section 83 of the Labour Relations Act which prohibits a person from engaging in acts that will cause another person to engage in an unlawful strike.

3 Following the oral reading of the Board's decision, at approximately 12:30 p.m. on October 24, 1996 the Board issued its written decision at approximately 3:30 p.m. that day. The decision comprised approximately 8 1/2 pages of single-spaced text.

4 With regard to remedy, the Board made the following order:

> [21.] We also hereby direct Mr. Wilson and Mr. Ryan cease and desist from causing or encouraging persons to picket any premises or workplaces of the TTC on October 24, 25 and 26, 1996, to the extent such picketing is restricted as follows:
>
> ...
>
> [25.] ... [W]e hereby order that at each TTC site, as identified in paragraphs 1 and 2 of the amended restrictions on picketing requested by the TTC, the TTC is to identify necessary access points or areas, whether they be a door, driveway, gate or whatever, to ensure that employees have unimpeded access to the work site or workplace as is necessary. Picketing is hereby prohibited in or around those access points or areas if it will interfere in any way with employees access to work or ability to work.
>
> [26.] The board suggests no minimum number of metres of picket free' space, except to note that any such area or space should be no larger than is necessary to ensure that employees do not have to cross lines in order to work. The actual details will of course depend on the particular context. If one access point is sufficient in a location, to enable employees to work without crossing a picket line, then picketing is to be restricted only at that one point or area.
>
> [27.] Within any picket free' access point or area, access by employees to the workplace, or their ability to work, is not to be impeded in any manner.
>
> [28.] And, for example, where bus drivers must be able to drive their vehicles in and out of terminals, in order to work, picketing is hereby prohibited in any manner from impeding such access and egress.
>
> [29.] With respect to the subway stations, the TTC has asked that no picketing take place from Thursday 6:00 p.m. until Friday at 6:30 a.m., and from Saturday 12:01 a.m. until 6:30 a.m., during which times the TTC asserts it can arrange for its employees to enter the various stations.

> Similar to our other orders, no picketing is to take place at subway stations for whatever portion of the periods from 6:00 p.m. today to 6:30 a.m. tomorrow, and between 12:01 a.m. and 6:30 a.m. on Saturday during which employees would have to enter stations in order to work.
>
> [30.] No doubt, the parties may wish to further discuss these restrictions.
>
> [31.] Our orders are made binding upon the parties and anyone who has notice of or who is made aware of them.
>
> [32.] The final matter is the request that Mr. Wilson and Mr. Ryan be required to instruct all participants in the Days of Protest' to refrain from picketing. In this respect we make no such direction, but we do hereby direct Mr. Wilson and Mr. Ryan advise participants in the Days of Protest' scheduled for October 24, 25 and 26, 1996 of the declarations and directions that the Board has made herein.

5 The Board's decision, including its directions, was filed and entered with this court at approximately 4:15 p.m. on October 24, 1996. The Board's directions were effective as of 6:00 p.m. that night.

6 The entered and filed decision was couriered to Ryan's counsel and to all managers of the TTC's affected sites on the afternoon of October 24, 1996.

7 The TTC in its Notice of Application submits that Ryan failed to comply with the Board's direction as a result of the following conduct: with knowledge of the Board's decision; he attended at the TTC's access point at its Hillcrest location on October 25, 1996; while present at the scene, picketers chanted "nobody in -- nobody out" while they marched across the designated access point; Ryan spoke to the picketers, but failed to advise them of the Board's directions regarding picketing in the access point; and before, during and after Ryan's attendance at Hillcrest the picketers blocked access to the facility through the designated access point contrary to the Board's direction.

8 The TTC in its Notice of Application submits that Kennedy failed to comply with the Board's direction as a result of the following conduct: indicating in his capacity as the leader of the picketers at the Wilson Division his knowledge of the Board's decision and stating when he was provided with a copy of the decision: "So this is the infamous injunction that I have heard about -- I will accept it -- but I will not abide by it"; indicating in an interview with City-TV on October 25, 1996, that he and the other CAW picketers at the Wilson Division were not bound by the direction of the Ontario Labour Relations Board; participating in and leading the picketing at the Wilson Division that prevented vehicles and TTC employees from passing through the designated "picket free" access point.

9 The TTC in its Notice of Application submits that DeCarlo failed to comply with the

Board's direction as a result of the following conduct: in his capacity as a picket captain, he was advised of the Board's direction on picketing and its application at the Wilson Division; he stated during the course of October 25, 1996 that "All the picketers want to do is shut the TTC down for the day" and that "Nothing is coming in -- get used to it"; as a leader of the picketing prevented vehicles and TTC employees from passing through the designated "picket free" access point.

10 The respondents resist the application on its merits, but they also have moved to have the contempt motion dismissed on several grounds unrelated to the merits -- that is to say, unrelated to the question whether the respondents' conduct was in breach of the order.

11 The respondents' attack in its motion to dismiss is on two general bases. First, there are procedural defects in the registration of the Board's decision and in the notice of application launched by the applicant. Second, the direction of the Board is so unclear and ambiguous as to be unenforceable by contempt proceedings.

12 In an application for a finding of contempt of court, it is necessary to consider the issues in the context of, and with close regard for, several important and well-settled principles of law.

13 An allegation of contempt of court, whether civil or criminal, has a public dimension and attracts the procedural protections relating to offences for which persons may be deprived of their liberty. Accordingly, the procedural and substantive protections of the Canadian Charter of Rights and Freedoms apply to matters relating to contempt and all of the constituent elements of the contempt must be proved against the respondents beyond a reasonable doubt. An application in respect of the contempt of court is strictissimi juris and as a result calls for the most scrupulous attention of the courts to ensure adherence to all necessary safeguards.

> Minister of Employment and Immigration and The Secretary of State for External Affairs v. Deborah Bhatnager, [1990] 2 S.C.R. 217
>
> Video Tron Ltee and Premier Choix: T.V.E.C. Inc. v. Industries Microlec Produits Electroniques Inc. et al., [1992] 2 S.C.R. 1065 per Gaunthier J.
>
> Claggett v. Claggett, [1945] 3 D.L.R. 414
>
> Divi v. Divi (1992), 106 Sask. R.241
>
> Dare Foods (Biscuit Division) Ltd. V. Gill, [1973] 1 O.R. 637 (H.C.)

14 The need for strictissimi juris is enhanced where, not only is the liberty of the person

potentially at stake, but also where the intervention of the court to correct procedural or substantive defects in the material filed could lead to the perception that justice is not seen to be done.

> Re R.W.D.S.U. & Morris Reed Weeder Co. Ltd. (1973), 38 D.L.R. (2d) 419 (Sask.Q.B.)

15 In this respect, in order to be enforceable in a court, a labour board order must be filed in strict compliance with all statutory requirements.

> Re Ajax and Pickering General Hospital et al. V. Canadian Union of Public Employees et al. (1981), 35 O.R. (2d) 293 (Ont.C.A.) Per Blair J.A. at 299
>
> Re Amalgamated Transit Union Division 101-134 and Ken Mar Handi Cabs Ltd. Et al. (1971), 23 D.L.R. (3d) 220
>
> Dare Foods, supra

16 An order which has been properly filed in a court does not become an order of the court but, rather, remains an order of the Labour Relations Board.

> Re United Nurses of Alberta v. Alberta Attorney General) 1 35 N.R. 321 (S.C.C.) per Sopinka J.A., dissenting on other grounds, at p.350
>
> Re Ajax and Pickering General Hospital et al., supra

17 Further, an order will not be enforced by contempt proceedings if there is any ambiguity in it, or if there is any doubt as to what the party against whom it is directed is required to do or if there is any defect in the materials relied upon.

> Stratford Professional Firefighters' Association, Local 534, International Association of Firefighters v. Corporation of the City of Stratford (1981), 23 C.P.C. 250 (Ont.H.C.)
>
> Re United Steelworkers of America, Local 663, and Anaconda Company (Canada) Ltd. (1969), 3 D.L.R. (3d) 577 (B.C.S.C.)
>
> Re Distillery, Brewery, Winery, Soft Drink & Allied Workers' Union, 604 British Columbia Distillery Co. Ltd. (1975), 57 D.L.R. (3d) 752 (B.C.S.C.)

18 In Chrysler Credit (Canada) Ltd. v. 734925 Ontario Ltd. and Theodore (1991), 5 O.R. (3d) at 65, Master Peppiatt reviewed the procedure in Rule 59 concerning the settling and

signing of orders. He, quite correctly, commented upon the importance of ensuring the accuracy and clarity of a formal order which is issued following the decision of the court.

> The purpose of this procedure is to ensure, so far as humanly possible, that the formal order upon which an appellate court, and other members of the same court, sheriff, accountant, etc., will act accurately sets out the intention of the court which pronounced the order as reflected in the endorsement or the reasons. It is important that this should be done so that all concerned may know their rights, obligations and duties. It is far more than a mere formality. (Emphasis added)

19 It hardly needs to be added that especially in the context of an allegation of contempt of court, members of the community, including legal advisers, have the right to have court orders expressed in terms that are clear, unambiguous and precise.

Procedural Defects

20 Section 100 of the Labour Relations Act gives the Labour Relations Board the authority to issue declarations and directions in circumstances where an illegal strike has either been called, authorized or threatened.

21 Section 102 of the Labour Relations Act provides a mechanism for filing such directions in this court to prevent subsequent enforcement as if it were an order of this court:

> A party to a direction made under s. 100 or 101 may file it, excluding the reasons, in the prescribed form in the Ontario Court (General Division) and it shall be entered in the same way as an Order of that Court and is enforceable as such.

22 The forms to be used for filing of orders of the Ontario Labour Relations Board with the Ontario Court of Justice (General Division) are prescribed by Regulation 684 (as amended) made pursuant to the provisions of the Labour Relations Act. In the case of directions made by the Board pursuant to s. 100 of the Act, Regulation 684 prescribes that Form 12 shall be used. Paragraph 3 of Form 12 provides that:

> The direction, exclusive of the reasons therefore, reads as follows:
>
> Form 12, L.R.O. 1990, Reg.684, as amended

23 Nowhere in Form 12 is the filing of the entirety of an OLRB direction required, or permitted.

24 In this case, the TTC has failed to comply with the requirements of s. 102 of the Labour Relations Act, and, in addition, the requirements of Form 12. In particular, the TTC failed to file the Direction of the Board "exclusive of the reasons therefore". Rather, the

TTC simply appended the entire decision of the Labour Relations Board.

25 There is ample authority for the proposition that if a labour board order is not filed with the court in strict compliance with the statute, it is not enforceable.

> Re Ajax and Pickering General Hospital and CUPE (1981), 35 O.R. (2d) 293 (C.A.) at p. 299
>
> Re Amalgamated Transit Union and Ken Mar Handi Cabs Ltd. (1971), 23 D.L.R. (3d) 220 (B.C.S.C.) at pp.222-3
>
> IBEW v. Central Broadcasting Co. Ltd. (1976), 76 C.L.L.C. 263 (F.C.T.D.) at p. 269

26 The exclusion of the Board's reasons from a Direction filed with the court is a mandatory requirement of the statutory mechanism for the registration of directions with the court. As recognized by the Court of Appeal, strict compliance is required. The TTC has not complied. The order is therefore a nullity. It is not capable of enforcement by this court.

27 I agree with the submission by counsel for Kennedy and DeCarlo that the purpose of the restrictions contained in s. 102 is to ensure that persons in respect of whom the order is sought to be enforced, and who are often lay persons with no legal representation, have clear knowledge both as to the existence of the order and of its terms. The Legislature has determined that respondents must not be required to search through the totality of the Board's decision in order to discern what, if anything, they are to do or to refrain from doing but, rather, this should be clearly and unequivocally apparent from the direction filed.

28 The second alleged procedural defect is related to the fact that the date of the particular acts alleged to constitute the contempt is not set out in the Notice of Application. The applicant responds to this position by pointing out that the respondents were fully aware of the contents of the Board's direction, and they received copies of videotapes which contained the date as part of the material served with the Notice of Application. Further, the particulars were furnished ultimately on the examinations of the parties. In my view, none of these responses by the applicant satisfies the point and the application is defective on this ground as well.

29 A notice of motion in a contempt proceeding must set out the particulars of the alleged contempt. The notice of motion must specify the person against whom the order is sought, and state the date, place, and other facts sufficient to identify the particular acts alleged to constitute contempt.

> Dare Foods (Biscuit Division) Ltd. v. Gill, [1973] 1 O.R. 637 (Ont.H.C.)

Re RWDSU and Morris Rod Weeder Co. Ltd. (1973), 38 D.L.R. (3d) 419 (Sask.Q.B.)

30 The rationale for the requirement of particularization is obvious. While contempt often (as here) arises in the context of a civil matter, it is clear that the contempt complained of may be criminal in nature and that punitive sentences may be called for. As a result, the party against whom the contempt is alleged is entitled to certain protections. Zuber J. (as he then was) noted in the Dare Foods case, at p. 639, that:

> While I appreciate that criminal procedure generally is not applicable to these proceedings, I think it equally valid to say that in a proceeding such as this where the liberty of the subject is at stake, that concrete facts of a nature to identify the particular act which is charged' are necessary ingredients of the grounds upon which the motion is based.

31 One of the "necessary ingredients" of a motion for contempt identified by Zuber J. is the date of the alleged acts said to constitute the contempt. In the absence of such information, the notices lack the "allegations of a concrete fact of a nature to identify the particular acts complained of".

Dare Foods (Biscuit Division) Ltd. v. Gill, supra.

32 Moreover, the fact that the missing particulars might be discovered upon review of the affidavit material does not cure the defective notice:

> It is argued, however, that details of the plaintiff's complaint can be discovered by reading the affidavit filed in support of the notice. In my view, this is not an answer. A long line of cases have held that a proceeding such as this is strictissimi juris. The plaintiff's motions, therefore must be dismissed.

Dare Foods (Biscuit Division) Ltd. V. Gill, supra, at pp. 639-640.

33 The third procedural defect alleged by the respondents is that the notice of application is defective because it fails to state the precise relief claimed. I do not agree with this submission. The same relief was requested by the applicant in Re Ajax and Pickering Hospital et al. and CUPE (1981), 35 O.R. (2d) 293 (C.A.) and the Court of Appeal found no fault with the expression of the relief claimed.

The Direction of the Board being so Unclear and Ambiguous as to be Unenforceable

34 The findings above concerning the procedural defects are sufficient to dispose of the application, but I wish to note that I agree with the submissions of the respondents concerning the ambiguity of the directions of the Board as those submissions are expressed in paras. 18-22, inclusive, of the factum of Kennedy and DeCarlo.

35 Accordingly, the application for a finding of contempt is dismissed. If the parties are unable to agree on the question of costs I may be spoken to.

FERRIER J.

TAB 5

See paras. 11, 14

CITATION: Monteith v. Monteith, 2010 ONCA 78
DATE: 20100120
DOCKET: (C51050) M38244

COURT OF APPEAL FOR ONTARIO

MacPherson J.A. (In Chambers)

IN THE MATTER OF THE ESTATE OF GEORGE E. MONTEITH

BETWEEN:

Robert George Monteith

Appellant

and

Donald Graham Monteith

Respondent

J. Waldo Baerg, for the appellant/moving party

Lisa N. Gunn, for the respondent/responding party

Heard: January 16, 2010 (in writing)

Motion to extend time to perfect the appeal.

MacPherson J.A. (In Chambers):

A. INTRODUCTION

[1] The appellant/moving party Robert Monteith seeks an order granting an extension of time to February 19, 2010 to perfect his appeal from the orders of Tausendfreund J. dated August 11, 2009 and October 21, 2009.

B. FACTS

[2] In a judgment dated August 11, 2009, Tausendfreund J. ordered the removal of Robert Monteith as an estate trustee of the estate of George Monteith and ordered the continuation of Donald Monteith as the sole estate trustee.

[3] On September 10, 2009, the appellant filed a Notice of Appeal.

[4] On October 21, 2009, Tausendfreund J. made a costs order of $35,000 in favour of the respondent. The appellant appealed that order as well.

[5] On October 26, 2009, the registrar sent a notice of intent to dismiss for delay (NIDD) to the appellant, setting November 17, 2009, as the deadline to perfect his appeal. On November 18, 2009, when the appellant was informed of the perfection deadline in person, he informed the registrar that he did not receive the NIDD because his mail was being forwarded to Montreal. The registrar allowed the appellant until November 27, 2009, to either perfect his appeal or serve and file his motion to extend. At no time did the registrar actually dismiss the appeal for delay.

[6] On November 25, 2009, the registrar received the appellant's notice of motion for an order granting an extension of time to perfect the appeal, dated November 20, 2009, and served on the respondent's counsel on November 23, 2009. Under the heading "Grounds for the Motion", the appellant explained and requested as follows:

> 1. Notice of the impending deadline of November 17, 2009, (dated October 26, 2009), was sent to the wrong address, and never received.
>
> 2. An active effort to retain counsel to perfect the Appeal has so far not been successful, and a vigorous search for legal assistance in this regard continues.
>
> 3. As 2 months of interviews has as yet proved fruitless, I request that no date for the deadline be assigned, as firstly counsel must be retained, then time spent on research and preparation of the documents to perfect the appeal.
>
> 4. As soon as counsel is retained, we will advise the Court, and propose a date for completion of perfecting the appeal.

[7] On January 11, 2010, the appellant retained J. Waldo Baerg as his counsel and Mr. Baerg filed a Supplementary Notice of Motion requesting an order extending the time to perfect the appeal to a specific date, namely February 19, 2010.

C. ISSUE

[8] The sole issue on the appeal is whether an order should be made extending the time to perfect the appeal to February 19, 2010.

D. ANALYSIS

(1) Preliminary point

[9] The respondent submits that in his motion the appellant has not sought to set aside the registrar's order dismissing the appeal for delay. As the respondent asserts, "[u]nless this Order is set aside, the relief requested by the appellant is meaningless."

[10] In fact, the registrar never dismissed the appeal for failure to perfect. In keeping with the registrar's usual protocol, the registrar allowed some leeway for the appellant to perfect his appeal after the deadline on November 17, 2009, rather than dismiss the appeal as a matter of course. On November 18, 2009, the appellant informed the registrar that he did not receive their notice of the impending deadline. In light of this, the registrar allowed the appellant ten extra days to file his motion to extend. The appellant filed his motion ahead of the deadline.

(2) The merits

[11] In my view, the test for extending the time for perfecting an appeal should be similar to the test for extending the time for filing a notice of appeal. In *Rizzi v. Mavros* (2007), 85 O.R. (3d) 401 (C.A.) at para. 16, Gillese J.A. listed five factors:

> (1) whether the ... appellant formed an intention to appeal within the relevant period;
>
> (2) the length of the delay and explanation for the delay;

(3) any prejudice to the respondent;

(4) the merits of the appeal; and

(5) whether the "justice of the case" requires it.

[12] The first of these factors is not relevant on this motion because the appellant filed his Notice of Appeal in a timely fashion. Accordingly, I will consider the other four factors from *Rizzi v. Mavros.*

(a) The length of delay and explanation for it

[13] The appellant proposes a perfection date of February 19, 2010, which is slightly more than a month after he retained counsel and three months after the registrar put him on notice about his appeal. The reason for this delay, apparent form the record, and in particular from the appellant's original Notice of Motion prepared by himself, is that he was having difficulty retaining a lawyer. He has now succeeded on this front and his counsel has moved with dispatch and proposes, through the suggested perfection date of February 19, 2010, to continue to do so. In these circumstances, the delay in perfection will be relatively brief and the explanation for the delay strikes me as reasonable.

(b) Prejudice to the respondent

[14] Delay in court proceedings always encompasses some prejudice. In this case, the settlement of an estate will be delayed. However, the respondent does not assert any specific prejudice if the motion is granted. The delay is brief.

(c) The merits of the appeal

[15] The appellant has not provided any evidence or argument about the merits of the appeal.

[16] In the original Notice of Appeal, prepared by the appellant himself, the following is found:

> THE GROUNDS OF APPEAL are as follows:
> No notice was received prior to the hearing by the appellant from either Gunn & Associates or Ledroit-Becket therefore impeding preparation of a suitable defence for this action.

[17] However, the formal Judgement of Tausendfreund J. records, *inter alia*, "hearing the submissions of ... the self-represented Respondent".

[18] In addition, I note that the appellant has not provided the reasons, if any, of Tausendfreund J.

[19] This factor tells in favour of the respondent.

(d) The "justice of the case"

[20] In a sense, this is an 'umbrella' factor, requiring the motion judge to step back, balance the preceding factors, and consider any other factor that might be relevant in the particular circumstances of the appeal.

[21] In this case, the appellant was self-represented in the early stages of his appeal. He filed a timely Notice of Appeal. When he did not follow through and perfect his appeal in compliance with the rules and discovered that his appeal was in danger of being dismissed for delay, he moved quickly with this motion. Importantly, he has now retained counsel. This counsel has moved with dispatch; he did not seek an adjournment of the motion even though it was scheduled only four days after his retainer, he responded to it, and he proposes an early date, February 19, 2010, for perfection of the appeal. In these circumstances, the balancing of the factors and the "justice of the case" point towards a disposition that permits the appeal to be heard on the merits sometime this spring.

E. DISPOSITION

[22] The motion is granted. The appellant is given to February 19, 2010 to perfect his appeal.

[23] The appellant seeks his costs of the motion on the basis that the respondent unreasonably withheld his consent to a motion reasonably brought. I disagree. This is a close call. I have, in effect, granted the appellant an indulgence so that the appeal can be heard and determined on the merits. Accordingly, each party should bear its own costs.

RELEASED: January 20, 2010 ("J.C.M.")

"J.C. MacPherson J.A."

TAB 6

See para. 21

COURT OF APPEAL FOR ONTARIO

CITATION: Mortazavi v. University of Toronto, 2013 ONCA 66
DATE: 20130130
DOCKET: M41960 (C56058)

Laskin J.A. (In Chambers)

BETWEEN

Houman Mortazavi and Mojgan Yousefi

Plaintiffs (Appellants/Moving Parties)

and

The University of Toronto, Adonis Yatchew, Martin Osborne, Arthur Hosios, Jon Cohen, Berry Smith, Brian Corman, Heather Kelly, Elizabeth Smyth, Jane Alderdice, Ralph Scane, Edith Hillan, Jill Matus, Cheryl Misak, Ellen Hodnett, Angela Hildyard, Hamish Stewart, Joan Foley, and Isfahan Merali

Defendants (Respondents/Responding Parties)

Houman Mortazavi, acting in person

Mojgan Yousefi, acting in person

Robert A. Centa, for the responding parties, The University of Toronto, Adonis Yatchew, Martin Osborne, Arthur Hosios, Jon Cohen, Berry Smith, Brian Corman, Heather Kelly, Elizabeth Smyth, Jane Alderdice, Ralph Scane, Edith Hillan, Jill Matus, Cheryl Misak, Ellen Hodnett, Angela Hildyardm, Joan Foley, and Isfahan Merali

Eric S. Baum, for the responding party, Hamish Stewart

Heard: December 4, 2012

On appeal from the order of Justice Edward Belobaba of the Superior Court of Justice, dated August 27, 2012 and on a motion for an extension of time to perfect the appeal.

Laskin J.A.:

Overview

[1] The appellants, Houman Mortazavi and Mojgan Yousefi, were both doctoral students in the University of Toronto's Department of Economics. They are married. Early in their studies, they sought accommodation from the University when Mortazavi's father became ill and they returned to Iran to care for him. Though some accommodation was made, they received failing grades in five classes and were required to pay tuition for classes they did not attend.

[2] They appealed these decisions through three levels of internal academic appeals. Their final appeal was dismissed and they were left with two failing grades. They did not seek judicial review. Instead, on May 1, 2012, they filed a claim against the school and several of its administrators and employees. On August 27, 2012, the claim was struck by a motion judge under rules 25.06 and 25.11 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, without leave to amend.

[3] On September 27, 2012, the appellants filed a notice of appeal of the motion judge's decision. However, they have not yet perfected their appeal. They now seek an extension of time to do so. In this case, whether that extension should be granted depends on whether the appeal has any merit.

A. FACTS

(1) Background

[4] The appellants were admitted to the Ph.D. program in Economics for the 2007-2008 academic year. Shortly after they were admitted, Mortazavi's father, who lived in Iran, became seriously ill. They returned to Iran to care for him, and contacted the University to request a one-year deferral. The appellants say that their request was initially denied, and that they were told to re-apply to the program, without a guarantee of re-admission.

[5] The appellants then say that, after some back-and-forth with the University, only Yousefi's deferral was approved. Mortazavi's deferral was still declined. Finally, according to the appellants, they incurred approximately $5,000 to fly back to Canada to resolve the status of their registration. Upon attending at the graduate director's office in person, they say they were granted a deferral "in less than 3 minutes."

[6] In the fall of 2008, the appellants began their studies. According to the appellants, the financial terms of their new offer of admission were varied from the previous year. For example, they say that an entrance award due to each of the appellants in the amount of $5,000 had been retracted. Nonetheless, they attended classes throughout September.

[7] Then, in early October 2008, Mortazavi and Yousefi learned that Mortzavai's father's illness had suddenly progressed. They flew back to Iran to care for him. During October and November, they exchanged a series of emails with the graduate director about potential accommodations. The appellants eventually requested a leave of absence for the fall 2008 term.

[8] The University says there was confusion over what period of time the leave of absence would apply to, and the request was eventually cancelled; the appellants say it was arbitrarily refused. Ultimately, the appellants did not attend any more classes or take exams during the fall 2008 term. As a result, they received three failing grades.

[9] The appellants returned to the program for the winter 2009 term with a modified schedule to reflect the classes they had missed in the fall. They attended classes and completed some assignments. Then, in March 2009, Mortazavi's father died. Both Mortazavi and Yousefi returned to Iran to make funeral arrangements.

[10] The appellants did not return to classes, and they did not sit their exams in April 2009. As a result, they received two more failing grades. The appellants say that they gave notice of Mortazavi's father's death to the University. The University says the appellants did not communicate with the school until May

2009, when the appellants were informed that the Department would be seeking to terminate their registration.

[11] During the summer and fall of 2009, the appellants and the Department continued to negotiate about the terms of the appellants' studies. The appellants were permitted to audit three courses in the fall 2009 term and to write two exams, despite not being formally registered and not having paid tuition. However, their exams were not graded.

[12] The appellants eventually appealed their academic record to the Graduate Department Academic Appeals Committee (GDAAC), which unanimously dismissed the appeal. They next appealed that decision to the Graduate Academic Appeals Board (GAAB), which directed that the three failing grades in the fall 2008 semester be marked as "withdrawals" and recommended that the fees attributable to that term be waived. The three grades were changed; however, the school declined to follow the GAAB's recommendation on the fees.

[13] In early 2012, the appellants appealed the decision of the GAAB to the Academic Appeals Committee (AAC). They submitted, among other things, that the GAAB should have ordered that their two winter 2009 failing grades be marked withdrawn and that their two fall 2009 tests be graded. Those appeals were dismissed. The appellants were therefore left with two failing grades from the winter 2009 term.

[14] The record is unclear on which fees have been paid by the appellants to the University and which scholarships and disbursements have been paid by the University to the appellants. The appellants appear to owe the University arrears for unpaid tuition from the fall of 2008, plus accumulated interest. They say the University unfairly forwarded their debts to a collection agency during the appeals process. As a consequence of their lapsed status as students, the appellants have also lost their employment as teaching assistants.

(2) The Appellants' Allegations

[15] As I said, instead of seeking judicial review, the appellants filed a statement of claim against the University of Toronto; the Dean of the School of Graduate Studies (SGS) (Brian Corman); two Vice-Deans of the SGS (Berry Smith and Elizabeth Smyth); two directors of the SGS (Jane Alderdice and Heather Kelly); three professors in the Department of Economics (Arthur Hosios, Adonis Yatchew, and Martin Osborne); two vice-provosts of the University (Edith Hillan and Jill Matus); two vice-presidents of the University (Cheryl Misak and Angela Hildyard); the chair of the Academic Board (Ellen Hodnett); the chair of the GDAAC (Jon Cohen); the chair of the GAAB (Ralph Scane); the chair of the AAC (Hamish Stewart); the University Ombudsperson (Jane Foley); and the manager of the Anti-Racism and Cultural Diversity Office at the University (Isfahan Merali).

[16] The statement of claim is 187 pages. The appellants seek approximately 80 million dollars. For the purpose of this motion, I rely on the appellants' listed claims at p. 5 of their statement of claim. The allegations can be grouped in the following way:

1. Collective agreement claims arising from the appellants' employment as teaching assistants (only against the University);
2. Breach of the appellants' ss. 2(b), 2(d), 7, 12, and 15 rights under the *Canadian Charter of Rights and Freedoms* and breach of the appellants' rights under the *Canadian Human Rights Act* and the *Canada Labour Code*;
3. Violations of procedural fairness and natural justice (including the creation of a "capricious and prejudicial complaint process, abuse of procedure", and bias);
4. Conspiracy to injure;
5. Misfeasance in public office;
6. Breach of fiduciary duty;
7. Negligence;
8. Breach of contract;
9. Various intentional torts.

[17] The University defendants and Professor Hamish Stewart, who is represented by separate counsel, moved to strike the statement of claim under Rules 21 and 25.

(3) The Motion Judge's Decision

[18] I agree with the respondents that the motion judge struck the claim under rules 25.06 and 25.11. However, he also declined to grant leave to amend. As

he describes in the excerpt below, he declined to do so because he was confident that the claim should be struck anyway under Rule 21 as disclosing no reasonable cause of action:

> Indeed I am more than satisfied that the defendant's motion to strike without leave to amend should be granted in its entirety.
>
> I say this primarily because at root I agree with Mr. Centa that this is a genuine but misguided attempt by two very upset former graduate students to re-package and re-litigate the very claims (about leave of absence and failing grades) that were advanced and considered and argued and reasons given before several appeal boards as provided in the university system, namely internal appeals to various graduate boards and overarching appeal tribunals. I note that neither plaintiff decided to seek judicial review of the university's decisions with regard to any of their complaints or concerns.

[19] The motion judge also specifically struck the allegations pleaded against Professors Scane and Cohen on the principle of adjudicative immunity, and found that the court had no jurisdiction over disputes arising under the appellants' collective agreement as teaching assistants for the University. Finally, the motion judge struck the claims against all individual defendants as an abuse of process.

(4) The Appeal

[20] The appellants argue that the motion judge erred in dismissing the action because the claim, or parts of it, disclosed reasonable causes of action falling

within the jurisdiction of the Superior Court of Justice. They further submit that, once the claim was struck, the motion judge erred in declining to grant the appellants leave to amend. The appellants also suggest that the motion judge exhibited bias against them during the motion hearing.

B. PRINCIPLES AND ANALYSIS

[21] The overriding principle the court must consider in deciding whether to grant a party an extension of time to perfect an appeal is whether the justice of the case requires it. In applying this principle, the court typically takes into account the following four factors:

1. Whether the appellant formed an intention to appeal within the relevant period;
2. The length of the delay and explanation for the delay;
3. Any prejudice to the respondent;
4. The merits of the appeal.

See *Issasi v. Rosenzweig*, 2011 ONCA 112, at para. 4.

[22] The respondents acknowledge that the appellants had a timely intention to appeal, the length of the delay is short, and a brief extension would cause them no actual prejudice. However, they argue that the justice of the case does not require an extension, because the appellants have not provided a reasonable explanation for the delay and because the underlying appeal has no merit.

(a) Explanation for the Delay

[23] The appellants say they were erroneously advised by their counsel at the time that they would have sixty days to perfect the appeal from the date they received the motion transcript. Emails in the motion record confirm their belief that they were not subject to the thirty-day timeframe. I accept the appellants' statements. They provide a reasonable explanation for the delay.

(b) Merits of the Appeal

[24] I must consider whether the appellants' case has so little merit that this court could reasonably deny the important right of an appeal: *Issasi v. Rosenzweig,* at para. 10.

[25] As a preliminary matter, I reject the appellants' contention that the motion judge exhibited bias towards them. Nothing in the transcript of the proceedings before the motion judge supports this contention.

[26] I also see no merit to the appeal of the striking of the claim under Rule 25. Rule 25.06 requires that every pleading "shall contain a concise statement of the material facts on which the party relies for the claim or defence..." Rule 25.11 allows a judge to strike out a pleading, with or without leave to amend, if the pleading "(a) may prejudice or delay the fair trial of the action; (b) is scandalous, frivolous or vexatious; or (c) is an abuse of process of the court." The appellants' statement of claim was 187 pages long and, in the words of the motion judge,

"replete with evidence being repeated over and over again." Without doubt it violated Rule 25 and was properly struck.

[27] The only serious question is whether the motion judge was justified in refusing to grant leave to amend. His reason for doing so was his confidence that the claim should be struck anyway under Rule 21 because it disclosed no reasonable cause of action. The legal benchmark for striking a claim for failing to disclose a reasonable cause of action is whether it is plain and obvious that the claim will fail: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959. Therefore, in determining whether the appeal of the motion judge's decision not to grant leave to amend has any merit, I must consider whether there is any force in the appellants' argument that it was not plain and obvious that their claims would fail.

[28] Largely for the reasons set out by the motion judge, I believe that the following claims were bound to fail: all claims relating to the appellants' employment as teaching assistants; all claims alleging breaches of the appellants' rights under the *Canadian Charter of Rights and Freedoms*, the *Canadian Human Rights Act*, the *Canada Labour Code*; all claims relating to violations of procedural fairness, natural justice, or the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, including those made personally against Professors Scane, Cohen, and Stewart as chairs of the internal appeals bodies; all claims alleging misfeasance in public office, conspiracy to injure, and other miscellaneous intentional torts; and all claims alleging breach of fiduciary duties.

If these were the only claims set out in the appellants' statement of claim, I would decline to grant an extension of time.

[29] I am not prepared, however, to say the statement of claim does not disclose a reasonable cause of action for negligence or breach of contract. In particular, I am not persuaded that the appellants' claims arising from the University's conduct in relation to the following events – subject, as they may be, to statutory time limitations – are bound to fail:

- The appellants' deferral in 2007 – specifically, the University's allegedly arbitrary delay in granting each party a deferral, and resulting damages;
- The appellants' requests for accommodation in the fall 2008 academic term – specifically, the University's alleged mismanagement of the appellants' request for a leave of absence, and resulting damages;
- The appellants' dispute with the University over unpaid tuition and fees – specifically, the University's failure to adopt the GAAB's recommendation that the school waive the fall 2008 tuition owing and the University's alleged management of the arrears during the appeals process, and resulting damages.

[30] This court has held that judicial review is the appropriate option when the desired legal remedy aims to reverse an internal academic decision made by university authorities. However, the court has also held that where "the plaintiff alleges factors that constitute a cause of action based on torts or a breach of

contract, while claiming damages, the court has jurisdiction, even if the dispute stems from academic or educational activities of the university in question": *Gauthier v. Saint-Germain*, 2010 ONCA 309, 325 D.L.R. (4th) 558, at para. 46.

[31] Even where a court is found to have jurisdiction, a plaintiff must still plead the requisite elements of the cause of action. In *Gauthier*, at paras. 47-49, Rouleau J.A. discussed the limited ways in which a student can establish a cause of action against a university in relation to academic decisions:

> ...[B]y registering at a university, it is understood that the student is subject to the discretion of that institution for the resolution of academic issues, namely for the evaluation of the quality of the student's work, the structure and implementation of the university programs...This discretion is very broad...
>
> To establish a cause of action for a breach of contract, the student must show that the university failed to meet its express or implicit obligation to which the institution committed by approving the student's registration...
>
> ...[I]n order to establish a cause of action based on negligence...the student must submit specific facts to show that the behaviour of the university, or the professor in question, constituted an intentional tort...or was outside the discretionary scope granted to the university and its professors.

[32] Rouleau J.A. also discussed the two circumstances in which a court may strike a cause of action in cases of this nature, at para. 50:

> First, if the lawsuit for a tort or a breach of contract is but an indirect attempt to appeal an internal academic decision when the proper procedure is a judicial review (for instance, the decision to yield a specific result, to

> require a specific task, to refuse admission to a program, or to fail to grant a diploma), the option to strike will be available to the court. Second, if the submission does not provide the necessary details to show that the university or its employees went beyond the scope of their discretionary power, the court may strike the cause of action.

[33] The appellants are not asking the court to reverse an internal academic decision – they are not asking for their grades to be changed or to be readmitted to the program. They are asking for damages arising from the University's alleged failure to comply with its contractual obligations and the duty of care it owed to the appellants as students.

[34] Further, a judge considering a motion under Rule 21 must assume that all facts in the statement of claim are proven. Taking the appellants' allegations as true, I cannot say that it is plain and obvious that the university did not breach its implied obligations or exceed its discretionary power in dealing with the appellants' requests for accommodation – specifically with respect to the 2007 deferral, the fall 2008 academic term, and the appellants' unpaid tuition (over which the internal appeals bodies appear to have lacked jurisdiction).

[35] This court has also recently granted student-plaintiffs in similar circumstances an opportunity to revise their statements of claim to pinpoint an implied or express contractual term or applicable standard of care from which the university or its employee deviated: see *Gauthier v. Saint-Germain*; *Jaffer v. York University*, 2010 ONCA 654, 268 O.A.C. 338, leave to appeal refused, [2010]

S.C.C.A. No. 402. I am therefore unwilling at this juncture to deny the appellants' their right of appeal of the motion judge's decision. The justice of the case entitles the appellants to an extension of time to perfect their appeal.

C. CONCLUSION

[36] The appellants also seek leave to file the transcript of the submissions made before the motion judge and an interim decision made by the Ontario Human Rights Tribunal in relation to this case. The respondents do not oppose this request, and neither do I.

[37] I grant the appellants thirty days from the release of this decision to perfect their appeal. If the appeal is not perfected within this thirty-day period, the respondents may bring a motion without notice before the registrar to have the appeal dismissed. As the appellants obtained only limited success on the motion and were asking for an indulgence from the court, I order that there be no costs of the motion.

Released: Jan 30, 2013 "John Laskin J.A."
"JL"

TAB 7

See para. 5

1979 CarswellOnt 461
Ontario Supreme Court [Court of Appeal]

Miller Manufacturing & Development Co. v. Alden

1979 CarswellOnt 461, [1979] O.J. No. 3109, 13 C.P.C. 63

Miller Manufacturing and Development Co. v. Robert J. Alden et al.

Blair J.A., [In Chambers]

Heard: May 30, 1979
Judgment: June 1, 1979

Counsel: *H.B. Campbell*, for appellant.
E. W. Trasewick, for respondents.

Subject: Civil Practice and Procedure

Headnote

Practice --- Practice on appeal — Time to appeal — Extension of time — Grounds for extension

Appeals — Elapse of time for filing notice of appeal — Application for extension of time — Applicable principles.

The applicant had served a notice of appeal upon the respondent's solicitors but had failed to file the notice. One year later, this omission was discovered. Nothing had been done subsequent to service of the notice. The applicant requested an extension of time in which to file the notice of appeal.

Held:

The application was dismissed. If the appellant's intention to appeal had been firm, the long delay would not have been incurred. In addition the lapse of time had prejudiced the respondent. The Court, on such applications, may consider the merits of the proposed appeal. In the instant case, no arguable question of law was apparent.

Application for extension of time to file notice of appeal.

***Blair J.A.* (In Chambers):**

1 The applicant applies for an extension of time for filing the notice of appeal. Judgment was pronounced by Mr. Justice Robins on February 16, 1978 and a notice of appeal was served on the solicitor for the respondents on March 1, 1978. The notice of appeal was not filed. An affidavit of the applicant's then solicitor states that the omission occurred because of confusion in his own office and with counsel apparently engaged to take the appeal. The error was not discovered until March 1979 when the solicitor for the respondent wrote the Court of Appeal office to enquire about the status of the appeal. No steps had been taken in the interim to perfect the appeal and no transcript has been ordered.

2 The affidavit of the president of the respondent corporation alleged prejudice if the proceedings were revived at this late date. The full reasons for judgment of Robins J. and the notice of appeal itself, in my opinion, indicate that the appeal essentially challenges the findings of fact of the learned trial Judge and raises no readily apparent, let alone fairly arguable, question of law.

3 At the conclusion of the argument I stated that I would dismiss the application. Because counsel for the applicant indicated that he might appeal my decision to the full Court I stated that I would give written reasons.

4 Applications for extension of time under R. 504 and its predecessors have been considered on many occasions by this Court. The practice in dealing with them was well stated by Hogg J.A., in *Sinclair v. Ridout*, [1955] O.W.N. 633 at 635 where he said:

> Some 70 years ago is [sic] was said that the basic rule to be observed in dealing with applications to extend the time for appeal is that leave should be granted if justice requires that it be given. Brett M.R. in *In Re Manchester Economic Building Society* (1883), 24 Ch. D. 488 at 497, said: '... I know of no rule other than this, that the Court has power to give the special leave, and exercising its judicial discretion is bound to give the special leave, if justice requires that leave should be given.'
>
> In *Leslie v. Canadian Credit Corporation Ltd.*, 61 O.L.R. 334, [1927] 4 D.L.R. 1083, Orde J.A., in considering an application for an order allowing an appeal to the Supreme Court of Canada although the time had expired for such application, referred with approval to the statement in Cameron's Supreme Court Practice, 3rd ed., p. 329, based upon the cases there cited, that: 'No uniform rule can be deduced from the cases ... If any rule can be laid down, it seems to be that to do justice in the particular case is above all other considerations'.

5 Osler J.A., in *Ross v. Robertson* (1904), 7 O.L.R. 413 quoting Holmested & Langton, stated that "Each case depends upon its own circumstances, and discretion is to be exercised so as to do what justice requires in the particular case." The voluminous number of decisions under R. 504 reveal that a number of considerations are viewed as important, the emphasis given to them in each case varying with the circumstances. They include the existence of a bona fide intention to appeal, the length of the delay, prejudice to the other party, whether it can be compensated by costs and the merits of the appeal.

6 Although the notice of appeal was served in proper time in this case, some doubt is thrown on the firmness of the applicant's intention to appeal by the fact that nothing was done to perfect it for more than a year. This long lapse of time contributed substantially to the prejudice which the respondents might suffer from prolongation of proceedings. These factors are almost sufficient in my view to justify dismissal of the application but the matter is put beyond doubt by the nature of the intended appeal. Counsel for the applicant argued strongly that I was precluded from considering the merits of the appeal on an application for extension of time. This is not so as many decisions of this Court demonstrate. In *Re Blair and Weston*, [1959] O.W.N. 368, Aylesworth J.A., stated at p. 369:

> The other ground which was equally fatal to the application was that there was no indication of any really arguable point of law to be dealt with on the appeal, if the time for bringing an appeal were extended.

McGillivray J.A., in *R. v. Toronto Magistrates; Ex Parte Tank Truck Tpt. Ltd.*, [1960] O.W.N. 549 at 550, 129 C.C.C. 209, Middleton J.A., in *Alropa Corpn. v. Holdcroft*, [1938] O.W.N. 498 at 503 provide other examples of reference to the merits of an appeal in considering applications under this Rule. Although, as a general rule, as Osler J.A., stated in *Ross v. Robertson, supra*, at p. 466, Courts in applications for extension of time "purposely refrain" from putting consideration of the merits "as high ... as [on] an application for leave to appeal", this, nevertheless, has been a decisive element in many cases. As I have already stated, no arguable question of law is apparent from the face of the record and for this reason, along with the others I have mentioned, I consider that justice, in this case, requires that the application for extension of time should be dismissed.

7 At the conclusion of the argument I was disposed to award costs to the respondent on a solicitor and client basis and, at the request of counsel for the applicant, granted leave to appeal from this determination. After further reflection, I do not consider that this is an appropriate case for this award of costs and the respondent will be entitled to costs only on a party and party basis. The applicant has leave, if so advised, to appeal this award of costs.

Application dismissed.

End of Document

TAB 8

COURT OF APPEAL FOR ONTARIO

CITATION: Enbridge Gas Distribution Inc. v. Froese, 2013 ONCA 131
DATE: 20130304
DOCKET: M42141

Gillese J.A. (In Chambers)

BETWEEN

Enbridge Gas Distribution Inc.

Plaintiff (Responding Party)

and

David Froese a.k.a. David Frose

Defendant (Moving Party)

Peter B. Cozzi, for the moving party

Jennifer Heath, for the responding party

Heard in writing: February 28, 2013

On motion for an extension of time to file a Notice of Motion for Leave to Appeal the order of the Divisional Court (DiTomaso J.) dated November 14, 2012.

GILLESE J.A.:

THE MOTION BEFORE THE COURT

[1] David Froese a.k.a. David Frose ("Mr. Froese" or the "moving party") wants to appeal the order of the Divisional Court dated November 14, 2012 (the "Order"). He does not have a right to such an appeal, as leave to appeal is required.

[2] As a first step in the process, Mr. Froese has to file a Notice of Motion for leave to appeal to this court (the "Notice"). The deadline for filing the Notice has passed. Consequently, he brings a motion, in writing, seeking an extension of time to file the Notice.

BACKGROUND

[3] Mr. Froese is a contractor, a long-time property maintenance manager at a small landscaping business, and a friend of Mr. Massey.

[4] In November of 2008, Mr. Massey called Mr. Froese and asked for his help. The septic tank system at his property in Holland Landing, Ontario (the "property") was leaking and causing a sewage backup into his home.

[5] Mr. Froese agreed to help. He went to the property and spoke with Mr. Massey and a neighbour about the lot line, specifically where the property line ended. It appears that he made these inquiries because he believed that gas pipes are not located on private property. On that assumption, so long as he dug only on private property, he thought he could not hit a gas pipe.

[6] Mr. Froese also visually inspected the utility lands and, digging by hand, located the septic pipe coming from the tank leading to the header pipe.

[7] Mr. Froese then began using a mini-excavator to uncover the leaking septic tank. After digging out two or three scoops of soil, he heard a loud rush of

air. He had ruptured a gas main belonging to Enbridge Gas distribution Inc. ("Enbridge").

[8] Mr. Froese did not call for a utility locate before digging, a fact that he acknowledged before trial.

[9] Enbridge brought an action in Small Claims Court in which it sought to recover from Mr. Froese the cost of repairs to the gas main. Its claim was framed in negligence. The amount of the claim was $7,144.65.

[10] At trial, Mr. Froese admitted that he failed to call for a locate and that a locate could have prevented the incident.

[11] At first instance, Enbridge lost. The trial judge held that Mr. Froese was not negligent. He assessed Enbridge's damages at $4,831.30.

[12] Enbridge appealed only the question of liability to the Divisional Court. It was successful.

[13] In a decision dated November 14, 2012, DiTomaso J. of the Divisional Court found that the trial judge erred in fact and in law (the "Decision".) He held that the trial judge made a palpable and overriding error when he found that a utility locate call would not have avoided the incident. He further held that "but for" Mr. Froese's failure to make the utility locate call, the incident would never have occurred.

THE ISSUE

[14] This motion raises a single issue: ought the court grant an extension of time to file the Notice?

ANALYSIS

The Test for Extending Time

[15] The test on a motion to extend time is well-settled. The overarching principle is whether the "justice of the case" requires that an extension be given. Each case depends on its own circumstances, but the court is to take into account all relevant considerations, including:

(a) whether the moving party formed a *bona fide* intention to appeal within the relevant time period;

(b) the length of, and explanation for, the delay in filing;

(c) any prejudice to the responding parties, caused, perpetuated or exacerbated by the delay; and

(d) the merits of the proposed appeal.

See *Rizzi v. Mavros* (2007), 85 O.R. (3d) 401 (C.A.).

[16] In my view, lack of merit alone can be a sufficient basis on which to deny an extension of time, particularly in cases such as this where the moving party seeks an extension to file a notice of leave to appeal, rather than an extension of

time to file a notice of appeal: see *Miller Manufacturing and Development Co. v. Alden*, [1979] O.J. No. 3109 (C.A.), at para. 6.

The Principles Applied

[17] The focus of the submissions of both parties was on the merits of the proposed appeal. Although the record contains very little on the length of the delay and reasons therefore, it is clear that the moving party had the requisite intention and attempted to file within time. Further, I see nothing in the record to suggest that Enbridge will suffer prejudice, apart from the inevitable cost associated with permitting the litigation to carry on. Accordingly, I will say nothing more on those matters.

[18] I turn, therefore, to a consideration of the merits of the proposed appeal.

[19] It is important to begin this discussion by recalling that the decision which the moving party seeks to appeal is one rendered by the Divisional Court exercising its appellate jurisdiction. In *Sault Dock Co. v. Sault Ste. Marie (City)*, [1972] O.J. No. 2069, at para. 7, this court explained that, as a general rule, such decisions of the Divisional Court are intended to be final. A review of such a decision, by the Court of Appeal, is an exception to this general rule.

[20] Before granting leave, this court must be satisfied that the proposed appeal presents an arguable question of law, or mixed law and fact, requiring consideration of matters such as the interpretation of legislation; the

interpretation, clarification or propounding of some general rule or principle of law; the interpretation of a municipal by-law where the point in issue is a question of public importance; or the interpretation of an agreement where the point in issue involves a question of public importance: see *Sault Dock Co.* at para. 8.

[21] At para. 9 of *Sault Dock Co.,* the court adds that it will also consider cases where special circumstances make the matter sought to be brought before it a matter of public importance or would where it appears that the interests of justice require that leave should be granted.

[22] Finally, at para. 10 of *Sault Dock Co.,* this court observes that there may be cases in which there is clearly an error in the judgment or order of the Divisional Court such that the Court of Appeal might grant leave to correct the error.

[23] If Mr. Froese were given leave to appeal, he would argue that the trial judge's decision was correct in law and fact. He would contend that the Divisional Court erred by effectively retrying the case and substituting its findings of fact for those of the trial judge. He would further contend that the Divisional Court made factual errors relating to such things as the likely accuracy of the utility locate and the location of the damaged gas pipeline.

[24] In my view, the proposed appeal is largely fact based. I do not see that it raises an arguable question of law, and certainly not one of the sort

contemplated by para. 8 of *Sault Dock Co.* Nor does the purported appeal involve a special circumstance or a matter of public importance. The questions it would raise are of importance only to the parties, not to the public generally. Furthermore, I see nothing in the purported factual errors.

[25] Accordingly, the moving party has not established that the justice of the case requires that an extension of time for filing of the Notice should be given.

DISPOSITION

[26] For these reasons, the motion is dismissed. If the parties are unable to resolve the matter of costs, they may make brief written submissions on the same within ten days of the date of release of these reasons.

Released: March 4, 2013 ("E.E.G.")

"E.E. Gillese J.A."

TAB 9

See para. 25

CITATION: Rizzi v. Mavros, 2007 ONCA 350
DATE: 20070508
DOCKET: M35020 (C44688)

COURT OF APPEAL FOR ONTARIO

GILLESE J.A. (In Chambers)

BETWEEN:

DEBBIE RIZZI and DELIO RIZZI

Plaintiffs(Appellant/
Responding Party)

and

GEORGE MAVROS and THOMAS PARTALAS

Defendants(Respondents/
Moving Parties)

Douglas A. Wallace for the respondents/moving parties.

Karl Arvai for the appellant/responding party.

Heard: May 2, 2007

On a motion for an extension of time to file a notice of cross-appeal from the judgment of Justice T. David Little of the Superior Court of Justice, dated December 2, 2005.

ENDORSEMENT

[1] The respondents seek an order granting an extension of time to file a Notice of Cross-Appeal.

Background

[2] On April 2, 1995, Debbie Rizzi injured her right leg when she attempted to move some metal sheets that were stored in the laundry/storage room of the apartment building in which she lived. The apartment building is owned by the respondents.

[3] Ms. Rizzi later developed fibromyalgia. In an action brought against the respondents (the moving parties on this motion), Ms. Rizzi claimed damages for the injury to her leg and for fibromyalgia.

[4] Causation in respect of the fibromyalgia was a central issue at trial. The parties offered competing theories. Ms. Rizzi's theory was that the leg injury caused or materially contributed to the development of fibromyalgia and that she was entitled to full compensation for that condition. The respondents argued that Ms. Rizzi's pain complaints were caused by a pre-existing condition which started in her right wrist and, over a period of months just prior to the incident on April 2, 1995, increased in severity and extended up her arm and into her shoulder. It was this pain, the respondents contended, that continued to spread and led to the diffuse pain that Ms. Rizzi suffered.

[5] Expert evidence at the trial differed with respect to the cause of the fibromyalgia or diffuse pain. Some experts testified that the leg injury caused or contributed to the development of the fibromyalgia or diffuse pain. One defence expert testified that the appellant's pain complaints were more likely caused by the pre-existing condition than the leg injury.

[6] Counsel at trial disagreed about the test for causation. Counsel for the respondents urged that the instruction to the jury be based on the "but for" test. In the charge, however, the trial judge proposed a number of possible scenarios and then instructed the jury on the basis of the "material contribution" test.

[7] The jury found in favour of the appellant, including that her fibromyalgia or diffuse pain was caused or materially contributed to by the incident on April 2, 1995. They assessed general non-pecuniary damages of $41,000, special damages of $17,400, past income loss of $175,000, future income loss of $485,500 and future care costs of $160,000. The jury found Ms. Rizzi to be 75% contributorily negligent for the accident.

[8] In a Notice of Appeal dated December 29, 2005, Ms. Rizzi appealed the quantum of general non-pecuniary damages and the assessment of contributory negligence.[1] In the Notice of Appeal, Ms. Rizzi asks that the judgment be varied or, alternatively, that a new trial be ordered.

---

[1] She sought leave to appeal the costs order by way of a supplementary notice of appeal dated January 26, 2006.

[9] The appeal was perfected in January 2007 and is scheduled to be heard on July 16, 2007.

[10] In February 2006, the respondents paid Ms. Rizzi $185,000, on account of monies owing under the judgment. Ms. Rizzi has spent a considerable portion of those funds.

[11] The Supreme Court of Canada clarified the law of causation in *Resurfice Corp. v. Hanke*, [2007] S.C.J. No. 7, 2007 SCC 7, released February 8, 2007. In *Resurfice*, the trial judge applied the "but for" test in determining causation but the Alberta Court of Appeal, relying on *Athey v. Leonati*, [1996] 3 S.C.R. 458, thought the "but for" test was unworkable and applied, instead, the "material contribution" test.

[12] The Supreme Court of Canada reversed the appeal decision and restored that of the trial judge. It reiterated that the basic test for determining causation is the "but for" test and that the test applies to multi-cause injuries. The Court stated that the "material contribution" test applies only in special circumstances. Special circumstances involve two requirements: first, it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test and, second, it must be clear that the defendant breached a duty of care owed to the plaintiff thereby exposing the plaintiff to an unreasonable risk of injury and the plaintiff must have suffered that form of injury.

[13] In *Barker v. Montfort Hospital*, [2007] O.J. No. 1417 (C.A.), released on April 18, 2007, this court relied on *Resurfice* and allowed an appeal from a trial decision in which the "material contribution" test had been applied. This court noted that the first special circumstance requirement of impossibility had not been established and, therefore, causation ought to have been decided on the "but for" test.

[14] On reviewing the above decisions, counsel for the respondents immediately sought and received instructions to cross-appeal on the issue of causation. A Notice of Cross-Appeal was served on the appellant's solicitors on April 23, 2007.

[15] The respondents now seek leave for an extension of time to cross-appeal on the grounds that the trial judge erred in his instruction to the jury with respect to the law of causation. The appellant opposes the motion on three bases: (1) the recent decisions have not changed the law; (2) the trial judge correctly instructed on the issue of causation so there is no merit to the appeal; and (3) Ms. Rizzi would be prejudiced in a number of ways, including that she would be unable to repay monies already paid to her; permitting the cross-appeal to proceed could lead to the need for an adjournment and, thus, a delay in the hearing of the appeal; and, success on the cross-appeal increases the likelihood that a new trial will be ordered.

The Test

[16] Although this motion involves a request for leave to file a cross-appeal, in my view, it is useful to consider the factors that apply when determining whether to exercise discretion and extend the time for filing a notice of appeal. Those factors are:

1) whether the (cross) appellant formed an intention to appeal within the relevant period;
2) the length of the delay and explanation for the delay;
3) any prejudice to the respondent;
4) the merits of the appeal; and
5) whether the "justice of the case" requires it.

See *Kefeli v. Centennial College of Applied Arts and Technology* (2002), 23 C.P.C. (5th) 35 at para. 14 (C.A.).

[17] However, I would echo the following comments of Laskin J.A. in *Bratti v. Wabco Standard Trane Inc. (c.o.b. Trane Canada)* (1994), 25 C.B.R. (3d) 1 at 3 (Ont. C.A.):

> While appellate courts have considered a number of different factors in determining whether to grant leave to extend the time for appealing, the governing principle is simply whether the "justice of the case" requires that an extension be given. [citation omitted]

Analysis

Intention to Cross-Appeal and Delay

[18] The respondents concede that they did not form an intention to appeal within the prescribed time period. They explain the approximately fifteen months of delay on the basis that, prior to *Resurfice*, conflicting appellate authority on causation made success on appeal very uncertain.

[19] I accept the explanation for the delay. Although *Resurfice* did not change the law of causation, it did clarify the law. The history of *Resurfice* demonstrates that there was confusion in this area following *Athey v. Leonati* – the trial judge applied the "but for" test but the Alberta Court of Appeal applied the "material contribution" test. If there were no confusion about the law of causation, it seems to me that the two levels of court would not have differed on which test applied. This court's decision in *Barker* reinforces my view.

Prejudice

[20] I will address the three types of prejudice it is argued will ensue if the motion is granted: delay, exposure to a monetary loss and the possibility of a new trial.

[21] I am not persuaded that the proposed cross-appeal will cause a significant delay in the hearing of the appeal. The addition of the causation issue will not create the need for additional transcripts to be ordered. The existing and available material adequately supports the arguments of both parties on causation. Counsel for the appellant advises that he is very busy between now and the scheduled appeal date of July 16, 2007. Nonetheless, in my view, there is adequate time for the parties to file their materials on the cross-appeal so that the appeal could proceed as scheduled. If an adjournment is necessary, little delay should be occasioned as counsel for the respondent has advised that he would move expeditiously to perfect the cross-appeal.

[22] In terms of monetary prejudice, it appears that this type of prejudice "cuts both ways". While the appellant faces the prospect of a reduced damage award and a possible obligation to repay sums already received if the cross-appeal is successful, the respondents also face exposure for increased amounts should the appeal be successful.

[23] As for the possibility of a new trial, the appellant says it is her fervent wish that the appeal will resolve the matter. However, it is clear that a new trial may be necessary as a result of the appeal alone. Indeed, the Notice of Appeal requests that as an alternate form of relief. Although the cross-appeal may increase the prospect of a new trial being ordered, that prospect already exists as a result of the appellant's decision to appeal.

Merit of the Cross-Appeal

[24] In my view, the cross-appeal has considerable merit. I do not accept the appellant's contention that the trial judge correctly instructed on the issue of causation. Instruction was given on the basis of "material contribution" and the jury findings were on that basis also. But, the necessary determination that special circumstances warranted application of the "material contribution" test had not been made. Until such a determination is made, it cannot be known which of the two causation tests ought to have been applied.

Justice of the Case

[25] Ultimately, however, it is fairness considerations that move me to grant the motion. Had the motion been for an extension of time to file an appeal, the result might have been different. In such a situation, the public interest in the finality of judgments may be paramount. But, this motion is not for an extension of time to file a notice of appeal; it is a motion to permit the filing of a notice of cross-appeal. Finality considerations do not come into play because this case has not been finally resolved; the appeal has yet to be heard.

[26] Moreover, the respondents face significant exposure should the appeal be successful. In the circumstances, they are entitled to have their concerns about the correctness of the judgment below addressed at the same time as the appellant's concerns about the correctness of the judgment are addressed. And, the panel hearing the appeal ought to be in a position to properly decide the appeal and ensure that a just result is arrived at. Addressing the concerns of only one side precludes such a result.

[27] In light of the merit of the cross-appeal, the competing considerations in respect of prejudice and these fairness concerns, the justice of the case compels me to grant the extension.

Disposition

[28] Accordingly, I would grant the motion and permit the respondents an extension of time to file a Notice of Cross-Appeal, such notice to be filed with seven days of the date of the release of these reasons. Although successful on the motion, as the respondents sought an indulgence of the court which was reasonably opposed by the appellant, I order costs to the appellant fixed at $4,000, all inclusive.

"E. E. Gillese J.A."

6P

TAB 10

See p. 2

Supreme Court of Canada | Cour suprême du Canada

May 25, 2005 | le 25 mai 2005

05 257 003

ORDER
MOTION

ORDONNANCE
REQUÊTE

JANSSEN-ORTHO INC. and DAIICHI PHARMACEUTICAL CO., LTD. v. NOVOPHARM LIMITED and THE MINISTER OF HEALTH
(F.C.A.) (30900)

LEBEL J.:

The Applicants, Janssen-Ortho Inc. and Daiichi Pharmaceutical Co. Ltd., applied on April 22, 2005 for an order extending the time to serve and file an application for leave to appeal from a judgment rendered by Chief Justice Richard of the Federal Court of Appeal on January 4, 2005, dismissing an application for a stay of a judgment of Justice Mosley of the Federal Court rendered on November 19, 2004; and from a judgment of the Federal Court of Appeal rendered on January 6, 2005, dismissing the appeal from the judgment of Justice Mosley as moot. The judgment of Justice Mosley had dismissed an application to prohibit the Minister of Health from issuing a notice of compliance to the Respondent Novopharm Limited under the *Patent Medicine (Notice of Compliance) Regulations*. After the judgment of Justice Mosley, the Minister issued a notice of compliance. The Applicants filed a notice of appeal from the judgment of Justice Mosley and attempted to stay that judgment and quash the notice of compliance in the Federal Court of Appeal.

The deadline for filing an application for leave to appeal was March 7, 2005. From the record of the application, it appears that the Applicants gave no indication until March 7, 2005, of their intention to seek leave the appeal. Then, on the last day of the sixty-day period, they sent a letter to each of the Respondents, Novopharm Limited and the Minister of Health, seeking their consent. Consent was refused by the Respondent Novopharm, while the Minister took no position. Nevertheless, the Applicants did not file their application for leave to appeal and for an extension of time until April 22, 2005, 106 days after the judgment of the Federal Court of Appeal.

The grounds for an extension of time are that our Court rendered two decisions dismissing applications for leave to appeal on January 20 and 27, 2005, in cases raising similar issues and that the Applicant needed more time to consider the implications of these decisions, as well as relevant case law. No other explanation is offered for this apparent lack of diligence.

Absent other and better grounds for the delay, our Court should not entertain such an application in a matter that was mainly procedural and in which one would expect that the relevant issues and case law should have been considered and scrutinized in the courts below. Time limits should mean something. Valid reasons should be given to explain the delay. Our Court must be flexible and fair. Fairness is owed not only to Applicants but also to Respondents who may very well be significantly inconvenienced by undue or unexplained delays.

For these reasons, the application for an extension of time is dismissed with costs.

J.S.C.C.
J.C.S.C.

2p

TAB 11

See para. 12

COURT FILE NO.: 340/09
(07-CV-344269 PD3)
Heard: 20090925

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: BEARD WINTER LLP, Plaintiff
-and-
KERSASP SHEKHDAR, Defendant

-and-

COURT FILE NO.: 340/09
(08-CV-347902PD3)

RE: KERSASP SHEKHDAR, Plaintiff
-and-
BEARD WINTER LLP and ROBERT C. HARASON, Defendants

BEFORE: Justice D. Aston

COUNSEL: Robert C. Harason, for Beard Winter LLP and Robert C. Harason

Kersasp Shekhdar – Self-Represented

ENDORSEMENT

[1] Mr. Shekhdar brings this motion for leave to appeal the order of Campbell J. dated October 30, 2008 and the subsequent decision on costs. That order dismissed Mr. Shekhdar's appeal of the interlocutory order of Master Dash made on May 5, 2008. The order of Campbell J. and the underlying decision of the Master are both interlocutory in nature (as recognized by the Court of Appeal decision in this case dated July 9, 2009) so the matter proceeds under s. 19(1)(b) of the *Courts of Justice Act*, necessitating leave to appeal and triggering the application of Rule 62.02 The test under Rule 62.02(4) reads as follows:

> Leave to appeal shall not be granted unless,

(a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or

(b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

[2] Mr. Shekhdar also seeks an extension of time for his motion for leave to appeal, if necessary.

Ruling on Adjournment Request and Materials Filed

[3] The hearing of the motion was arranged weeks in advance. Mr. Shekhdar was granted permission to make submissions by teleconference. Other directions from the Administrative Justice of the Divisional Court, Swinton J., in her letter dated August 17, 2009, included deadlines for filing material

[4] Evidently both sides have misunderstood the directions for filing material. Mr. Shekhdar apparently thought he only had 14 days from August 17 to file his material for the motion for leave to appeal, when in fact these were only required 14 days "before the motion". He had until September 10 to file his material, but his Motion Record, Factum and Book of Authorities were served and filed by September 3, 2009. Mr. Harason believed he had until seven days prior to the motion to file his responding material, but it is clear from Justice Swinton's letter of August 17 that his material was to be delivered within seven days of receiving Mr. Shekhdar's material. It was due September 1, 2009. Mr. Shekhdar admits that he received the Respondent's material (a Responding Motion Record, Factum and Book of Authorities), by e-mail, in pieces, over the period September 10-12, 2009. Mr. Shekhdar asserts a right of reply to that material and to that end delivered an extensive affidavit. He sets forth his present position in a 63 paragraph affidavit notarized September 22, 2009.

[5] At the commencement of the hearing of the motion on September 25, Mr. Shekhdar sought an adjournment of his own motion, on terms that included a stay of the interlocutory order from some 16 months ago that is the subject of his proposed appeal. He asserted a need to more fully reply to the Respondent's Motion Record. It is true the Respondents did not deliver their materials within seven days of receiving Mr. Shekhdar's material, but they did so approximately two weeks before the scheduled hearing of this motion. Mr. Shekhdar's affidavit of September 22, 2009 evidences an ability to make a fulsome reply.

[6] During the course of the adjournment request I asked both sides to clarify why they thought new evidence could be filed by either side, since the motion for leave to appeal would consist of a review of the record before Campbell J. and not subsequent facts. On both sides the "new" evidence is somewhat wide-ranging and goes beyond its purported purpose of addressing the issue of extending the time for the motion for leave to appeal. I ruled that I would consider the new material from both sides (including Mr. Shekhdar's affidavit of September 22, 2009) but

only for the limited purpose of whether the time for leave to appeal should be extended. With that determination in mind I then refused to grant Mr. Shekhdar's adjournment request. In my view his affidavit of September 22 satisfies any right of reply he enjoys under the *Rules* or otherwise

Extension of Time for Appeal

[7] On October 30, 2008 Campbell J. rendered his decision on two matters before him October 24, 2008: an appeal by Mr. Shekhdar from the interlocutory order of Master Dash dated May 5, 2008 and a motion to set aside the noting-in-default in Action No. 340/09. The decision of October 30 addressed the merits of those matters but reserved on the question of costs.

[8] A copy of the Endorsement of October 30, 2008 (found at tab 7 of Mr. Shekhdar's current Motion Record) was sent to Mr. Shekhdar on or about November 3, 2008 together Mr. Harason's Costs Outlines on both matters. Mr. Shekhdar chose not to respond and on April 20, 2009 Campbell J. decided the costs issues, giving written reasons that date.

[9] On April 24, 2008 Mr. Shekhdar delivered a motion for leave to appeal returnable in the Court of Appeal which he withdrew the same day, replacing it with a motion in this court to set aside the order of Campbell J.

[10] Subsequently the parties could not agree on the form of order, so that issue went back to Campbell J. on June 12, 2009, at which time he also apparently considered Mr. Shekhdar's objection to the fact that the matter had proceeded in his absence the prior October. Justice Campbell signed a formal court order from a draft provided by Mr. Harason and gave written reasons which may be regarded as supplementary to his original reasons of October 30 and April 20.

[11] In the meantime Mr. Shekhdar had initiated an appeal to the Court of Appeal over all of this. On July 9, the Court of Appeal determined that it had no jurisdiction to address his issues and that his motion for leave to appeal ought to be in the Divisional Court because he was challenging the interlocutory order rather than the final order. Within a week of that decision, Mr. Shekhdar brought the Notice of Motion now before me seeking leave to appeal and the extension of time.

[12] It is appropriate to extend the time for the motion for leave to appeal for the following reasons:

(i) By e-mail dated November 18, 2008 Mr. Shekhdar wrote, "I shall be moving to transfer these actions directly to the Court of Appeal". I accept this as evidence of his intention to appeal soon after receiving his copy of the decision of October 30, 2008 on November 3, 2008.

(ii) It was not unreasonable in the circumstances for Mr. Shekhdar to await the decision on costs and to try to convince the presiding judge to revisit the issues determined in his absence before proceeding with an appeal. The Endorsement of June 12, 2009

sustains Mr. Shekhdar's submissions that Campbell J. was not "functus" until the order was settled on that date and that a reconsideration was (at least in the mind of Mr. Shekhdar) a possibility that might avoid the necessity of an appeal.

(iii) In dismissing a request for an extension of time for an appeal, the Court of Appeal simply ruled that Mr. Shekhdar had appealed to the wrong court. It did not turn its attention to the merits of whether time should be extended or not.

(iv) Though self-represented litigants and those living outside Canada while litigating here are bound by the same rules of procedure as Ontario litigants represented by counsel, it would reflect badly on the administration of justice in this case not to grant this indulgence to Mr. Shekhdar.

Merits of the Motion for Leave to Appeal

[13] I turn then to the merits of the motion.

[14] Mr. Shekhdar submits there are three errors that warrant appellate review.

(a) Did Campbell J. err in ordering Mr. Shekhdar to pay $15,000 for costs?

[15] Mr. Shekhdar submits that the motions judge erred by including in the costs award the "unnecessary costs" of the motion to set aside the noting-in-default; unnecessary because Mr. Shekhdar never noted the defendants in default. I reject this submission. Two separate Costs Outlines were delivered to Mr. Shekhdar November 3. The costs ordered were only in relation to the part of the order dismissing Mr. Shekhdar's appeal of the order of Master Dash.

[16] Mr. Shekhdar also submits that the motions judge erred by failing to consider that Mr. Harason is not just participating as counsel, but also as a litigant. There is some merit to the argument that a proper assessment of costs needs to distinguish time spent by a person as counsel from time spent by that person as a litigant. However, I decline to grant leave to appeal the costs decision for these reasons.

(i) Mr. Shekhdar had literally months within which to make a submission on costs or to respond to the Costs Outlines, but he chose not to do so. In fact his submission about "the lawyer as litigant" is not even addressed at this late date in his Factum on this motion. It was raised for the first time in his oral submissions September 25, 2009.

(ii) The Endorsement on Costs, in paragraph [3], suggests the awareness of Campbell J. to the dual role of Mr. Harason in its reference to details of "the extent to which he as counsel has incurred time and expense" (emphasis added).

(iii) Campbell J. took into account that Mr. Shekhdar had levelled many accusations against Mr. Harason that brought Harason's character, integrity and reputation into question, without proof. The judge indicated that the conduct of Mr. Shekhdar might warrant costs on a substantial indemnity scale. However, he made allowances for the

fact that Mr. Shekhdar is a self-represented litigant by reducing the costs claimed by more than $5,000 to reflect a partial indemnity scale.

(iv) The issue has no broad implications which rise to the level of public importance, nor does the cost decision create any particular precedent.

(b) Did Campbell J. err in requiring Mr. Shekhdar to participate in the hearing of the Motion by Videoconference?

[17] The scheduling of the motion for October 24, 2009, first occurred on June 23, 2008. There were discussions at a very early stage about the manner by which Mr. Shekhdar would participate. His suggestions for participation by teleconference or public webcam were rejected with reasons. Mr. Harason's insistence that Mr. Shekhdar appear either personally or by counsel in Toronto was also rejected. The court accepted a suggestion by Mr. Shekhdar himself that he participate by videoconference with the responsibility for setting up the videoconference resting on his shoulders. Mr. Shekhdar now submits that a telephone conference would have been adequate for his participation and he has also attempted to show that he could not afford the videoconference and was prevented from participating as a result. Mr. Shekhdar's submission is that he was denied procedural fairness and natural justice because of his financial and geographic circumstances.

[18] I reject this submission for the following reasons:

(i) Mr. Shekhdar was the one who proposed the videoconference method and knew long in advance what was going to be required of him to set it up. See page 162 of his present Motion Record.

(ii) There is no right to appear by teleconference or videoconference. It is a discretionary indulgence and there is no demonstrable error in the exercise of the discretion in this particular case.

(iii) The Endorsement of June 12, 2009 addresses this issue and includes reconsideration of the issue. Campbell J. gives cogent reasons to explain the earlier decision requiring Mr. Shekhdar to set up the videoconference as an alternative to personal attendance, teleconference or webcam.

(iv) Importantly, Mr. Shekhdar did not submit evidence to Campbell J. before October 24 to prove either the cost of the videoconference or that he was impecunious or could otherwise not afford to set up that videoconference. It was only after the fact that such evidence was tendered.

(v) The submission that expensive dedicated videoconferencing violates *Charter* rights by discriminating on the basis of national origin against those foreign litigants who live in countries with weak currencies is patently absurd.

(c) Did Campbell J. err in hearing and determining the matter in Mr. Shekhdar's absence October 24, 2008?

[19] Though it overlaps somewhat with the issues raised over the videoconferencing method, Mr. Shekhdar raises additional grounds as to the *ex parte* nature of the appeal hearing. Mr. Harason was present and was able, according to Mr. Shekhdar, to make disparaging and misleading comments about him to the motions judge. Mr. Shekhdar points out that Mr. Harason brought various e-mails to the attention of the motions judge in the affidavit material he filed but Mr. Shekhdar alleges that it did not include all of the e-mails, resulting in a mischaracterization and misjudgment of Mr. Shekhdar by the motions judge, as evidenced by reference to his "scurrilous" language, et cetera. Mr. Shekhdar also says the motions judge was led to believe that Mr. Shekhdar had noted the defendants in default when in fact he had not done so, and Mr. Harason knew or should have known that he had not done so. Mr. Shekhdar says that he had no opportunity to respond to the evidence of Karen Louzado in her affidavit sworn October 15, 2008.

[20] I reject these submissions because:

(i) The reasons of Campbell J. make it clear he considered all of the material filed by Mr. Shekhdar on his appeal of the decision of Master Dash and treated Mr. Shekhdar's motion as a "motion in writing". He did not dismiss the appeal just because Mr. Shekhdar failed to make any oral submissions.

(ii) Mr. Shekhdar chose not to avail himself of the right to appear by videoconference (a privilege that had been converted to a right by the preconference arrangements) nor did he do anything to request an adjournment from the presiding judge or explain the reason for his non-participation on October 24.

(iii) To the contrary, Mr. Shekhdar's non-participation seems to have been a conscious and strategic choice on his part, as evidenced by e-mails October 9 and 24, 2008 in which he said in part, "I have decided to make my argument before a global audience where anyone and everyone, rather than masters and judges like Dash and Campbell, can come to their own conclusions", and "I shall be taking you, along with the likes of [Madam Justice] Thorburn, [Mr.] Juma, [Master] Dash and such, to a far higher court: the Court of Public Opinion...so keep a watch on two URLs that I shall e-mail to you as soon as they are transferred to my name".

I accept Mr. Shekhdar's characterization of these e-mails as hasty and expressions of frustration and anger, but I cannot disregard the fact that he made a choice not to attend the hearing personally, by agent or through videoconference or in any other manner October 24. It was certainly reasonable for Campbell J. to assume Mr. Shekhdar was choosing not to participate in oral submissions.

(d) Other Considerations

[21] Even had I not rejected the various submissions of Mr. Shekhdar as already noted above, I would not grant leave to appeal in this case. The original decision of Master Dash is a decision to case manage a case that obviously needs case management. It is an interlocutory and procedural order only and it can be changed if circumstances warrant. There is nothing whatsoever to demonstrate that the decision was wrong in principle, is in conflict with any other decision or that it is outside the ambit of what is reasonable in the circumstances of the case. It is high time this stalled litigation moved forward for a determination on the merits.

[22] The motion for leave to appeal is therefore dismissed.

[23] Brief written submissions on costs by the Respondents on this motion may be made by fax transmission to my attention within the next 15 days. Mr. Shekhdar will have seven days to respond in like manner to any costs submission.

The Hon. Mr. Justice D. Aston

DATE RELEASED: September 30, 2009

DIVISIONAL COURT FILE NO.: 340/09
(07-CV-344269 PD3
(08-CV-347902PD3)

DATE HEARD: 20090925

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: BEARD WINTER LLP, Plaintiff
-and-
KERSASP SHEKHDAR, Defendant

-and-

KERSASP SHEKHDAR, Plaintiff
-and-
BEARD WINTER LLP and
ROBERT C. HARASON,
Defendants

BEFORE: Justice D. Aston

COUNSEL: Robert C. Harason, for Beard Winter and Robert C. Harason

Kersasp Shekhdar – Self-Represented

ENDORSEMENT

Aston J.

DATE RELEASED: September 30, 2009

TAB 12

COURT OF APPEAL FOR ONTARIO

CITATION: Schwilgin v. Szivy, 2015 ONCA 816
DATE: 20151124
DOCKET: M45679

Brown J.A. (In Chambers)

BETWEEN

Laszlo Schwilgin

Moving Party

and

Lori Anne Szivy

Responding Party

Laszlo Schwilgin, acting in person

Fredrick Schumann, appearing as duty counsel

No one appearing for the responding party

Heard: November 19, 2015

ENDORSEMENT

OVERVIEW

[1] Laszlo Schwilgin moves for an extension of the time in which to file a notice of appeal from the May 20, 2014 order of Backhouse J. The lengthy history of this matrimonial litigation is set out in the May 20, 2010 reasons of Métivier J. (2010 ONSC 2857), the reasons of Backhouse J., and the July 2, 2015 reasons of the Divisional Court (2015 ONSC 4292).

[2] At the motion to extend the time to appeal, Mr. Schwilgin appeared in person and was assisted by duty counsel. Ms. Szivy served and filed responding materials, but advised the court she could not afford to travel down from Ottawa for the motion. She asked the court to consider her written materials. I have done so.

[3] Mr. Schwilgin and Ms. Szivy separated in 2002. They have two children: Alexander, who is now 18 years old and suffers from autism, and Jennifer, who is 17 years old. Prior to July 2013, the children lived with their mother in Ottawa. Since then, they have resided with their father, most recently in Toronto.

[4] After the children began to live with him, Mr. Schwilgin brought a motion to vary the child support obligations then in force. That motion resulted in the May 20, 2014 order of the motion judge. Mr. Schwilgin contends the motion judge made several errors in dismissing most of his motion to vary: she failed to relieve him of $75,000 in accumulated child support arrears that date back to at least 2006; she erred in the level of child support she ordered Ms. Szivy to pay on a go-forward basis; and she erred in holding that the child support payments to be made by Ms. Szivy be treated as an offset against the arrears owed by Mr. Schwilgin.

[5] For the reasons set out below, I dismiss Mr. Schwilgin's motion for an extension of time to file a notice of appeal.

ANALYSIS

[6] The factors a court must take into account in considering a motion to extend the time to file a notice of appeal are set out in *Kefeli v. Centennial College of Applied Arts and Technology* (2002), 23 C.P.C. (5th) 35 (Ont. C.A.).

Intention to Appeal and Explanation for Delay

[7] Although I am satisfied that Mr. Schwilgin formed an intention to appeal within the relevant time, I do not accept as reasonable his explanation for the delay in seeking to appeal to this court.

[8] Mr. Schwilgin stated that he had filed a notice of appeal from the order of the motion judge within 30 days of the date of the order. However, he filed the appeal with the Divisional Court. That court quashed his appeal in July 2015 on the ground that it lacked jurisdiction because his claim to rescind arrears that was dismissed by the motion judge exceeded $50,000.

[9] Mr. Schwilgin deposed that he appealed to the Divisional Court as a result of a mistake he made as a lay person. In assessing that assertion, I must take into account two other factors. First, in her 2010 reasons Métivier J. described Mr. Schwilgin as a "talented and experienced computer engineer." He is a person of some sophistication. Second, I asked Mr. Schwilgin whether opposing counsel had told him his appeal to the Divisional Court was made to the wrong court. Mr. Schwilgin confirmed that he had been put on notice he was appealing

to the wrong court. He persisted nonetheless. The Divisional Court addressed his conduct in para. 6 of its July 2015 reasons when it stated:

> In this case the issue of jurisdiction was raised by the respondent in August 2014. The appellant did not move expeditiously to bring his appeal in the proper forum. In this regard we do not accept that the respondent's failure to consent to the transferring of this appeal is a satisfactory explanation for the appellant's failure to move with expedition to ensure that this appeal was brought in the proper forum.

[10] The Divisional Court declined to exercise its discretion to transfer Mr. Schwilgin's appeal to this court. Mr. Schwilgin thereupon applied to this court for an extension of time to seek leave to appeal from the Divisional Court's order. On August 21, 2015, Juriansz J.A. dismissed that motion, stating: "It is apparent to me that the proposed leave application is devoid of merit."

[11] Given that procedural history, I am not satisfied that Mr. Schwilgin has provided an adequate explanation for his lengthy delay in seeking to appeal to this court. This weighs very heavily against granting his motion for an extension of time to appeal.

Merits of the Appeal

[12] I am not persuaded on the evidence before me that there is merit in Mr. Schwilgin's appeal. He did not file a draft notice of appeal with his motion, so there is no concise identification of the errors he contends the motion judge made. However, from his materials and submissions made at the motion, it is

apparent that the primary argument Mr. Schwilgin wants to advance on an appeal is that the motion judge erred in not re-considering his financial ability to pay child support going back to 2006, when Mr. Schwilgin consented to the imputation of a certain income level to him. Had she done so, according to Mr. Schwilgin, his child support arrears would have been eliminated.

[13] In support of his position, Mr. Schwilgin relies heavily on the decision of this court in *Difrancesco v. Couto* (2001), 56 O.R. (3d) 363 (C.A.), which identified the factors to be taken into account in any decision to rescind child support arrears. In that case, this court stated, at para. 26, that the dismissal of an application to rescind arrears is not an absolute bar to a future rescission of those same arrears provided there is a change in circumstances sufficient to warrant a variation in child support obligations.

[14] In my view, Mr. Schwilgin's proposed argument that the motion judge erred in refusing to rescind his child support arrears faces two very significant difficulties. First, in 2008 Mr. Schwilgin moved to vary the 2006 consent child support order to reduce his child support obligations from $1,215 to $400 and to rescind all child support arrears. The court dismissed his motion. He brought a second variation motion in 2010 for similar relief, although that time for the elimination of any child support obligation, as well as the rescission of all arrears. Métivier J. dismissed that motion, noting that Mr. Schwilgin had stopped paying the support to which he had consented.

[15] Métivier J. conducted a lengthy review of Mr. Schwilgin's employment history and earnings, going back to 2001, the year prior to the parties' separation. At para. 16 of her reasons she stated: "Mr. Schwilgin has claimed before each judge since 2002 that he is unemployed and looking for employment." As noted, she found that Mr. Schwilgin "is a talented and experienced computer engineer." Métivier J. concluded, at para. 34, that there had been no material change in Mr. Schwilgin's financial circumstances since the 2006 consent order, and "[h]e is, in my view, determinedly and deliberately under-employed for his own purposes."

[16] Mr. Schwilgin advised that the Divisional Court had dismissed his appeal from the order of Métivier J. (2011 ONSC 5918). In the circumstances of this case, that dismissal of his appeal would foreclose, for all practical purposes, any re-examination of Mr. Schwilgin's financial circumstances prior to 2010. He acknowledged that if his pre-2010 arrears were not changed, any reduction in post-2010 child support arrears would not bring his child support arrears down to zero, but would still leave him liable for somewhere between $20,000 and $40,000 in arrears.

[17] A second weakness exists in Mr. Schwilgin's proposed argument on appeal. By the time of Mr. Schwilgin's 2014 variation motion, a material change in circumstances had occurred – since July 2013 Mr. Schwilgin had been the custodial parent. The motion judge varied the parties' child support obligations in

light of that material change in circumstances, terminating Mr. Schwilgin's child support obligations and imposing support obligations on Ms. Szivy.

[18] In respect of Mr. Schwilgin's request to rescind his child support arrears, the motion judge informed herself about the principles stated by this court in the *Difrancesco* case: at para. 3. However, she found that there had been no change in Mr. Schwilgin's financial circumstances or ability to pay child support since the 2010 decision of Métivier J. Based on her review of the evidence, the motion judge concluded, at para. 7, that "Mr. Schwilgin has gone to great lengths either to conceal his true income or to be deliberately underemployed in order to avoid his support obligations." Her conclusion echoed that made four years earlier by Métivier J.

[19] Mr. Schwilgin obviously disagrees with that conclusion. But, nothing in the three substantive affidavits he filed on this motion – September 28, 2015, October 19, 2015 and the fresh evidence affidavit of November 13, 2015 – would indicate the motion judge made any palpable and overriding error in reaching her conclusion that no material change had occurred in Mr. Schwilgin's financial circumstances since 2010.

[20] Consequently, I conclude that there is little, if any, merit to Mr. Schwilgin's appeal.

Prejudice to the Respondent and Whether the Justice of the Case Requires Granting the Motion

[21] Finally, I am not satisfied that the justice of the case supports granting the motion to extend. In quashing his appeal from the order of the motion judge, the Divisional Court ordered Mr. Schwilgin to pay Ms. Szivy costs of $10,000. He has not done so. In open court, Mr. Schwilgin said he would not pay those costs because he contends he lacks the resources to pay them.

[22] In her affidavit on the motion, Ms. Szivy deposed that Mr. Schwilgin owes her over $25,000 in costs from their matrimonial proceedings. In her letter of November 16, 2015 transmitting her responding materials to the court, Ms. Szivy wrote:

> I do not understand how Mr. Schwilgin is permitted to constantly bring motions and appeals without paying the costs of previous court orders. It seems all the court does is order more costs, which I cannot collect. He gets stern words and a slap on the wrist (costs), and I get a bill from my lawyer. How is this fair?

[23] That is a most legitimate question to ask. Courts usually talk in terms of prejudice which cannot be compensated for by costs. But, at some point, costs themselves become an inadequate form of compensation for prejudice, especially where the party on whom they are imposed refuses to pay them.

[24] In this case, Mr. Schwilgin has not paid the costs ordered by the Divisional Court. This court dismissed his motion for leave to appeal that decision. In para. 7 of its reasons, the Divisional Court stated:

> The appellant has used this appeal as a means of delaying paying the arrears in question and the costs ordered to the respondent. Further, the appellant has a history of using Court proceedings in this way. This has caused the respondent considerable prejudice.

[25] In my view, to grant Mr. Schwilgin's motion would cause further prejudice to Ms. Szivy, prejudice which a cost award obviously could not compensate because Mr. Schwilgin will not pay it. The justice of the case favours dismissing Mr. Schwilgin's motion.

DISPOSITION

[26] Looking at these factors in their totality and considering the overall justice of the case, I dismiss Mr. Schwilgin's motion to extend the time to appeal.

[27] Ms. Szivy states she has incurred $1,000 in costs to respond to the motion. I order Mr. Schwilgin to pay Ms. Szivy those costs in the amount of $1,000 no later than Friday, December 4, 2015.

[28] Finally, the day following the hearing of the motion, Mr. Schwilgin filed with the court a letter to my attention setting out further arguments. It was improper for Mr. Schwilgin to communicate with the court in that fashion. In any event, I

read his letter; it contained nothing of relevance. I therefore have not taken its contents into account in disposing of his motion.

"David Brown J.A."

TAB 13

CITATION: Bagnulo v. Complex Services Inc., 2014 ONSC 3311
COURT FILE NO.: DC-13-497 ML
DATE: 2014-05-30

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

B E T W E E N:		
Rosa Bagnulo	Moving Party (Plaintiff)	Margaret A. Hoy, for the Plaintiff
- and -		
Complex Services Inc.	Responding Party (Defendant)	Frank Cesario, for the Defendant

The Honourable Madam Justice J.A. Milanetti

[1] This is a motion by the Moving Party, Ms. Bagnulo, seeking an extension of time to file and serve a Notice of Appeal in the Divisional Court. Ms. Bagnulo seeks to appeal two orders of Mr. Justice B.H. Matheson: the first dated September 20, 2011, wherein he dismissed Ms. Bagnulo's action; and the second dated January 31, 2012, wherein he awarded costs to Complex Services Inc.

HISTORY OF THE PROCEEDINGS:

[2] Ms. Bagnulo commenced an action against her former employer, Complex Services Inc., on August 21, 2009, claiming damages of $50,000 for wrongful dismissal, career counselling, and punitive and exemplary damages.

[3] Justice Matheson heard Ms. Bagnulo's action for wrongful dismissal at a three day trial in July 2011. The action was brought under the Simplified Procedure provided for in Rule 76 of the *Rules of Civil Procedure*, R.R.O 1990, Reg. 194.

[4] In a decision dated September 20, 2011, Justice Matheson dismissed Ms. Bagnulo's action against Complex Services Inc. Justice Matheson found that Ms. Bagnulo had been employed pursuant to fixed term contracts after she lost the status of an unlimited term employee and she had not been constructively dismissed. Justice Matheson further found that Ms. Bagnulo had issued her Statement of Claim outside the two year limitation period. For these reasons, Ms. Bagnulo's claim was dismissed.

[5] In his subsequent decision as to costs, dated January 31, 2012, Justice Matheson awarded costs to Complex Services Inc. in the amount of $38,000.00 inclusive of disbursements and H.S.T.

[6] Ms. Bagnulo filed a Notice of Appeal to the Ontario Court of Appeal on March 1, 2012. Despite being warned by counsel for Complex Services Inc. numerous times that the appeal lay to the Divisional Court, not the Court of Appeal, counsel for Ms. Bagnulo refused to abandon the appeal. As a result, Complex Services Inc. brought a motion to quash the appeal for lack of jurisdiction.

[7] On April 9, 2013, the Ontario Court of Appeal issued a written endorsement granting Complex Services Inc.'s motion to quash, noting that it lacked jurisdiction and that the proper forum to hear the appeal is the Divisional Court. The Court of Appeal declined to exercise its jurisdiction to transfer the appeal to the Divisional Court.

[8] Ms. Bagnulo then filed a Notice of Motion seeking leave to appeal the orders of Justice Matheson to the Divisional Court, dated August 1, 2013. After the Notice of Motion was amended twice with different return dates, the matter came before the court on November 21, 2013. Justice Kent found that the motion was incorrectly styled and was in fact a motion to extend the time for serving and filing a Notice of Appeal to the Divisional Court. The motion was adjourned to November 28, 2012. On that date, the motion was set to be heard as a long motion during the week of February 3, 2014.

[9] The motion was heard by me on February 6, 2014. For the reasons that follow, the motion is dismissed.

THE LAW:

[10] Pursuant to Rule 61.04(1) of the *Rules of Civil Procedure*, an appeal to an appellate court must be commenced by serving a notice of appeal within 30 days after the making of the ordered appealed from, unless a statute or the Rules provide otherwise. However, Rule 3.02(1) gives the court the discretion to order an extension or abridgement of any time prescribed by the Rules or on such terms as are just.

[11] It is agreed by the parties that there are four factors the court should consider when determining whether to extend time to file an appeal, including:

(a) whether the moving party had a *bona fide* and continuing intention to proceed with the appeal;
(b) the length of, and explanation for, the delay in filing the Notice of Appeal;
(c) any prejudice to the responding parties caused, perpetuated, or exacerbated by the delay; and
(d) the merits of the proposed appeal.

(See *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131, at para. 15 and *Rizzi v. Mavrosi*, 2007 ONCA 350, at para. 16)

[12] In addition to these factors, the court must consider the overarching principle of whether the "justice of the case" requires that extension be given. (*Bratti v. Wabco Standard Trane Inc.* (1994), 25 C.B.R. (3d) 1 (Ont. C.A.), at para. 4)

ANALYSIS:

(a) *Intention to Appeal*

[13] The first factor to consider is whether Ms. Bagnulo had a *bona fide* and continuing intention to proceed with the appeal. As noted above, Ms. Bagnulo filed her Notice of Appeal from the decisions of Justice Matheson on March 1, 2012.

[14] Ms. Bagnulo states that she had a *bona fide* intention to pursue this appeal, and that it was only as a result of an error on the part of her counsel that the appeal was launched in the Court of Appeal, rather than in the Divisional Court.

[15] Complex Services Inc. questions how Ms. Bagnulo could have a *continuing* intention to appeal when, at the time materials for this motion were filed, it had been more than 20 months since the expiry of the 30 day time limit to appeal and no valid Notice of Appeal had yet been served or filed.

[16] Complex Services Inc. points to the case of *Roach v. Oneil*, [2005] O.J. No 745 (Ont. S.C. (Div. Ct.)), where a delay resulted from the plaintiff filing a Notice of Appeal on time, but in the wrong court, despite the plaintiff being warned by defence counsel about the jurisdictional issue. Justice Malloy found that a delay of approximately six months between the court striking the plaintiff's appeal and his correspondence regarding continuing the appeal in the proper forum was inconsistent with a *bona fide* and continuing intent to appeal.

[17] Complex Services Inc. also points to the case of *Rainbow Concrete Industries v. Serbcan Inc.*, [2001] O.J. No. 764 (Ont. S.C.), wherein Justice Gauthier found that the assertion that the defendants had always intended to appeal was "woefully inadequate" evidence and inconsistent with the defendants' failure to take any remedial steps to perfect their cross-appeal for four months. Justice Gauthier concluded that on the facts that the defendants could not be characterized as having maintained a firm intention to appeal.

[18] In the case at bar, Complex Services Inc. notes that its counsel, Ms. Khoraych, notified Ms. Bagnulo's counsel, Ms. Hoy, that she had commenced the appeal in the wrong forum six times over seven months.

[19] Ms. Khoraych first wrote to Ms. Hoy on March 5, 2012, indicating that the appeal was launched in the wrong court and directed counsel to the relevant rules in this regard. Ms. Khoraych repeated her argument in a letter dated March 30, 2012, as Ms. Hoy had not addressed this in her reply on March 22, 2012. Ms. Khoraych wrote again requesting a response on April 25, 2012, on June 8, 2012, and on July 12, 2012, and included all previous correspondence on this issue.

[20] Despite all of these letters, together with invitations from Ms. Khoraych to discuss this issue, Ms. Bagnulo served and filed her Factum, Appeal Book and Compendium, and Certificate of Perfection at the Court of Appeal on October 9, 2012.

[21] On October 11, 2012, Ms. Khoraych once again pointed out the jurisdictional error first raised back in March. On October 12, 2012, Ms. Hoy asked Ms. Khoraych to consent to a transfer of the case from the Court of Appeal to the Divisional Court. Ms. Khoraych responded on October 15, 2012, and twice on October 22, 2012, seeking an explanation for the seven month delay since Ms. Hoy was first made aware of the jurisdictional issue. On October 22, 2012, Ms. Hoy replied indicating she would bring a motion to transfer the matter but provided no explanation for the delay.

[22] Receiving no further response from Ms. Hoy, Ms. Khoraych filed Complex Services Inc.'s material for its motion to quash. After Ms. Hoy twice requested an adjournment of the motion, it was rescheduled and heard on April 9, 2013. The Court of Appeal granted Complex Services Inc.'s motion to quash Ms. Bagnulo's appeal for want of jurisdiction.

[23] As will be discussed in more detail below, there was a further four month delay from the Court of Appeal's decision until Ms. Bagnulo served a Notice of Motion seeking leave to appeal to the Divisional Court on August 1, 2013.

[24] Ms. Bagnulo's materials include a facsimile cover letter requesting to file a Notice of Appeal at the Divisional Court dated April 25, 2013. Apparently Ms. Hoy's office was informed by the Divisional Court on May 15, 2013, that leave was required before the Notice of Appeal could be issued. A Notice of Motion for Leave was then filed on August 1, 2013.

[25] Ms. Khoraych states that she was not aware that Ms. Bagnulo had attempted to file a Notice of Appeal with Divisional Court until she was provided with Ms. Bagnulo's materials the day before the November 21, 2013 motion was heard. Ms. Hoy did not mention her communications with the Divisional Court to Ms. Khoraych, despite their numerous communications over those four months. Ms. Khoraych also points out that the letter to the Divisional Court was not signed and did not include any proof of delivery.

[26] Given these delays and the lack of meaningful and prompt response by Ms. Bagnulo's counsel, it is difficult to see how Ms. Bagnulo had a *bona fide* and continuing intention to appeal. Over seven months, despite being warned numerous times by Complex Services Inc.'s counsel that the appeal had been commenced in the wrong court, Ms. Hoy took no steps to address the jurisdictional error. Further, while Ms. Bagnulo may have attempted to file a Notice of Appeal with the Divisional Court in April 2013, any intention to appeal after the Court of Appeal's decision does not appear to have been communicated to Complex Services Inc. until August 1, 2013.

[27] While Ms. Bagnulo's first Notice of Appeal was filed and served within the time requirements, it was not for another 17 months that a Notice of Motion for Leave was filed in the proper court. Ms. Bagnulo's statement that it was her full intention to bring the appeal in the proper court is not borne out on the facts.

[28] In these circumstances, I am unable to find that Ms. Bagnulo had a *bona fide* and continuing intention to appeal.

(b) *Delay*

[29] The court must consider both the length of, and any explanation for, the delay in filing the Notice of Appeal.

[30] In its Endorsement dated April 9, 2013, the Ontario Court of Appeal found that there was no reasonable explanation for the Ms. Bagnulo's delay in appealing the decisions of Justice Matheson. Blair J.A. stated:

> There is simply no reasonable explanation for the delay, particularly in view of the numerous letters sent by counsel for the respondent pointing out the jurisdictional problem and the lack of any meaningful response to those letters.

[31] It is noteworthy that the Court of Appeal declined to exercise its discretion to transfer the appeal to the Divisional Court.

[32] I accept the Court of Appeal's finding that there was no reasonable explanation for the delay to that point. Unfortunately, the matter continued to be delayed after the Court of Appeal granted Complex Services Inc.'s motion to quash.

[33] Ms. Khoraych wrote to Ms. Hoy on April 11, 2013, seeking approval of a draft order reflecting the Court of Appeal's Endorsement and requesting payment of the costs awarded by the court. Not having received any response, Ms. Khoraych's office emailed Ms. Hoy's office on April 17 and again on April 22, 2013. Ms. Khoraych sent a further letter on April 25, 2013, requesting a response by April 30, 2013. On April 25, 2013, Ms. Hoy responded and approved the draft order but failed to address the payment of costs. Ms. Khoraych sent another letter to Ms. Hoy on May 17, 2013, and received a cheque from Ms.

Hoy's office on July 29, 2013. Ms. Khoyach then wrote to Ms. Hoy on July 31, 2013, regarding the interest on the amount awarded, as well as the costs from the trial and related motion awarded by Justice Matheson.

[34] On August 1, 2013, Ms. Khoraych received by facsimile an amended Index and Notice of Motion, as well as the Appellant's Motion Record for leave to Divisional Court (though this second letter was dated July 18, 2013). Ms. Hoy sent two further facsimiles attaching Amended Notices of Motion, the final one on September 19, 2013, with a return date of November 21, 2013.

[35] Ms. Khoraych wrote to Ms. Hoy on September 19, 2013, acknowledging the receipt of the Notice of Motion and requesting confirmation that the Appellant would not be attempting to deal with the merits of the appeal at the hearing of the motion for leave to appeal. Receiving no response, Ms. Khoraych wrote Ms. Hoy again on September 30 and on November 12, 2013. Ms. Khoraych wrote Ms. Hoy a further time on November 14, 2013, indicating that given Ms. Hoy's lack of response, she understood that no attempt to argue the merits would be made, and advising that if it was it would be opposed.

[36] Ms. Hoy wrote to Ms. Khoryach on November 20, 2013, requesting an adjournment of the motion scheduled for November 21 because she had been on a trial which commenced on November 8. Ms. Khoraych responded outlining the reasons why Complex Services Inc. would not consent to the adjournment, and offered to dismiss the motion with costs. The same day, Ms. Hoy replied that she would not consent to the dismissal of the action and reiterated that she would be requesting an adjournment. Again on November 20, Ms. Khoraych wrote to Ms. Hoy repeating the reasons why Complex Services Inc. would not consent to an adjournment and noting that if Ms. Hoy proceeded, Complex Services Inc. would object to the adjournment and seek costs on a substantial indemnity basis.

[37] In addition to the length of the delay, the court must also consider any explanation for the delay. Ms. Bagnulo had no reasonable explanation for the first delay, as found by the Court of Appeal. The only explanation for this further delay in Ms. Bagnulo's evidence was "the availability of Ms. Hoy's schedule and court schedule."

[38] Just as the Court of Appeal found that there was no reasonable explanation for the delay at that point in the proceedings, I find that Ms. Bagnulo has given no reasonable explanation for any subsequent delay.

[39] The decisions being appealed from were issued on September 20, 2011 and January 31, 2012. As of the hearing of this motion, no valid Notice of Appeal has yet been filed. I find that both the excessive length of the delay and the lack of any meaningful explanation for the delay are unreasonable in this case.

(c) *Prejudice*

[40] Neither party made extensive submissions on the issue of prejudice.

[41] Ms. Bagnulo submits that there is no prejudice to Complex Services Inc. as a result of any delay.

[42] Complex Services Inc. alleges that the delay has caused both pecuniary and non-pecuniary prejudice, as it has been more than two years since Ms. Bagnulo's action was initially dismissed and Complex Services Inc. continues to spend time, money, and resources defending against her claim. Complex Services Inc. also notes that Justice Matheson found that Ms. Bagnulo's claim was commenced outside of the statutory limitation period, and therefore Ms. Bagnulo's delay has caused Complex Services Inc. the sort of prejudice that the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, was created to prevent.

[43] I note that this action was commenced under the Simplified Procedure provided for in Rule 76 of the *Rules of Civil Procedure*. Justice Malloy, in *Roach v. Oneil*, also took note that the action in that case was brought under the Simplified Procedure, "which is supposed to be a streamlined and expeditious means of resolving disputes" (para. 25). On the issue of prejudice resulting from delay, Justice Malloy concluded: "While the prejudice is not so significant that it would warrant, in and of itself, refusing the relief sought, neither is it inconsequential. It is a relevant factor to be taken into account" (*ibid*).

[44] Complex Services Inc. has been defending this action since it was commenced in 2009. Ms. Bagnulo has been attempting to appeal the decisions of Justice Matheson since March 2012. More than two years have since passed. The excessive delay caused by Ms. Bagnulo in appealing these decisions has increased the time and cost to Complex Services Inc. in defending this action. While this alone is not sufficient to dismiss the motion for an extension of time to file a Notice of Appeal, it is something to account for when considering whether to grant the requested extension.

(d) *Merits*

[45] According to Ms. Bagnulo's Amended Notice of Motion, dated August 1, 2013, the grounds for this motion are:

1. The learned Judge erred in law by dismissing the action on the grounds that the Plaintiff was not constructively dismissed and that her employment ended as a result of her signing several fixed term contracts.
2. The learned Judge erred in law in failing to find that the Defendant was obligated to file a further and better complete Affidavit of Documents including an appropriate description of the privileged documents, pursuant to the *Rules of Civil Procedure*.
3. The learned Judge erred in law in dismissing the action on the ground that the Statement of Claim was not brought within the limitation period.
4. The learned Judge erred in the fact and law. The court erred on its evaluation of damages.
5. The learned Judge erred in law in determining the Plaintiff's limitation date.
6. The learned Judge erred in law awarding costs.

7. Such further and other grounds as counsel may advise and this Honourable Court may permit.

[46] Ms. Bagnulo submits that at the time her final contract was terminated, she was working under a contract of indeterminate length and was therefore entitled to reasonable notice or damages in lieu of the same. Ms. Bagnulo further submits that the proper date of termination was in January 2009, and therefore Ms. Bagnulo's action was commenced within the applicable limitation period. Regarding costs, Ms. Bagnulo submits that if the court finds that Ms. Bagnulo was wrongfully dismissed, Complex Services Inc. is not entitled to costs and the costs order should be set aside. In the alternative, if the court finds that the action was properly dismissed, Ms. Bagnulo submits that the trial judge failed to consider all of the relevant principles, including whether the costs award was disproportionate and exceeded the reasonable expectations of Ms. Bagnulo, and on that basis the costs order should be set aside.

[47] Complex Services Inc. submits that Ms. Bagnulo's appeal has no merit, nor any chance of success. Complex Services Inc. submits that the court considered every fact and legal issue raised by Ms. Bagnulo and made findings of fact, including that Ms. Bagnulo's employment ceased pursuant to a fixed term contract, and that any claims which arose more than two years prior to her action being commenced were correctly dismissed pursuant to the applicable limitation period. With regards to costs, Complex Services Inc. submits the cost award was neither disproportionate nor beyond reasonable expectations, given that Justice Matheson recognized that the amount of costs requested by both parties were similar and decreased Complex Services Inc.'s counsel's fees to better reflect Ms. Bagnulo's expectations. Furthermore, Justice Matheson considered the conduct of Ms. Bagnulo's counsel in delaying the proceedings and the settlement offers made by Complex Services Inc. which were not accepted by Ms. Bagnulo.

[48] In determining whether or not the appeal has merit, I am not required to evaluate whether Ms. Bagnulo will or will not be successful on appeal. It does not matter whether I would allow or dismiss the appeal. Rather, it is enough that there is some chance of success on appeal. In this case, I see no basis on which Ms. Bagnulo could be successful in her appeal.

[49] While Ms. Bagnulo's Notice of Motion contends that the trial judge erred "in law", Justice Matheson's findings in his decision dismissing the action were largely findings of fact.

[50] Justice Matheson found as a fact that Ms. Bagnulo signed several fixed term contracts after she lost the status of an unlimited term employee. Furthermore, Justice Matheson found as a fact that the limitation period began to run when the logo shops closed on February 1, 2007, as that is the date that Ms. Bagnulo's employment status changed.

[51] In his decision to award costs to Complex Services Inc., Justice Matheson gave extensive reasons for the cost award. Justice Matheson considered the principles for costs outlined in Rule 57.01 of the *Rules of Civil Procedure* and made findings in relation to all of the relevant principles. Furthermore, Justice Matheson explicitly addressed the additional considerations of Complex Services Inc.'s offers to settle and the conduct of Ms. Bagnulo's counsel in extending the length of the proceeding.

[52] Trial judges are accorded significant deference regarding findings of fact since, unlike appellate courts, they are present to see and hear all of the evidence. In my opinion, the grounds of appeal are largely fact based. Accordingly, I am not persuaded that there is any merit to the grounds of appeal sought to be raised by Ms. Bagnulo.

[53] In addition I note that, while the court must consider all of the relevant factors in determining whether to grant an extension of time to file a Notice of Appeal, the Court of Appeal in *Enbridge Gas Distribution v. Froese* found that "lack of merit alone can be a sufficient basis on which to deny an extension of time, particularly in cases such as this where the moving party seeks an extension to file a notice of leave to appeal, rather than an extension of time to file a notice of appeal..." (para. 16)

(e) Justice of the Case

[54] The overarching consideration in determining whether or not to grant an extension to file a Notice of Appeal is whether the "justice of the case" requires that an extension be given. In this case, I do not find that justice requires an extension.

[55] This is not a motion for an extension of time to file a Statement of Claim. The merits of Ms. Bagnulo's action were heard and adjudicated. If Ms. Bagnulo was unhappy with the decisions of Justice Matheson, it was incumbent on her to file a Notice of Appeal in the proper court within the time limit proscribed. At the time of this hearing, Ms. Bagnulo had yet to do so. It was more than a year after Ms. Bagnulo first filed a Notice of Appeal at the Court of Appeal that she attempted to file a Notice of Appeal with the Divisional Court. Moreover, it has been more than two years since the first Notice of Appeal was filed, and no valid Notice of Appeal has been filed in the proper court.

[56] Additionally, I am very conscious of the fact that when the Court of Appeal addressed this matter in April 2013, it had the discretion to transfer the appeal to the Divisional Court but declined to do so. This resonates strongly with me.

[57] In all of the circumstances of this case, I find that the interests of justice to not warrant an extension of time to file a Notice of Appeal.

CONCLUSION:

[58] Considering all the relevant factors, I am not persuaded that Ms. Bagnulo should be granted an extension of time to file a Notice of Appeal in the Divisional Court.

[59] Ms. Bagnulo failed to act expeditiously after her counsel was informed, repeatedly, by Complex Services Inc.'s counsel of the jurisdictional error in March 2012. Ms. Bagnulo also failed to act

expeditiously after she became aware that leave was required to appeal to the Divisional Court in April 2013. This does not indicate a *bona fide* and continuing intention to appeal.

[60] The Court of Appeal found that Ms. Bangulo had no reasonable explanation for the delay in April 2013, and I similarly find that no reasonable explanation has been given for the further delay until the matter was brought before the Divisional Court.

[61] While no strong prejudice was presented by either side, Complex Services Inc. has continued to spend time and money defending against this claim for an excessive and unjustified length of time.

[62] Finally, given that the proposed grounds of appeal are largely based on findings of fact, I find that the merits of Ms. Bagnulo's appeal have no chance of success.

[63] As Justice Malloy noted in *Roach v. Oneil*, "[e]ven where any single factor might not, on its own, be sufficient to warrant such a disposition, the combination of factors makes it so" (para. 27). After considering all of the factors in this case, I find that an extension of time to file a Notice of Appeal is not warranted in this case.

[64] The motion is dismissed.

[65] If the parties are unable to resolve costs, they may provide a maximum of 3 pages written submissions to me within 30 days of the date of this decision.

Milanetti J.

Released: May 30, 2014

CITATION: Bagnulo v. Complex Services Inc., 2014 ONSC 3311
COURT FILE NO.: DC-13-497 ML
DATE: 2014-05-30

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Rosa Bagnulo

Moving Party
(Plaintiff)

- and –

Complex Services Inc.

Responding Party
(Defendant)

REASONS FOR JUDGMENT

Milanetti J.

JAM:lb/mw

Released: May 30, 2014

TAB 14

COURT FILE NO.: 62/05
DATE: 20050228

05 063 022

SUPERIOR COURT OF JUSTICE - DIVISIONAL COURT - ONTARIO

RE: CHARLES C. ROACH, Plaintiff (Appellant)

A N D:

MICHAEL ONIEL and LEGAL AID ONTARIO, Defendants (Respondents)

BEFORE: MOLLOY J.

COUNSEL: Samuel Willoughby, for the Appellant

Lee David, for the Respondent Legal Aid Ontario

Michael Oniel, in person

HEARD: February 24, 2005

ENDORSEMENT

Introduction

[1] The plaintiff ("Mr. Roach") seeks leave to extend the time for appeal from the decision of Master Clark, released July 26, 2004. Master Clark had refused to grant leave to Mr. Roach to amend his statement of claim in order to assert additional grounds and relief against the defendant Legal Aid Ontario ("LAO").

[2] The statement of claim was issued on July 7, 2003 under the Simplified Rules. The claim as against Mr. Oniel is essentially based on fees for professional services allegedly rendered by Mr. Roach in connection with a malicious prosecution action brought by Mr. Oniel against various police defendants. After a long legal battle, Mr. Oniel received a judgment and costs in respect of that action. By then, Mr. Roach was no longer acting for him. There is a factual dispute as to the nature and extent of Mr. Roach's retainer and when it was terminated.

[3] The parties agree that the relevant factors to be considered on this motion are: the length of the delay; a settled intention to appeal within the prescribed time; the merits of the appeal; and any prejudice to the respondent.

The Delay

[4] The action was set down for trial by the plaintiff only when a dismissal for delay by the registrar was imminent. At that point, LAO brought a summary judgment motion to dismiss the action as against it. In response, the plaintiff brought a motion to amend its statement of claim as against LAO, which motion was heard by Master Clark on May 18, 2004. In light of that motion, the summary judgment motion has been held in abeyance.

[5] Master Clark dismissed the plaintiff's motion, for written reasons released on July 26, 2004, and which I understand were received by plaintiff's counsel on July 28, 2004. The parties are now in agreement that the decision of Master Clark is a final order and as such an appeal lies to the Divisional Court. However, counsel for Mr. Roach initially issued a notice of appeal (dated August 5, 2004) returnable before a judge of the Superior Court, rather than before Divisional Court.

[6] Mr. David, counsel for LAO, telephoned Mr. Willoughby soon thereafter to advise him that the appeal had been brought in the wrong forum, but was unable to reach him. Mr. David therefore wrote to Mr. Willoughby on August 24, 2004 and suggested he change the venue of his appeal to the Divisional Court because the Order of the Master was final in nature.

[7] On September 20, 2004, Mr. David again wrote to Mr. Willoughby seeking confirmation that the appeal would proceed in Divisional Court. Mr. Willoughby replied by letter later that same day that he would not be transferring the appeal to Divisional Court as he was of the view the decision was interlocutory and the Superior Court was the proper forum.

[8] The appeal came on in the Superior Court before Madam Justice Low on October 27, 2004. At that point, Mr. Willoughby conceded that the appeal should have been brought to the Divisional Court. However, he did not advise Mr. David or Mr. Oniel of this prior to their attendance in court that day. In the result, Madam Justice Low endorsed the record that the proper forum for the appeal was in the Divisional Court and ordered costs payable to LAO and Mr. Oniel in the amounts of $300 and $100 respectively. She declined to traverse the matter to Divisional Court.

[9] After that appearance, Mr. Willoughby sought the consent of Mr. David and Mr. Oniel to traverse the matter to Divisional Court. Mr. David consented at that time, but Mr. Oniel refused to do so (as was his right). Mr. Oniel wrote to Mr. Willoughby on November 19 and November 26, 2004 advising that he would not consent and stating that he would object to any further steps being taken until the costs ordered by Low J. had been paid. Although Mr. David initially consented to the appeal proceeding in the Divisional Court, he subsequently withdrew that consent because of the delay by the plaintiff in proceeding with this motion. On the argument before me, Mr. David did not consent or oppose the relief sought, but made submissions as to the circumstances of the delay.

[10] Mr. Oniel received payment of the cost ward on December 12, 2004 (although they were ordered to be paid by November 27, 2004). However, he heard nothing further from the plaintiff's solicitors until the late afternoon of February 17, 2004 when he was served with the three volume motion record and factum for this motion returnable on February 24, 2004.

[11] The only explanation for the delay from November 26, 2004 is that Mr. Willoughby was trying to clear dates for the motion with Mr. David and there was a period of time in December (I believe two weeks) during which Mr. David was away on vacation. Mr. Willoughby did speak to Mr. David about dates in early January. An initial motion date was obtained but Mr. Willoughby did not have his materials ready. Therefore, that date was abandoned and this February 24 date substituted. None of this was known to Mr. Oniel who was not consulted at all about the return date, even though he was at that point the only party opposed to leave being granted.

[12] It is apparent that neither of the defendants are responsible for the delay. The major portion of the delay was caused by the appeal having been commenced in the wrong court. Obviously, that is the responsibility of plaintiff's counsel. Further, counsel for the LAO advised plaintiff's counsel of the error in a timely way and the plaintiff nevertheless failed to cure the problem. I can therefore see no good reason for the delay between mid August and October 27 when Mr. Willoughby finally conceded his error.

[13] Likewise, although some delay is inevitable to get a court date and prepare material, the length of delay from November 19, 2004 to February 24, 2005 is longer than it needed to be.

[14] Therefore, the length of the delay and the explanation for the delay are both problematic. Case law to the effect that an error by counsel ought not to prejudice the client's right to a hearing on the merits is less applicable in a case such as this, where the plaintiff is himself an experienced lawyer and his own firm is representing him in the litigation.

Settled Intention to Appeal

[15] Mr. Willoughby argues that the settled intention to appeal component of the test is met as the original notice of appeal was issued promptly after the decision of the Master, albeit in the wrong court.

[16] I agree there was an initial intention to appeal. However, Mr. Oniel makes a valid point that the intention to appeal must be ongoing and that the excessive delay by the plaintiff after the Master's Order is not consistent with a *bona fide* and continued intent to proceed with the appeal.

Merits of the Appeal

[17] The claims which Mr. Roach sought to add to his statement of claim relate solely to LAO. There are two aspects to the claim. First, through various causes of action, Mr. Roach claims entitlement to any amount by which the costs recovered by LAO in the litigation involving Mr. Oniel exceed the amounts LAO paid on any legal aid certificate issued in favour of Mr. Oniel. Second, Mr. Roach claims damages in negligence against LAO for failing to take steps to ensure Mr. Oniel did not receive any funds from the City of Toronto on account of legal costs, thereby depriving the plaintiff of the opportunity to secure such funds.

[18] In considering the merits of the appeal on a motion such as this, it is not my role to actually rule on the appeal itself. It is not enough that I might dismiss the appeal if it were before

me. If there is any chance of success on the appeal, this aspect of the test for extending the time for appeal would be met.

[19] In my opinion, there is no chance the appeal will succeed. It is totally without merit.

[20] With respect to the amounts recovered by LAO, s. 46(4) of the *Legal Aid Services Act*, S.O. 1998, c. 26 provides that all costs ordered to be paid to an individual who has received legal aid "are the property" of LAO. Those funds, including any in excess of the amounts paid out by LAO (if there are any) belong to LAO. LAO may have a discretion to return excess funds to a legal aid claimant (as, for example, repayment of any amounts the legally aided person has himself contributed) or LAO may also pay extra amounts to the lawyer involved if it deems that to be appropriate. However, that is solely a matter for the discretion of LAO and Mr. Roach has no right, statutory or at common law, to those funds. Unjust enrichment cannot arise where the funds by statute belong to LAO. No facts are pleaded to support any other claim against LAO in respect of how its discretion not to pay any excess funds to Mr. Roach may have been exercised.

[21] Furthermore, there has already been a ruling by a judge of this Court that Mr. Roach is not entitled to recover fees recovered in excess of the legal aid rate. On September 29, 2003, the plaintiff appeared before Madam Justice Backhouse seeking a Mareva type injunction to freeze monies received by Mr. Oniel. Backhouse J. dismissed the motion. Her endorsement at that time includes the following findings:

> In my view, the material filed on behalf of the Plaintiff, on its own, falls far short of establishing even a prima facie case. It is clear that Legal Aid has been reimbursed in full by Mr. Oniel, ... Mr. Roach is not entitled to legal fees recovered by Mr. Oniel in excess of the Legal Aid rate, where Mr. Roach was working under a legal aid certificate.

[22] Mr. Oniel included this decision in the material he filed in response to the motion before me. This would appear to be a direct ruling on the very issue of Mr. Roach's entitlement to funds recovered for legal costs over and above the amounts paid on legal aid certificates. No appeal was taken from this decision. Mr. Oniel relies on the principle of *res judicata.* Thus, even apart from the grounds upon which the Master found no cause of action in the new allegations against the LAO, the decision of Backhouse J. is a further obstacle for the plaintiff. I put it no higher than that, however, because Mr. Willoughby submitted in argument that he was unaware of the decision of Backhouse J. and not in a position to address it. Thus, although application of *res judicata* in light of the decision of Backhouse J. is a further indication of the weakness of the plaintiff's appeal on the merits, I do not rest my decision upon it, but rather on the grounds addressed by the Master.

[23] With respect to the negligence claim, the Master ruled that the allegations were not supported by any factual underpinnings to support the cause of action. I agree. There is no pleading of any facts that could give rise to a duty owed by LAO to Mr. Roach, nor any power or ability by Legal Aid to have any control over monies paid by third parties to Mr. Oniel.

[24] In short, I see no merit whatsoever to the grounds of appeal asserted. The amendments sought are legally untenable. In my view, the appeal has no chance of success.

Prejudice

[25] There is no prejudice alleged by LAO. However, Mr. Oniel does claim he is prejudiced as a result of the delay. He describes himself as "an innocent prisoner of the justice system for over 16 years". After what he has been through, that does not seem to me to be an exaggeration. Mr. Oniel alleges that every court appearance is traumatic for him. He suffers from stress and requires medication to even attend court. Although he did an admirable job of preparing material and was an articulate advocate on the motion before me, the stress this is causing for him is apparent. He points out, quite correctly, that this is a Simplified Procedure case, which is supposed to be a streamlined and expeditious means of resolving disputes. The cause of action asserted dates back to the period from 1992 to 2002. The action was commenced in July 2003. There is still no trial date. Further delay is prejudicial to Mr. Oniel. While the prejudice is not so significant that it would warrant, in and of itself, refusing the relief sought, neither is it inconsequential. It is a relevant factor to be taken into account.

Conclusion

[26] Mr. Oniel provided the Court with the very recent decision of the Court of Appeal in *Lee v. The Bank of Nova Scotia*, released on February 21, 2002 (Court file # M32014(C42615) and M32158, heard February 17, 2005, per Feldman, Cronk and LaForme JJ.A., unreported. In that case an unrepresented plaintiff, facing a 30 day time limit to launch his appeal, was five months late issuing his notice of appeal. The Court of Appeal noted that counsel for the defendant had advised the plaintiff of the time period for appeal in ample time for him to comply and found the five-month delay by the plaintiff to be "significant". That, in addition to a finding that there was no merit to the appeal, was sufficient to persuade the Court that it ought not to extend the time for appeal. As Mr. Oniel points out, if that is the standard to which an unrepresented litigant is held, the result should certainly not be different for a personal plaintiff who is himself a lawyer with 40 years experience and who has his own firm with many other lawyers representing him.

[27] Taking all of the relevant factors in this case into account, I am not persuaded by the plaintiff that leave to extend the time for appeal should be granted here. Even where any single factor might not, on its own, be sufficient to warrant such a disposition, the combination of factors makes it so. The delay, although partially explained, is inordinate when seen in the circumstances of the case. The explanation for much of the delay is not acceptable, particularly given the timely notice given to plaintiff's counsel that the appeal was brought in the wrong place. Further, there is no merit to the appeal and the defendant Oniel would be adversely affected by the further delay that would result if the appeal were to proceed. Therefore, the plaintiff's motion is dismissed.

[28] The defendants are entitled to their costs in responding to this motion. Those costs are fixed in the amount of $1000 for Legal Aid Ontario (recognizing that time was spent for attendance and argument and that Mr. David was of considerable assistance to the Court even though he did not fully oppose the relief sought by the plaintiff and filed no material) and $750

for Mr. Oniel (who was not represented by counsel, but who filed helpful material prepared under time pressure and provided the Court with an articulate and well-reasoned oral argument). Those costs are payable forthwith.

MOLLOY J.

Released: February 28, 2005

6p

TAB 15

See para. 33

COURT OF APPEAL FOR ONTARIO

CITATION: Howard v. Martin, 2014 ONCA 309
DATE: 20140417
DOCKET: M43502

Gillese J.A. (In Chambers)

BETWEEN

Jane Howard

Applicant (Respondent)

and

Anthony Michael Martin

Respondent (Applicant)

Michael Stangarone, for the applicant

E.L. Nakonechny, for the respondent

Heard: April 15, 2014

Application for an extension of time in which to appeal from the order of Justice Victor Paisley of the Superior Court of Justice, dated February 25, 2013, and the orders of Justice Peter G. Jarvis of the Superior Court of Justice, dated June 24, 2013, and January 8, 2014.

Gillese J.A.:

[1] Anthony Michael Martin moves for an extension of time to file his notice of appeal of the order of Paisley J., dated February 25, 2013 (the "Paisley Order") and the orders of Jarvis J., dated June 24, 2013 (the "Jarvis Order"), and January 8, 2014 (the "Costs Order").

[2] Jane Howard, his former spouse, opposes the motion.

[3] For the reasons that follow, the motion is dismissed.

BACKGROUND IN BRIEF

The Paisley Order

[4] Ms. Howard brought an application for a divorce, and associated relief, in June 2012. The application was uncontested and resulted in the Paisley Order.

[5] Two terms of the Paisley Order are relevant to this motion. The first is that Mr. Martin and Ms. Howard are to share equally in their two children's special and extraordinary expenses. The second gave Mr. Martin the right to retain the matrimonial home, provided that he made a specified payment to Ms. Martin. The payment included a sum for equalization plus an adjustment to reimburse Ms. Martin for 50% of the increase in the parties' joint line of credit that Mr. Martin had unilaterally made during the marriage. The Paisley Order provided that if Mr. Martin failed to make the payment, the home would be listed for sale and sold by March 1, 2013.

[6] It is important, for the purposes of this motion, to understand why the application before Paisley J. proceeded on an uncontested basis.

[7] In June 2011, Ms. Howard's lawyer wrote to Mr. Martin, suggesting that he retain counsel, provide his financial disclosure, and begin negotiation of a separation agreement.

[8] In September 2011, she served him with Ms. Howard's sworn financial statement and a disclosure brief.

[9] After these and other unsuccessful attempts to obtain financial disclosure, Ms. Howard initiated the court proceeding in June of 2012.

[10] Mr. Martin ignored the 30-day deadline to provide responding materials after being served with Ms. Howard's application.

[11] On September 14, 2012, Penny J. ordered Mr. Martin to:

- serve and file his sworn financial statement and specific financial documentation by September 24, 2012;
- serve and file his answer on or before 5:00 p.m. on September 28, 2012; and
- pay costs of $500.

[12] The order also provided that if Mr. Martin failed to comply with it, Ms. Howard could proceed to an uncontested trial of the issues.

[13] This order was made on consent. However, Mr. Martin failed to comply with it. He did not produce pay stubs, relevant bank statements, Visa statements, mortgage statements, or evidence of income tax arrears. He also failed to file his answer on time. His cheque for the costs bounced.

[14] At a case conference held on October 12, 2012, Mesbur J. gave Mr. Martin another chance. She ordered him to "comply strictly" with Penny J.'s order by noon on October 26, 2012, failing which Ms. Howard could proceed with an uncontested trial.

[15] Mr. Martin failed to comply with Mesbur J.'s order. A few hours after the deadline, he delivered some material, much of which simply duplicated that previously provided. He did deliver a financial statement, purportedly sworn in front of a commissioner for oaths. However, the commissioner's "signature" was an illegible star-shaped scribble and the name of the commissioner was not printed underneath.

[16] As a result of Mr. Martin's failure to comply, the application before Paisley J. proceeded on an uncontested basis.

The Jarvis and Costs Orders

[17] Mr. Martin moved to set aside the Paisley Order on essentially the same grounds as he seeks to raise on appeal.

[18] Justice Jarvis found that Mr. Martin's health problems and alleged lack of financial resources did not justify his failure to comply with the various court orders and, in any event, ought to have been raised earlier in the proceedings. In his view, Mr. Martin's arguments about Paisley J.'s treatment of the value of the matrimonial home amounted to an assertion that he would have raised other

facts and made other arguments had he been able to participate before Paisley J. However, the evidence was available and known to Mr. Martin before that hearing, and it was his failure to comply with court orders that led to his inability to participate.

[19] The Jarvis Order, dated June 24, 2013, dismissed the motion. The Costs Order required Mr. Martin to pay costs of $10,321.31.

After the Paisley Order

[20] The Paisley Order enabled Mr. Martin to stay in the matrimonial home, if he made the specified payment to Ms. Martin. He did not make the payment. Thus, in accordance with the terms of the Paisley Order, the house was to be listed for sale.

[21] Mr. Martin refused to list the house for sale.

[22] Ms. Howard was forced to bring a motion in September 2013 so that the house could be sold (the "sale order"). Contrary to the terms of the sale order, Mr. Martin failed to keep the house "clean and presentable for all showings". Ms. Howard, along with six of her family members and friends, worked for about 200 hours to clean and repair the house for showings. She also incurred costs of approximately $1,770 to make it presentable.

[23] Mr. Martin also breached the sale order by failing to vacate the home on December 6, 2013.

[24] Ms. Howard had to spend additional legal fees to arrange for the Sheriff to remove Mr. Martin before the closing. At that point it was discovered that Mr. Martin had failed to leave the property "in broom swept condition", contrary to the terms of the sale order. Ms. Howard spent an additional $1400 and she and her crew of family and friends spent another four days cleaning the house, to ensure that the house was in a state to close.

[25] Mr. Martin has also failed to comply with four separate costs orders, totalling over $20,000, and continues to be in breach of the Paisley Order requiring him to pay one-half of the children's extraordinary expenses. While he has provided some cheques towards these costs, most of them have bounced.

THE TEST FOR EXTENDING TIME

[26] The test on a motion to extend time for filing a notice of appeal is well-settled. The overarching principle is whether the "justice of the case" requires that an extension be given. Each case depends on its own circumstances, but the court is to take into account all relevant considerations, including:

> 1. whether the moving party formed a *bona fide* intention to appeal within the relevant period;
>
> 2. the length of, and explanation for, the delay in filing;
>
> 3. any prejudice to the responding party that is caused, perpetuated or exacerbated by the delay; and,

4. the merits of the proposed appeal.

See *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131, at para. 15, and *Rizzi v. Mavros*, 2007 ONCA 350, 85 O.R. (3d) 401, at para. 16.

APPLICATION OF THE TEST

1. Intent to appeal

[27] I accept, for the purposes of this motion, that Mr. Martin had the requisite intention.

2. Length of, and explanation for, the delay

[28] The Paisley Order is dated February 25, 2013. Mr. Martin moved to have the Paisley Order set aside. The Jarvis Order dismissed that motion on June 24, 2013. Mr. Martin did not attempt to file his notice of appeal until February 27, 2014, some eight months after the Jarvis Order was made.

[29] Mr. Martin offers two explanations for the delay in filing, following the Jarvis Order: health problems and lack of legal representation.

[30] In my view, neither adequately explains the delay.

[31] Mr. Martin suffers from chronic pain syndrome and sometimes has difficulty concentrating. These difficulties are not new, as he had them throughout these proceedings. The record shows that they did not interfere with Mr. Martin's ability to engage in the litigation process. Moreover, the record shows that Mr. Martin

has continued to work throughout as a business writer, speaker and educator, and that he has led an active social life. I do not doubt that the medications and other treatments he receives are of assistance to him. I simply note that his medical problems do not excuse or explain his failure to file in a timely fashion.

[32] As for the absence of legal representation, there is no evidence that Mr. Martin lacked the resources to retain counsel to help him with this appeal. At various times throughout these proceedings, including this motion, he has had counsel.

3. Prejudice to the responding party

[33] It is an unfortunate reality that a respondent will often suffer some degree of emotional and financial stress when an appeal is delayed. In this case, however, the ramifications for Ms. Howard's health go well beyond the norm and amount to prejudice.

[34] Ms. Howard suffers from Type I diabetes, an irregular heartbeat, and Graves' disease. She must inject herself with insulin at least five times a day. The medical evidence makes it clear that prolonging this litigation will impact negatively on her health. Her family physician, Dr. S. Friedman, advises that the ability to manage Ms. Howard's health problems and get her blood sugars into the recommended range is not possible when she is under extreme stress, such as that which is caused, or contributed to, by this litigation. Dr. Friedman goes

on to identify the long term consequences of poorly managed diabetes, which include kidney failure, heart disease, peripheral vascular disease, visual impairment, and increased susceptibility to infection.

[35] Dr. Friedman has also recently advised Ms. Howard to work only part time, as opposed to full time. Ms. Howard is unable to follow that advice because of financial pressures.

4. Merits of the proposed appeal

[36] The merits of a proposed appeal can be decisive on a motion to extend the time for filing. Even if the other factors militate against extending time, the merits may be so significant as to justify extending time.

[37] That is not this case.

a. The Children's Interests

[38] The first proposed ground of appeal is that Paisley J. failed to consider the children's best interests when he ordered that the matrimonial home be sold. This ground has no merit.

[39] It will be recalled that the Paisley Order permitted Mr. Martin to retain the matrimonial home. However, he did not make the required payment with the result that the home was sold. Thus, if it was in the children's best interests that they remain in the home, the reason they could not was his actions and not an error in the Paisley Order.

[40] I note that if the children's best interests were served by remaining in the same neighborhood as the matrimonial home, that was achieved because Ms. Howard obtained rental accommodation for herself and the children very close to the matrimonial home.

b. The line of credit

[41] The second proposed ground of appeal pertains to the line of credit. Mr. Martin says that he used the money in question to pay family expenses and that Paisley J. erred by finding otherwise.

[42] This is a question of fact: did Mr. Martin use the money from the line of credit for his own purposes or for the family? As a question of fact, it is reviewable on the standard of palpable and overriding error. There is nothing in the materials before me to indicate any such error. On the contrary, the record overwhelmingly supports Paisley J.'s conclusion that Mr. Martin used the funds from the line of credit for his own purposes. A very brief review of key facts will demonstrate this.

[43] In November 2012, while this litigation was ongoing, Ms. Howard went to her bank to obtain copies of documents related to the parties' joint line of credit. She learned that in August 2007, Mr. Martin had forged her signature on bank and real estate documents to obtain an increase in the joint line of credit secured against the matrimonial home, from $175,000 to $373,607. Mr. Martin then

proceeded to take advances on that increased line of credit, beginning the following day when he transferred $60,000 to a TD Waterhouse account and purchased shares in four mining and mineral stocks totalling $74,326.20. Those investments did not exist at the date of separation.

[44] There is nothing in this proposed ground of appeal.

c. Value of the matrimonial Home

[45] The third proposed ground of appeal pertains to the matrimonial home.

[46] Justice Paisley valued the matrimonial home at $737,000. He had before him Ms. Howard's material which contained the opinions of two real estate agents, employed by different companies, as to the value of the home as of March 1, 2011. The house sold for $727,500.

[47] Mr. Martin claims that Paisley J. should have used a value of $655,000 for the matrimonial home. To the extent his claim is based on an appraisal that he had prepared on December 13, 2013 – ten months after the Paisley Order, and five months after the Jarvis Order – I see nothing in it. As fresh evidence, it is not clear to me that it would be admitted if the appeal were to be permitted to proceed. Setting that to the side, however, Mr. Martin has pointed to no error in Paisley J. relying on the evidence before him. The fact that Mr. Martin disagrees with the estimate and the fact that the home ultimately sold (subsequent to the

Paisley Order) for a slightly lower price than the estimate does not make it a mistake for Paisley J. to have relied on the estimate.

[48] Mr. Martin also claims that Paisley J. used an inflated value for the home because he brought the home to the marriage, therefore any increase in its value after the date of separation until the point of sale should have accrued solely to his benefit.

[49] While I cannot say that there is no merit whatsoever in this claim, it is very tenuous indeed. Ms. Howard put a very complete record before Paisley J., which included a 262 page affidavit. The values in her Net Family Property Statement were all supported by documentary evidence. The materials disclosed the facts upon which Mr. Martin relies for this claim. If Paisley J. had any concerns about how to fairly treat the matrimonial home, he had methods for exploring those concerns. He invoked none of them. Further, this claim ignores any right that Ms. Howard might claim based on constructive trust principles.

[50] Accordingly, I see very little prospect of success on this issue. I note also that the dollar amount in question is small, particularly when viewed against all the outstanding amounts that Mr. Martin owes Ms. Howard.

The overall justice of the case

[51] In my view, the overall justice of the case dictates that no extension of time should be granted.

[52] As I have explained, there is no adequate explanation for the delay in filing the notice of appeal; an appeal would result in serious prejudice to Ms. Howard's health; and the sole arguable ground of appeal is for a small sum and unlikely to succeed. To these factors, I would add the following two considerations.

[53] First, it is Mr. Martin's own misconduct that resulted in the application before Paisley J. proceeding on an uncontested basis. He was given a number of chances to obey the court disclosure orders and warned of the consequences of the failure to comply. Despite that, he did not comply with those orders. In the circumstances of this case, it would be contrary to the interests of justice to effectively undo the order precluding him from participating in the proceedings by now granting leave.

[54] Second, Mr. Martin is asking this court for an indulgence. When a person asks the court for an indulgence, it is appropriate to consider whether that person has respected prior court orders. Mr. Martin has not demonstrated that respect. On the contrary, as the brief recounting of events above shows, Mr. Martin has a history of repeatedly failing to comply with court orders and he continues to flout them to this day.

DISPOSITION

[55] Accordingly, the motion is dismissed with costs to the responding party, fixed at 5,000, inclusive of disbursements and all applicable taxes.

Released:

TAB 16

See para. 18

COURT FILE NO.: 45352/03
DATE: 2009/05/08

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
Liberty Mutual Insurance Company and Liberty Insurance Company of Canada	D. Burns, for the Plaintiffs
Plaintiffs	
- and -	
Rose Donatelli Venneri, Michael Venneri, Professional Counselling Services and Comprehensive Health Clinic Inc.	R. Donatelli Venneri was not represented M. Venneri was not represented T. Pedwell, for the Defendant Comprehensive Health Clinic Inc.
Defendants	
	HEARD: October 2, 2008 and March 3 and 4, 2009

Hambly J.

Introduction

[1] The defendants bring a motion for an extension of time to seek leave to appeal an interlocutory order made by Justice J. W. Quinn on July 18, 2007, in which he ordered costs against them. They also seek leave to appeal an interlocutory order made by Justice B. Matheson on August 11, 2008, in which he ordered that a defendant answer undertakings given on an examination for discovery, that the defendants pay the costs ordered by Justice Quinn and that

the defendants post security for costs. The defendants also bring motions for an order striking the plaintiffs' statement of claim, or in the alternative, to provide particulars for an order prohibiting the plaintiffs from bringing motions and for an order verifying the transcript of the examination for discovery of one of the defendants.

Background

[2] The plaintiffs, Liberty Mutual Insurance Company and Liberty Insurance Company of Canada, provide insurance to owners of automobiles. They carry on business under the name of T.D. Home and Auto Insurance (Liberty). Rose Venneri Donatelli (Donatelli) had a business as a counselor. She shared office space with her son, Michael Venneri (Venneri), who is a chiropractor in St. Catharines, Ontario. He carries on his chiropractic business through his company, Comprehensive Health Claims Inc. (Comprehensive). On October 6, 2001, Donatelli was charged by the police with fraud. It was alleged that she held herself out as a psychologist, which she was not. On October 6, 2001, a newspaper in St. Catharines published the fact that she faced criminal charges and the allegations against her. Liberty did an investigation in which they acquired consents from their insureds, whom the defendant had treated, to release their treatment records to the police. As a result of this information, Detective Kohut, on or about January 24, 2002, swore an information containing 3 additional charges which alleged that Rose Donatelli, between November 1, 1998 and December 31, 2000, defrauded Liberty Mutual of an amount exceeding $5000 by billing Liberty as Rose Donatelli, PhD psychologist. The allegation was that she did not have a PhD as a psychologist. Donatelli was served with a summons dated January 28, 2002 which set out the charges requiring her to appear in the Ontario Court of Justice

in St. Catharines, on February 12, 2002. The crown withdrew all of the criminal charges against Donatelli sometime in 2003.

[3] On September 16, 2003, the plaintiffs caused a statement of claim to be issued against Donatelli, Venneri, and Comprehensive, in which they claimed reimbursement of $31,689 being the amount that Liberty had paid Donatelli for treatment of their insureds. Mr. D.C. Burns, of Sigurdson and Associates, has represented the plaintiffs throughout. The defendants retained Mr. N.A. Abrahamson to represent them. He brought a motion for particulars of the statement of claim. Master Sedgwick dismissed the motion on May 12, 2004. His endorsement states the following:

> In my view the claim is sufficiently particularized to enable the defendants to plead; further particulars if required, can be obtained on discovery or on a motion for that relief ...

He fixed the costs against the defendants in the amount of $750, payable forthwith.

[4] On July 22, 2004, Mr. R. O'Connor went on the record as the solicitor for the defendants. He filed a statement of defence and counterclaim dated July 16, 2004, and then an amended statement of defence and counterclaim dated August 3, 2004. It claimed $12.5 million against the plaintiffs for defamation. On August 31, 2004, the plaintiffs served a demand for particulars on the defendants of their counterclaim. Mr. O'Connor was removed from the record as the defendants' solicitor by the order of Justice J. W. Scott on December 7, 2004. From that point the defendants represented themselves. The plaintiffs brought a motion for an order that the defendants provide particulars first returnable on January 6, 2005. After several adjournments, the motion came before Justice Walters for argument on April 22, 2005. By that

time, Venneri and Comprehensive had retained Mr. T. Pedwell. Donatelli represented herself. Justice Walters granted the plaintiffs the particulars which they sought to be supplied by the defendants by May 20, 2005. She also dismissed a motion brought by the defendants for a change of venue.

[5] A decision on the costs of these motions remained outstanding. The plaintiffs were not satisfied with the particulars which the defendants purported to give. The motions came before Justice Henderson on May 26, 2005. He adjourned the motions to a long motion to determine whether the defendants had complied with the particulars which Justice Walters had ordered and the costs of the motions. The motions next came before Justice Quinn on July 7, 2005. Donatelli had retained Mr. M. R. Yachetti to represent her. Justice Quinn, at the request of the defendants, adjourned the motions to July 29, 2005. He made the motions peremptory on the defendants. He fixed costs against the defendants at $500 plus GST payable forthwith. On July 29, 2005, Mr. Yachetti arrived at an agreement with the plaintiffs that he would file by September 1, 2005, an amended pleading for the defendants which would contain the particulars which the plaintiffs sought. He did this by filing a Fresh Amended Statement of Defence and Counterclaim. The plaintiffs filed a statement of defence dated October 26, 2005 to the counterclaim. Donatelli was examined for discovery on March 9, 2007. Mr. Yachetti represented her at her discovery.

[6] The matter of costs of the plaintiffs' motion for particulars and the defendants' motion for a change of venue remained outstanding. There were several more adjournments. The motions came before Justice Quinn on July 18, 2007. Mr. J. Marini, from Mr. Yachetti's

office, represented Donatelli. Mr. T. Pedwell represented Venneri and Comprehensive. The plaintiffs filed a bill of costs in which they sought substantial indemnity costs of $28,983.16 for their motion for particulars and the defendants' motion for a change of venue. Justice Quinn attributed $1500 of this amount to the motion for a change of venue. He found that the history of the proceedings was accurately set out in the plaintiffs' written submissions. He considered the factors set out in Rule 57.01. He found that the conduct of the defendants had greatly lengthened the proceedings. He stated:

> Having considered all the factors set out in Rule 57.01 and categorizing the degree of success in the particulars motion as substantial and in the change of venue motion as complete, the plaintiffs are entitled to their costs of both motions. As for the scale of costs, while the conduct of the defendants is open to much criticism, I do not think that it rises to the level of opprobrium necessary to attract substantial indemnity costs.

[7] He fixed the costs of the plaintiffs on a partial indemnity scale at $17,400 against the defendants jointly and severally. He fixed the costs of the proceedings before him on July 18, 2007, payable by the defendants to the plaintiffs in the amount of $1000 plus GST. Mr. Yachetti then withdrew from the case leaving Donatelli unrepresented. Donatelli filed a notice of intention to act in person dated July 24, 2007.

[8] On August 20, 2007, Donatelli served the plaintiffs with a notice of appeal to the Court of Appeal of Justice Quinn's order dated July 18, 2007. On August 24, 2007, she served the plaintiffs with an amended notice of appeal to the Court of Appeal. She appears to have been successful in filing these documents at the Court of Appeal. She received a telephone call from the office of the Court of Appeal advising her that she had appealed to the wrong court. She then filed an ex parte notice of motion dated September 18, 2007, in which she sought an order for

leave to appeal the order of Justice Quinn dated July 18, 2007, in the court office in St. Catharines. The matter came before Justice Arrell. In an undated memorandum, he made the endorsement, "this matter needs to be heard in motions court". Donatelli made no further attempt to obtain an order extending the time to appeal Justice Quinn's order before the motion brought by the plaintiffs before Justice Matheson, referred to below, was argued on July 8, 2008.

[9] The defendants did not pay any of the costs that had been ordered against them. Donatelli also did not answer undertakings that she had given on her examination for discovery on March 9, 2007. The plaintiffs brought a motion first returnable on February 28, 2008, for an order striking the statement of defence and counterclaim of the defendants or, in the alternative, for an order that Donatelli answer her undertakings within 30 days, failing which the plaintiff could move without notice to strike the statement of defence and counterclaim. The plaintiffs also sought security for costs against the defendants in relation to their counterclaim.

[10] The motion came before Justice Matheson for argument on July 8, 2008. Donatelli represented herself and Mr. Pedwell represented Venneri and Comprehensive. Justice Matheson released his reasons in August 11, 2008. He ordered that Donatelli comply with some 17 undertakings. He stated the following:

> [45] [Donatelli] will honour all of the undertakings that I found have not been answered within 30 days of the issuing of this order. Failure to do so may result in the striking of her portion of the counterclaim. These undertakings have been outstanding since March 9, 2007.

[11] Justice Matheson noted that the following costs orders remained unpaid:

1. Order of Master Sedgwick dated May 12, 2008 $ 750

2. Order of Justice Quinn dated July 7, 2005	$ 500
3. Order of Justice Quinn dated July 18, 2007	$17,400
	$ 1,000
Total	$19,650

[12] He was told that the order of Justice Quinn was under appeal. He asked for an explanation as to what happened to the appeal. Neither Donatelli nor Mr. Pedwell knew. At his request, Mr. Pedwell provided Justice Matheson with a letter dated July 25, 2008, in which he set out the history of Donatelli's attempt to appeal Justice Quinn's order. He attached a copy of the letter to the judgment. He stated the following:

> 53 From the letter it would appear that Venneri (Donatelli) was acting on her own and was appealing on behalf of all Defendants. It does not appear that anything has been done since the memo of Justice Arrell dated September 18, 2007.
>
> 54 It would be a reasonable inference that no court will hear the appeal because of delays in perfecting the appeal. Therefore, there are outstanding costs in the amount of $19,710.00 for almost a year. This, in my opinion, shows a deliberate disregard to orders of the court by the Defendants.
>
> 55 The Plaintiffs are asking for security for costs for $250,000.00 to deal with the counterclaim of the Defendants. Counsel states that the counterclaim will take six to eight weeks to deal with, and the rest of the matters will take an additional two weeks. The counterclaim is asking for damages for $8,500,000.00.
>
> 56 The Plaintiffs are not asking for security for costs pursuant to the *Libel and Slander Act*, but rather under Rule 56.01(1) of the *Rules of Civil Procedure*, which states:
>
> > "The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,
> >
> > ...

(c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remain unpaid in whole or in part;

...

(e) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to Pay the costs of the defendant or respondent; or

(f) a statute entitles the defendant or respondent to security for costs." (As stated, the Plaintiffs did not plead that section.)

57 One of the factors that the court must take into account is the issue of impecuniosity of the Defendants. Other than state they had no assets or few assets, they called no evidence on that point. One would have expected that they would have filed financial documents to bolster their position. The onus is on the Defendants/Plaintiffs by Counterclaim to establish that they are impecunious.

58 In *Hallum v. Canadian Memorial Chiropractic College*, 70 O.R. (2d) 119, Mr. Justice Doherty then of the High Court of Justice stated: "The onus was on the plaintiff to satisfy the court that he was impecunious."

59 In the affidavit of Sean P. Tindale, sworn June 24, 2008, he states that he obtained a report on the assets of the Defendants/Plaintiffs by Counterclaim. At tab "S" of his affidavit their assets are as follows:

a) Frank Venneri owns 84 Allan Drive, St. Catharines. It was purchased for $7,800 in 1969. There are no encumbrances on the property.

b) Rose Donatelli Venneri owns a 1994 Cadillac.

c) Venneri (Donatelli) has a credit card with MBNA with a limit of $7,500.00. There was a zero balance at the time of the report.

d) Venneri (Donatelli) has a Citi Mastercard with a credit limit of $7,000.00. There was no balance outstanding at the time of the report.

e) Venneri (Donatelli) has a CIBC Visa with a $30,000.00 limit. There was a balance outstanding at the time of report of $11,000.00.

f) At TD Canada Trust Venneri (Donatelli) had, at the time of report, $9,100.00 in an unregistered mutual fund.

g) Michael Venneri owns a 1989 Mercedes 4ZS.

h) Michael Venneri purchased 125 Welland Avenue, St. Catharines, in 1995 for $178,000.00. He transferred it in 1997 to 1149992 Ontario Limited for one dollar.

i) Michael Venneri has an MBNA Canada account with a limit of $14,000.00. At time of report there was a balance of $1,162.00.

j) Michael Venneri, in his dealings with TD Canada Trust, stated that he had assets of $370,000.000.

k) Michael Venneri also stated that he is a doctor.

60 The Defendants did not lead much evidence as to their financial situation, other than to say that they did not have any money.

61 I am satisfied on the material before me that they are not destitute and are able, if ordered, to put up security for costs.

62 The Plaintiffs have raised the issue as to whether the counterclaim is vexatious. It appears that the first counterclaim asked for $31,000.00 and in the amended counterclaim they are asking for $12,500,000.00. I believe that it would be premature to state that there were no grounds to the counterclaim.

63 The Plaintiffs have raised an issue as to the limitation period. The Plaintiffs state that the Defendants brought the counterclaim under the *Libel and Slander Act* well after the six week period as set out in the Act. Also, the Plaintiffs state that the counterclaim is well beyond the two-year limitation period as set out in the *Limitations Act.* There is an issue of discoverability. The Plaintiffs may bring a motion on that point, if they wish.

64 This matter has been before the courts for a long period of time. Venneri has failed to answer valid undertakings given by her then lawyer on March 9, 2007. All defendants have failed to pay costs as ordered by the court. They have failed to bring a motion as directed by Justice Arrell in September 2007. The court must protect its process.

65 Therefore, I make the following decision:

I. The Defendants will pay, within 30 days of the delivery of this order, all costs presently outstanding in the amount of $19,710.00 or their statement of defence and counterclaim will be struck.

II. The Defendants will file with the court a sum of $100,000.00 as a security for costs, within 90 days of the delivery of this order, or their statement of defence and counterclaim will be struck.

III. There will be costs of this motion fixed in the amount of $4,000.00 payable within 30 days.

[13] Donatelli served the plaintiffs on August 18, 2008, with a notice of appeal of Justice Matheson's order dated August 11, 2008, which she made first returnable August 28, 2008. She subsequently filed a supplementary motion on behalf of herself, Venneri and Comprehensive dated September 26, 2008, for leave to appeal Justice Matheson's order dated August 11, 2008, first returnable on the same day. She subsequently filed a further supplementary motion on behalf of herself, Venneri and Comprehensive for leave to appeal Justice Matheson's order dated August 11, 2008, first returnable on October 2, 2008. Mr. Pedwell filed a notice of motion dated September 29, 2008, on behalf of Comprehensive for an order granting leave to appeal Justice Matheson's order dated August 11, 2008 which he made returnable on October 2, 2008 in St. Catharines. He included in what he styled an "Appeal Record" this notice of motion and a notice of appeal on behalf of Venneri and Comprehensive of Justice Matheson's order dated August 11, 2008, to be heard on February 3, 2009 in Hamilton.

Discussion

[14] The rule governing an appeal from an interlocutory order of a judge is as follows:

Motion for Leave to Appeal

62.02 (1) Leave to appeal from interlocutory order of a judge -- Leave to appeal to the Divisional Court under clause 19 (1) (b) of the Act shall be obtained

from a judge other than the judge who made the interlocutory order. O. Reg. 171/98, s. 23 (1).

...

Time for Service of Motion

(2) The notice of motion for leave shall be served within seven days after the making of the order from which leave to appeal is sought or such further time as is allowed by the judge hearing the motion. O. Reg. 14/04, s. 34 (1).

Hearing Date

(3) The notice of motion for leave shall name the first available hearing date that is at least three days after service of the notice of motion. R.R.O. 1990, Reg. 194, r. 62.02 (3).

Grounds on Which Leave May Be Granted

(4) Leave to appeal shall not be granted unless,

(a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or

(b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted. R.R.O. 1990, Reg. 194, r. 62.02 (4).

Motion Record

(5) On a motion for leave, the requirement of rule 37.10 respecting a motion record may be satisfied by,

(a) requisitioning that the motion record used on the motion that gave rise to the order from which leave to appeal is sought be placed before the judge hearing the motion for leave; and

(b) serving and filing a supplementary motion record containing the notice of motion for leave to appeal, a copy of the order from which leave to appeal is sought and a copy of any reasons given for the making of the order as well as a further typed or printed copy of the reasons if they are handwritten. R.R.O. 1990, Reg. 194, r. 62.02 (5).

Factums Required

(6) On a motion for leave, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party. O. Reg. 14/04, s. 34 (2).

(6.1) The moving party's factum shall be served at least four days before the hearing. O. Reg. 14/04, s. 34 (2).

(6.2) The responding party's factum shall be served at least two days before the hearing. O. Reg. 14/04, s. 34 (2).

(6.3) Each party's factum shall be filed, with proof of service, in the court office where the motion is to be heard, at least two days before the hearing. O. Reg. 14/04, s. 34 (2).

Reasons for Granting Leave

(7) The judge granting leave shall give brief reasons in writing. R.R.O. 1990, Reg. 194, r. 62.02 (7).

Subsequent Procedure Where Leave Granted

(8) Where leave is granted, the notice of appeal required by rule 61.04, together with the appellant's certificate respecting evidence required by subrule 61.05 (1), shall be delivered within seven days after the granting of leave, and thereafter Rule 61 applies to the appeal.

[15] I heard argument on October 2, 2008, on the motion for leave to appeal Justice Matheson's order dated August 11, 2008. I did not understand, Mr. Burns, on behalf of the plaintiffs to object to the various documents related to the appeal of Justice Matheson's order dated August 11, 2008, being treated as a motion for leave to appeal this order and the time being extended beyond seven days from the date of the decision for service. I reserved my decision until I had heard argument on the motion to extend the time for leave to appeal Justice Quinn's order dated July 17, 2008. In due course, a date was set to hear arguments on this motion and the other motions brought by the defendants on March 3 and 4, 2009. After hearing argument, I ordered a transcript of the proceedings before Justice Matheson to determine if he heard argument in relation to the application of s. 12 (2) of the *Libel and Slander Act, R.S.O. 1990.*

Motion for extension of time for leave to appeal Justice Quinn's order dated July 18, 2007

[16] Donatelli brought a motion for an order "to grant an extension of time to file an appeal from the order of the Honorable Mr. Justice J.W. Quinn regarding the motion for costs dated July 18, 2007, made in St. Catharines, Ontario", which she served on the plaintiffs on July 25, 2008, and made first returnable on August 7, 2008. This was after the argument on the motion brought by the plaintiffs before Justice Matheson for an order requiring Donatelli to satisfy her undertakings given on the examination for discovery on March 9, 2007, and for security costs. This was a revival of an attempt to appeal Justice Quinn's order first started as set out above by Donatelli filing an appeal of Justice Quinn's order to the Court of Appeal on August 20, 2007.

[17] It must be assumed that Justice Arrell endorsed the ex parte motion sometime close to its being filed on or about September 18, 2007. No satisfactory explanation is given for the lapse of 10 months (September, 2007 to August, 2008) between the time of the ex parte motion and the bringing of the motion to extend the time to appeal Justice Quinn's order (rather than to extend the time for leave to appeal which is what is required), first returnable on August 7, 2008. I stated in dialogue during argument on March 3 and 4, 2009, that I would treat this motion as a motion for leave to extend the time to appeal Justice Quinn's order. The plaintiffs, having received no motion for leave to appeal Justice Quinn's order for the payment of costs, relied on that order to apply for security for costs before Justice Matheson on July 8, 2008. To permit the time to be extended for leave to appeal Justice Quinn's order would put Justice Matheson's order in jeopardy. This would substantially prejudice the plaintiffs.

[18] Given the defendants' conduct in failing to comply with a simple and reasonable request for particulars, the plaintiffs' success on the defendants' motion for a change of venue and the multiple attendances on the plaintiffs' motion, Justice Quinn's assessment of costs in the amount of $17,400 is entirely reasonable. The defendants do not remotely satisfy any of the elements in Rule 62.02 (4) (a) and (b). The motion for leave to extend the time to appeal Justice Quinn's order dated July 18, 2007, is denied.

Leave to Appeal Justice Matheson's Order dated August 11, 2008

Order to Comply with Undertakings

[19] Regarding rule 62.02 (4)(a), no decisions conflicting with Justice Matheson's order to enforce undertakings were cited to me. Regarding rule 62.02 (4)(b) (then R. 62.02 (5)) in *Greslik v. Ontario Legal Aid Plan (Div. Ct.)* 65 O.R., the Divisional Court in the judgment of ACJHC Callaghan (as he then was) stated the following:

> This case also raises another matter of concern and significance which we propose to deal with. On applications for leave to appeal from interlocutory orders a judge is granted jurisdiction to grant leave where, inter alia (rule 62.02 (5)):
>
> > (b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.
>
> ...A judge hearing such an application must have good reason to doubt the correctness of the decision. He must also be satisfied that the matters involved are of "such importance" that in his opinion leave should be granted. We wish to draw to the attention of the members of this court and the profession at large that those words refer to matters of general importance, not matters of particular importance relevant only to the litigants. General importance relates to matters of

> public importance and matters relevant to the development of the law and the administration of justice. (Citations omitted)

[20] There can be no doubt about the correctness of Justice Matheson's decision in ordering that Donatelli comply with the undertakings given on her examination for discovery. The undertakings were reasonable, they were given at the time of the examination for discovery on March 9, 2007, and they all remained unsatisfied when the motion was argued on July 8, 2008. The issue is undoubtedly of importance to the parties. However, it was a routine motion for the enforcement of undertakings. It is of no general importance. The motion for leave to appeal this part of Justice Matheson's order is denied.

Order to Pay Security for Costs

[21] The following legislation, legal principles and rules of civil procedure are relevant:

1. *Libel and Slander Act*, R.S.O. 1990 (LSA)

> **Security for costs**
> **12.** (1) In an action for a libel in a newspaper or in a broadcast, the defendant may, at any time after the delivery of the statement of claim or the expiry of the time within in which it should have been delivered, apply to the court for security for costs, upon notice and an affidavit by the defendant or the defendant's agent showing the nature of the action and of the defence, that the plaintiff is not possessed of property sufficient to answer the costs of the action in case judgment is given favour of the defendant, that the defendant has a good defence on the merits and that the statements complained of were made in good faith, or that the grounds of action are trivial or frivolous, and the court may make an order for the plaintiff to give security costs, which shall be given in accordance with the practice in cases where a plaintiff resides out of Ontario, and the order is a stay of proceedings until the security is given. R.S.O. 1990, c. L.12, s. 12(1).
>
> **Where libel involves a criminal charge**
> (2) Where the alleged libel involves a criminal charge, the defendant is not entitled to security for costs under this section unless the defendant satisfies the

court that the action is trivial or frivolous, or that the circumstances which under section 5 entitle the defendant at the trial to have the damages restricted to actual damages appear to exist, except the circumstances that the matter complained of involves a criminal charge. R.S.O. 1990, c.L.12, s. 12(2)

2. *The Law of Defamation in Canada, second edition, volume 1 by Raymond E.*

Brown states the following:

8.3 Distinguishing Between Libel and Slander

(1) Generally

The fundamental distinction in the law of defamation rests upon a difference in the manner of expression, that is, between libel, the written word, and slander, the spoken word. A libel is generally embodied in some printed, written or physical form such as a photograph, book, magazine, newspaper, investigative report, letter, postcard or advertisement.

(2) Oral Communications as Libel

Certain oral communications have traditionally been treated as libel if it is reasonably anticipated that they will be reduced to writing and published in that form. Thus, where someone causes another to author a written publication, he may be as responsible for the libel as though he had written it himself. Where he orally furnishes information to a newspaper reporter, he may expect that it will be published in the newspaper and he is accountable as though he had written it to the larger audience. The same is true where it is dictated to a stenographer for transcription and delivery in written form, or where it is orally communicated to a telegraph office, or the telegraph office in turn sends it by morse code to an agent elsewhere to be reduced to written form.

Rule 1.02 (1)3 reads as follows:

1.02 (1) These rules apply to all civil proceedings in the Court of Appeal and in the Superior Court of Justice, subject to the following exceptions:

...

3. They do not apply if a statute provides for a different procedure.

Rule 56.01 (1) (c), (e), and (f) reads as follows:

> 56.01 (1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,
>
> ...
>
> (c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remain unpaid in whole or in part;
>
> ...
>
> (e) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent; or
>
> (f) a statute entitles the defendant or respondent to security for costs.

[22] This order was based on the failure of the defendants to pay the costs orders referred to in paragraph 11 above. In my view, Justice Matheson was correct in stating in paragraph 54 of his judgment referred to in paragraph 12 above that it was a reasonable inference that no court would hear an appeal from Justice Quinn's order dated July 18, 2007 because of the delays in perfecting the appeal. Nothing had been done to advance a motion for leave to appeal since Justice Arrell's undated endorsement on the ex parte motion dated September 18, 2007. It would be reasonable to conclude that Justice Arrell made the endorsement within one week of its being made which was over nine months prior to the argument before Justice Matheson.

[23] The police laid three charges which alleged that Donatelli between November 1, 1998, and December 31, 2000, defrauded Liberty Mutual of an amount exceeding $5,000 by billing Liberty Mutual as Dr. Rose Donatelli, PhD psychologist. The allegation was that she did not have a PhD as a psychologist. It is an admitted fact that Liberty Mutual provided information to the police which resulted in charges being laid against Rose Donatelli as set out

above. It is also an admitted fact that the crown withdrew the charges. Donatelli states that the information which Liberty Mutual provided to the police is false and that Liberty Mutual well knew that. She has provided evidence which if believed would support these propositions. It would be a reasonable conclusion that the information which Liberty Mutual supplied to the police and which resulted in criminal charges constitutes libel. Donatelli states that the widespread publication of this information through the court process destroyed her practice and has had a severe adverse affect on her life. It lies at the heart of her allegation of defamation against the plaintiffs.

[24] In *Khan v. Metroland Printing,* [2001] O.J. No.2764, the plaintiffs sued a newspaper and an individual for libel based on statements made during an election. Justice Nordheimer granted the defendants security for costs. He relied on R. 56.09 which states the following:

> 56.09 Despite rules 56.01 and 56.02, any party to a proceeding may be ordered to give security for costs where, under rule 1.05 or otherwise, the court has a discretion to impose terms as a condition of granting relief and, where such an order is made, rules 56.04 to 56.08 apply with necessary modifications.

[25] Justice Then granted the plaintiffs leave to appeal to Divisional Court ([2001] O.J. No.4272). He stated the following:

> 1. ... The plaintiff/appellants seek leave to appeal under both branches of rule 62.02(4).
>
> 2. The motions judge did not consider the applicability of the Libel and Slander Act, R.S.O. 1990, c. L.12 to this libel action but purported to award security for costs on the basis of Rule 56.09. There is good reason to doubt the correctness of the decision based on rule 1.02(1)(3) which states that the rules of civil procedure "do not apply if a statute provides for a different procedure." See: Gunn v. North York Public Library Board et al. (1977), 14 O.R. (2d) 554.

> 3. In my view, it is important for the development of the jurisprudence of this province for the Divisional Court to determine the interplay between Rule 56.09 and s. 12 of the Libel and Slander Act or whether s. 12 of the Libel and Slander Act constitutes a complete Code in libel actions to the exclusion of Rule 56.09.

[26] The Divisional Court ([2003] O.J. No. 4261) in the judgment of Justice Linhares de Sousa stated the following:

> 70 Clearly, one cannot consider the LSA as a code in the same way that one might treat the Landlord and Tenant Act. However, when one examines the LSA in its entirety and some of the legislative history and antecedent sections as provided in the Respondents' factum, one is struck by its legislative breadth. It addresses many issues that will arise as a result of a libel and slander action involving newspapers, be it the issue of damages, the requirements of the offences, evidence, defences, limitation periods, costs and, of course, interlocutory relief such as security costs. The broad scope of the LSA supports the view that the Legislature intended the question of security costs in libel and slander actions involving newspapers, such as the case at bar, to be governed entirely by s. 12 of the LSA.

It rescinded the order of Justice Nordheimer and granted leave for the defendant to bring a new motion for security for costs under s. 12 of the LSA.

[27] The Court of Appeal ([2005] O.J. No. 178) in the judgment of Justice LaForme held as follows:

> 14 I turn first to the issue of whether the Divisional Court erred in holding that the LSA precludes security costs orders under the Rules. I conclude that an order for security for costs may be made under rule 56 in cases which the LSA applies, so long as the particular sub-rule under which the order is made does not directly conflict with s. 12(1) of the LSA. In addition, I conclude that rule 56.09, which is the rule the motion judge proceeded under in this case, does not directly conflict with s. 12(1) of the LSA
>
> ...

20 Respectfully, I disagree with the Divisional Court's conclusion that an order for security costs cannot be made under Rules in cases governed by the LSA.

...

25 Rather than demonstrating an intention to create an extensive self-contained code of procedure for libel and slander cases or to signal conflict with the Rules, s. 12 of the LSA demonstrates an intention that the LSA and the Rules should operate in conjunction with one another. This conclusion follows from the words in s. 12(1): "*and the security shall be given in accordance with the practice in cases where a plaintiff resides out of Ontario.*" [emphasis added]

26 The emphasized words refer to, but do not exclude, the availability of an order for security for costs under the Rules where a plaintiff resides outside of Ontario; in addition, they expressly adopt the practice under the Rules for giving security. As such, they signal an intention to co-exist with the Rules.

...

28 As already noted, at the time s. 12(1) of the LSA was first enacted, the precursor to rule 56 applied only to plaintiffs not ordinarily resident in Ontario. However, the range of circumstances in which an order for security for costs is available under rule 56 has since expanded. Since s. 12(1) demonstrates an intention to co-exist with the Rules, I conclude that an order for security for costs may be made under rule 56 in cases to which the LSA applies, so long as the particular sub-rule under which the order is made does not directly conflict with s. 12(1) of the LSA.

29 Section 12(1) of the *LSA* provides for security for costs in libel and slander cases in the limited circumstances where:

(1) the plaintiff is not possessed of property sufficient to answer the costs of the action in case judgment is given in favour of the defendant;

(2) the defendant has a good defence on the merits and that the statements complained of were made in good faith; or

(3) the grounds of action are trivial or frivolous.

30 On the other hand the *Rules* provide for security for costs in a variety of circumstances enumerated in rules 56.01(1)(a) through (f) and 56.09.

> 31 I see no apparent conflict between s. 12(1) of the *LSA* and rule 56.09; being the specific sub-rule that the motion judge proceeded under in this case. In particular, rule 56.09 does not address the criteria for awarding security for costs under s. 12(1) of the *LSA*.
>
> 32 Although it is not strictly necessary that I decide this point, on my reading of rule 56.01, it is only sub-rule 56.01(e) that might create a direct conflict between the *Rules* and the *LSA*. The criteria for awarding security for costs under sub-rules 56.01(e) and s. 12(1) of the *LSA* are similar. However, none of sub-rules 56.01(a), (b) (c), (d) or (f) address the criteria for ordering security for costs under s. 12(1) of the *LSA*. Accordingly, it does not appear that those sub-rules create any potential for direct conflict.
>
> 33 For these reasons, I conclude that the Divisional Court erred in holding that security for costs in libel and slander actions is governed exclusively by s. 12 of the LSA.

[28] It upheld the disposition of the Divisional Court but for different reasons.

[29] What was at issue in *Khan v. Metroland Printing Publishing and Distribution Ltd.,* was the application of s. 12 (1) of the LSA. No reference was made in these decisions to s. 12 (2) of the LSA. *The Law of Defamation in Canada (supra)* states the following:

> 17.3(1)(g) If the defamatory words contain a criminal charge, and the action is not trivial, security for costs will be denied, whether the charge is made expressly or by way of innuendo. It is enough that the words may involve such a charge, since the actual meaning of the words is for the jury to decide. (see also *Smyth v. Stephenson* (1897), 17 PR 374 (Ont. H.C.); *David v. O'Breirne* (1912), 3 OWN 513 (H.C.); *Wallace v. Lawson*, 1912 2 WWE 408 B.C.)

I disagree with the submissions of the plaintiffs that the decision of the Court of Appeal in *Khan v. Metroland* is determinative of an appeal from Justice Matheson's decision.

[30] My reading of the transcript of the proceedings before Justice Matheson on July 8, 2008 does not disclose any submissions as to the relevance of LSA s. 12(2). He did state in his judgment at para. 56, "The plaintiffs are not asking for security for costs pursuant to the *Libel*

and Slander Act, but rather under Rule 56.01(1) of the *Rules of Civil Procedure* ...." However, the defendants may well have had a defence to the motion for security for costs brought against them based on s. 12(2) of the LSA. Clearly, in this case the alleged libel "involves a criminal charge" (LSA S. 12(2)). On the material before me, the counterclaim is not trivial or frivolous. In my view, given the wording of s. 12(2) of the LSA there is both good reason to doubt the correctness of Justice Matheson's decision in ordering security for costs. I am also of the opinion as was Justice Then in *Khan v. Metroland Printing* with reference to the relationship between s. 12(1) of the LSA and R. 56.09 that it is of general importance to the jurisprudence of this province that the Divisional Court determine the relationship between Rule 56.01 and s. 12(2) of the LSA. Leave to appeal is granted from that part of Justice Matheson's order which relates to security for costs.

Other Motions

[31] There is no merit to any of the other motions brought by the defendants. The motion to strike the statement of claim, or in the alternative to provide particulars, was already decided by Master Sedgwick and is res judicata. The reference in his endorsement to bringing a motion must be read in the context of his statement that further particulars can be obtained on discovery to mean a motion brought after an examination for discovery of the plaintiffs has been conducted. The defendants have not examined the plaintiffs for discovery. The plaintiffs have brought two motions and have been successful on both. There can be no merit to a motion for an order prohibiting them from bringing further motions. The transcript of the examination for discovery is certified as being correct by the reporter. No evidence was presented that it is

incorrect. If the defendants had wanted to raise this issue the time to do so was before the plaintiffs' motion for an order requiring Donatelli to comply with undertakings that she gave on her examination for discovery. These motions are dismissed.

Costs

[32] The plaintiffs may make submissions for costs in writing within 10 days of receipt of these reasons. The defendants may have 10 days to respond in writing from the date of the receipt of the plaintiffs' submissions.

P.B. Hambly J.

Released: May 8, 2009

COURT FILE NO.: 43532/03

DATE: 2009/05/08

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Liberty Mutual Insurance Company and Liberty Insurance Company of Canada

Plaintiffs

- and –

Rose Donatelli Venneri, Michael Venneri, Professional Counselling Services and Comprehensive Health Clinic Inc.

Defendants

REASONS FOR JUDGMENT

P.B. Hambly J.

Released: May 8, 2009

TAB 17

Craig v. Riocan Real Estate Investment Trust CITATION: 2015 ONSC 307
COURT FILE NO.: 9851/08
DATE: 2015-01-16

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Christine Craig and Caroline Bilotta, plaintiffs (moving)

AND: Riocan Real Estate Investment Trust, 1623415 Ontario Limited

AND: Elkin Injury Law (responding)

BEFORE: Mr Justice Ramsay

COUNSEL: Ms. Leigh Harrison-Wilson for the moving party

Mr R. Swart and Mr G. Akilie for Elkin, responding

HEARD: 2015-01-14 at Welland

ENDORSEMENT

[1] The plaintiff moved for an extension of time within which to apply for leave to appeal the order of Tucker J. dated November 19, 2014. That order settled the terms of a previous order of Maddalena J., froze some $41,000 or so of settlement funds negotiated for the plaintiffs by their new lawyer, Falconieri Munro Tucci LLP ("Falconieri Munro"), directed the assessment of fees to proceed, and placed a charge on the settlement funds in the amount of the assessed fees. The charge secures money owed to the plaintiff's former lawyers, Elkin Injury Law ("Elkin"), for fees. I dismissed the motion in open court with reasons to follow. These are they.

[2] The test on a motion to extend time is well-settled. See *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131 (Gillese JA in chambers) and *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2015 ONCA 5 (Pardu JA in chambers). The overarching principle is whether the justice of the case requires that an extension be given. Each case depends on its own circumstances, but the court is to take into account all relevant considerations, including:

(a) whether the moving party formed a bona fide intention to appeal within the relevant time period;

(b) the length of, and explanation for, the delay in filing;

(c) any prejudice to the responding parties, caused, perpetuated or exacerbated by the delay; and

(d) the merits of the proposed appeal.

[3] The merits threshold is a very low one: *Falus v. Martap Developments 87 Ltd.*, 2012 ONSC 5163 (Div. Ct, Lax J.) However, depending on the context, it seems that an extension can be denied even where there is an arguable, if dubious, appeal: see *Bratti v. Wabco Standard Trane Inc.*, [1994] O.J. No. 855 (Laskin JA in chambers).

[4] In the case at bar the delay is short and there is no prejudice, strictly speaking. However, there is no explanation for the delay and the proposed appeal has not a scintilla of merit. The conduct of the plaintiffs in delaying the assessment of Elkin's account is another feature of the context which contributes to my decision that the justice of the case requires that the extension be denied.

[5] Neither plaintiff has filed an affidavit attesting to having had any intention to appeal before the expiry of the relevant period. To the contrary, their lawyer deposes that one of the plaintiffs, Ms Craig, was out of the country from November 23 to December 4, by which time the period had expired. Ms Craig left the country three days after Tucker J.'s ruling, which was given in open court. She could have talked to her lawyer before she left, or by telephone from abroad, wherever she was. Essentially, her explanation is that she did not form the intention because she did not form the intention. That is not really an explanation; it is simply a statement of the default. As to when the second plaintiff, Ms Bilotta, might have formed the intention to appeal, there is not a word in the materials. So neither plaintiff has an explanation for the delay.

[6] A brief review of the case is apt before discussing the merits of the proposed appeal. The plaintiffs sued the defendants for a slip and fall that occurred at the shopping mall owned by them. They hired Elkin to represent them. In November 2011 they discharged Elkin. In February 2012 Elkin delivered an account for work done on the file in the approximate amount of $41,000. Elkin transferred its file to the plaintiffs' new lawyer, Falconieri Munro Tucci LLP. In return, Falconieri Munro undertook to protect Elkin's account, subject to the clients' right to an assessment. In April 2012 the plaintiffs moved for an assessment.

[7] The assessment was scheduled for January 2014. On January 17, 2014 the assessor adjourned the assessment *sine die* to await the disposition of the slip and fall action. The next day the plaintiffs, through Falconeri Munro, sued Elkin for solicitor's negligence.

[8] The slip and fall action was settled in August 2014. Neither the plaintiffs nor Falconeri Munro informed Elkin. On October 1, 2014 Elkin moved for a charging order on the settlement funds to secure their account. Maddalena J. adjourned the motion on consent to November 19, with directions requiring Falconieri Munro not to disburse the settlement funds in the mean time. Falconeri Munro did not respond to Elkin's request for approval of a draft of Maddalena J.'s order. On November 19, 2014 Elkin also moved to settle the order. The motions came on before Tucker J.

[9] Tucker J. settled the order of Maddalena J., made an order requiring Falconieri Munro not to disburse the settlement funds pending the assessment of Elkin's fees, directed the

assessment to proceed forthwith, and ordered a charge on the funds for the benefit of Elkin to the extent of the fees allowed by the assessor.

[10] The plaintiffs propose two grounds of appeal:

a. Tucker J. erred in making the charging order when the action for solicitor's negligence is outstanding, and

b. She erred in directing the assessment to proceed.

[11] The Court of Appeal settled the first point against the plaintiffs in *Hendy v. Wilson*, [1999] O.J. NO. 4134.

[12] The second point is illusory. It is the plaintiffs who want an assessment and who filed a motion to have one done. No one is stopping them. They can hardly complain that they are being forced to go ahead with a proceeding that they brought. The assessment is being performed for their benefit. They can go ahead with it or waive it. It cannot be used to delay paying Elkin's bill.

[13] Nor is it a concern that the assessment could lead to a duplication of evidence that will be called in the solicitor's negligence action. The assessor will be concerned with the time spent by the lawyers, the work done, and the amounts charged therefor, and whether they were reasonable given the usual considerations. He will not be deciding whether Elkin performed their obligations in a competent manner or whether they overlooked relevant avenues of investigation. He will not be assessing damages.

[14] In any event, the plaintiffs have not produced Tucker J.'s reasons. They are not entitled to argue error without producing the reasons for the decision. I was told in oral argument that the reasons are not available for transcription. But they are. I got an audio recording of the oral ruling within hours of asking for it. It is perfectly audible and could have been transcribed if it had been ordered.

[15] There is no issue of any importance to anyone but the parties. There is no prospect of leave to appeal being granted, and no prospect of success on the appeal.

[16] Finally, the affidavit of Mr Elkin and the supporting documents show a pattern of stalling on the part of the plaintiffs and their lawyer, in the face of the lawyer's undertaking to protect Elkin's account. It is disturbing that Falconeri Munro did not advise Elkin in a timely way that the slip and fall had been settled, that they agreed to represent the plaintiffs on the solicitor's negligence action in the face of their undertaking to protect the account and that they did not cooperate in settling Maddalena J.'s order. I doubt the *bona fides* of the proposed appeal. It strikes me as another stalling tactic. This, too, is a factor to be considered.

[17] Having considered these factors I decided that the justice of the case required the extension to be denied.

J.A. Ramsay J.

Date: 2015-01-16

TAB 18

See para. 13

COURT OF APPEAL FOR ONTARIO

CITATION: Nguyen v. Economical Mutual Insurance Company, 2015 ONCA 828
DATE: 20151130
DOCKET: M45641 M45765

Hourigan J.A. (In Chambers)

BETWEEN

Binh Thi Nguyen

Plaintiff
(Moving Party)

and

Economical Mutual Insurance Company,

and Dr. Monte Bail

Defendants
(Respondent Parties)

Binh Thi Nguyen, acting in person

Catherine Korte and Matthew W. Malcolm, for the respondent Economical Mutual Insurance Company

Jacqueline Cole and Elder C. Marques, for the respondent Dr. Monte Bail

Heard: November 27, 2015

ENDORSEMENT

Introduction

[1] The moving party, Binh Thi Nguyen, brings a motion for an extension of time to serve and file her notice of appeal. The putative respondents to the

appeal, Economical Mutual Insurance Company ("Economical") and Dr. Monte Bail, resist the motion. Dr. Bail brings a cross-motion seeking a stay of the appeal and/or security for costs, if the motion for an extension is granted.

[2] In considering Ms. Nguyen's motion, I review below: the background facts of the case, the legal principles applicable to a motion to extend the time to serve and file a notice of appeal, and the application of those legal principles to the facts of this case.

Background Facts

[3] Ms. Nguyen commenced an action against Economical and Dr. Bail alleging that, in the context of a claim she made for statutory accident benefits, they prepared an Insurer's Assessor report which libelled her. This claim is one of several legal proceedings she has commenced against Economical and related entities arising from the denial of her statutory accident benefits claim.

[4] The parties were unable to agree to a discovery plan and Ms. Nguyen brought a motion before Justice Stinson on November 21, 2014 to impose a discovery plan. She was unsuccessful on that motion. Justice Stinson accepted the discovery plan proposed by Dr. Bail, with two minor exceptions. Ms. Nguyen delivered a notice of appeal from that order, but the appeal was later abandoned.

[5] Ms. Nguyen did not comply with Justice Stinson's order and counsel for Economical and Dr. Bail advised her that they would bring a motion to

stay/dismiss her action for non-compliance with that order. Ms. Nguyen refused to provide her availability for such a motion, so a case conference was held in front of Master Pope on May 7, 2015 to set a timetable. Ms. Nguyen did not attend the case conference and a timetable was ordered by the master in her absence.

[6] On June 3, 2015, Ms. Nguyen brought an unsuccessful motion before Justice Perell to vary or set aside Justice Stinson's order. The defendants were awarded costs of $2,000 each, in any event of the cause.

[7] On June 24, 2015 the defendants' motion to stay/dismiss the action was heard before Justice Faieta. On the morning of the motion, Ms. Nguyen advised that she would not attend because she "she had been legally advised" not to do so. The motion proceeded in her absence and an order was made that Ms. Nguyen's action would be dismissed unless she complied with Justice Stinson's order and paid each defendant $2,000 costs by July 17, 2015. Pursuant to that order, the action would be dismissed if the defendants provided an affidavit after July 17, 2015 advising the court that Ms. Nguyen remained non-compliant with Justice Stinson's order. Copies of the endorsement and Justice Faieta's order were provided to Ms. Nguyen.

[8] Rather than comply with the order of Justice Faieta, Ms. Nguyen brought an emergency motion before Justice Corrick on July 15, 2015 to set aside Justice

Stinson's order. In support of that motion she swore an affidavit that included a claim that she was in financial hardship. A notice of examination was served upon Ms. Nguyen to cross-examine her on her affidavit. Ms. Nguyen failed to attend for cross-examination. Justice Corrick dismissed the motion, finding that it was an abuse of process, and ordered Ms. Nguyen to pay costs of $3,000 to each defendant.

[9] On July 21, 2015, Dr. Bail's counsel filed an affidavit with the court, sworn July 20, 2015, confirming that Ms. Nguyen remained non-compliant with Justice Stinson's order. Justice Faieta dismissed Ms. Nguyen's action by order dated August 26, 2015, which was entered the next day. On August 28, 2015, counsel for Dr. Bail sent a copy of Justice Faieta's issued and entered order to Ms. Nguyen by email.

[10] On September 3, 2015, Ms. Nguyen's daughter wrote to opposing counsel to canvass dates for a motion to set aside Justice Faieta's order of August 26, 2015. She was advised by counsel that the action was dismissed. A similar exchange of emails occurred on September 9, 2015 and September 29, 2015. In both cases, Ms. Nguyen's daughter attempted to set a date for a motion to set aside Justice Faieta's order and she was told by counsel that the action had been dismissed.

[11] On October 7, 2015, Ms. Nguyen wrote to counsel seeking their consent for the late filing of her notice of appeal of Justice Faieta's order dated October 26, 2015. That consent was not forthcoming, necessitating this motion.

Legal Principles

[12] With that factual background in mind, I turn to the test for an extension of time for the service and filing of a notice of appeal. Pursuant to r. 3.02(1), the court may order an extension or abridgment of time on such terms as are just. The following five factors are relevant:

> (1) whether the appellant formed an intention to appeal within the relevant period;
>
> (2) the length of, and explanation for delay;
>
> (3) the prejudice to respondent;
>
> (4) the merits of the appeal; and
>
> (5) whether the "justice of the case" requires it.

See *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131, at para. 15, and *Howard v. Martin*, 2014 ONCA 309, at para. 26.

[13] When considering the merits of the appeal, it is not with a view to determining whether the appeal will succeed, but only with a view to determining whether the appeal has so little merit that the court could reasonably deny the important right of appeal: *Issai v. Rosenzweig*, 2011 ONCA 112, at para. 10, and

Duca Community Credit Union Ltd. v. Giovannoli (2001), 142 O.A.C. 146 (C.A.), at para. 14. The merits of a proposed appeal can be decisive on a motion to extend the time for filing. Even if the other factors militate against extending time, the merits may be so significant as to justify extending time: *Howard*, at para. 36. Similarly, even if other factors militate in favour of granting an extension, where the appeal is clearly without merit the motion will be denied: *1250264 Ontario Inc. v. Pet Valu Canada Inc., 2015 ONCA 5*, at para.7.

Application of Legal Principles

[14] There is no evidence that Ms. Nguyen intended to appeal Justice Faieta's order of August 26, 2015 within 30 days of the making of that order. It is clear that she understood that an appeal was the appropriate course of action. She had previously delivered a notice of appeal from the order of Justice Stinson, which appeal she later abandoned. Moreover, at the hearing before Justice Corrick on July 13, 2015, Justice Corrick told Ms. Nguyen repeatedly that a motion to set aside an order was not the correct procedure and that if she disagreed with an order the proper course of action was to appeal. Despite her knowledge that an appeal was the appropriate remedy, Ms. Nguyen declined to pursue that remedy within the time period in which to do so. Instead, she sought to schedule a motion to set aside Justice Faieta's order.

[15] With respect to length of the delay, it was relatively short. However, no explanation was offered to explain the delay. This is similar to the situation in *Ontario Wealth Management v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, where the court dismissed a motion for a time extension to appeal where no explanation for the delay was provided.

[16] I am satisfied that there is prejudice to the respondents if the relief is granted. To date, there are four costs orders against her by four different Justices of the Superior Court. There is a real risk that the respondents will not recover the existing costs awards or any future costs awards. In addition, the respondents ought not to be required to continue in litigation in which Ms. Nguyen refuses to abide by the court process.

[17] With respect to the merits of the appeal, there is nothing in the material filed on this motion that discloses the grounds of the purported appeal. Justice Faieta made his order of June 24, 2015, exercising his discretion on a full record. On my view of the record, there is nothing to suggest that he made any error in the exercise of his discretion. To the contrary, his order appears to have been well justified given Ms. Nguyen's refusal to comply with Justice Stinson's order. The order of August 26, 2015, was simply the logical follow up from his earlier order. I note as well that Ms. Nguyen has not filed any material suggesting that her underlying appeal is meritorious. While the merits test on this motion is not a high threshold, it has not been met in this case.

[18] In summary, none of the first four factors militate in favour of granting an extension. The question becomes whether the justice of the case favours an extension? The answer to that question is no. Ms. Nguyen has engaged in a course of conduct throughout the litigation that demonstrates a lack of respect for court orders and the court process. Costs orders remain outstanding. To date, she is still not in compliance with the order of Justice Stinson, including the production of documents that the court identified as relevant in the discovery plan it imposed on the parties. She has failed to attend, without good reason, for cross-examination and on a case conference. She has repeatedly brought motions in the Superior Court that are clearly collateral attacks on orders that she has not appealed and ignored the warnings of the court that the motions are an abuse of process. This conduct is relevant to whether the justice of the case favours an extension: *Howard* at para. 54. In my view, nothing in Ms. Nguyen's conduct supports the granting of an indulgence by this court and the justice of the case does not favour an extension.

Disposition

[19] The motion is dismissed. Given my ruling on the motion, it is unnecessary to consider the cross-motion, which is dismissed.

[20] The respondents, as the successful parties, are entitled to their costs of the motion. Ms. Nguyen submitted that she has no money to pay a costs award.

However, given her refusal to attend on a cross-examination on this point, it is not possible for me to assess the accuracy of that statement. I fix costs at $1,500, for each of Economical and Dr. Bail, inclusive of fees, disbursements, and applicable taxes. These sums are entirely reasonable and well below the costs actually incurred by Economical and Dr. Bail. The costs are payable by Ms. Nguyen within 30 days. Ms. Nguyen's approval of the form and content of the draft order is dispensed with.

"C. W. Hourigan J.A."

TAB 19

COURT FILE NO.: 524/08
DATE: 20081119

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

08 336 055

B E T W E E N:	
BELL EXPRESSVU LIMITED PARTNERSHIP, ECHOSTAR SATELLITE LLC, ECHOSTAR TECHNOLOGIES CORPORATION and NAGRASTAR LLC Plaintiffs	*Christopher D. Bredt*, for the Plaintiffs
- and -	
DAVID MORGAN a.k.a DAVID EDWARD MORGAN, DAVID MORGAN c.o.b. as www.modchipit.com, DAVID MORGAN c.o.b. as MODCHIPIT, MODCHIPIT, JOSEPHINE MORGAN, SHARON ALBERTA MORGAN, JOHN DOE, and other persons unknown who have conspired with the named Defendants Defendants	*Ian W. M. Angus*, for the Defendants
	HEARD at Toronto: November 19, 2008

BELLAMY J.: (Orally)

[1] The test for granting leave to appeal to the Divisional Court from this interlocutory order of Justice Wilton-Siegel is an onerous one. As far as I am concerned, the defendants have failed to meet the test in rule 62.04(b) and, for the following reasons, leave to appeal is denied.

[2] First, I see no good reason to doubt the correctness of the motion judge's decision. This was a well-reasoned decision, in which Wilton-Siegel J. applied the proper legal principles with respect to the review of all the facts and issues before him. He then applied the correct test established in the Supreme Court of Canada's decision in *Celanese Canada Inc. v. Murray Demolition*, [2006] 1 S.C.R. 189.

[3] Second, this appeal does not raise matters that are of general importance. This decision is essentially a factual one. The issues raised in it are presumably of importance to the parties, although I must confess to being surprised that the defendants waited a year after the Anton Piller Order was executed to even bring their motion. In any event, the issues raised lack general legal importance, they do not transcend the immediate interests of the specific facts of this case, they do not raise issues of general public interest, and, in the final analysis, they have very little jurisprudential value.

COSTS

[4] I have endorsed the Motion Record: "For oral reasons given, leave to appeal is denied. Costs payable by the defendants forthwith in the amount of $7,000.00, inclusive of GST and disbursements".

BELLAMY J.

Date of Reasons for Judgment: November 19, 2008

Date of Release: November 24, 2008

COURT FILE NO.: 524/08
DATE: 20081119

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

B E T W E E N:

BELL EXPRESSVU LIMITED PARTNERSHIP, ECHOSTAR SATELLITE LLC, ECHOSTAR TECHNOLOGIES CORPORATION and NAGRASTAR LLC

Plaintiffs

- and -

DAVID MORGAN a.k.a DAVID EDWARD MORGAN, DAVID MORGAN c.o.b. as www.modchipit.com, DAVID MORGAN c.o.b. as MODCHIPIT, MODCHIPIT, JOSEPHINE MORGAN, SHARON ALBERTA MORGAN, JOHN DOE, and other persons unknown who have conspired with the named Defendants

Defendants

ORAL REASONS FOR JUDGMENT

BELLAMY J.

Date of Reasons for Judgment: November 19, 2008

Date of Release: November 24, 2008

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TAB 20

CITATION: Sweda Farms Ltd. et al. v. Egg Farmers of Ontario et al, 2014 ONSC 3797
COURT FILE NO.: 426/13
DATE: 20140707

SUPERIOR COURT OF JUSTICE – ONTARIO

DIVISIONAL COURT AT TORONTO

RE: Sweda Farms Ltd., Best Choice Eggs Ltd. and Tilia Transport Inc., Plaintiffs/Respondents

AND:

Egg Farmers of Ontario, Harry Pelissero, Burnbrae Farms Limited, Burnbrae Holdings Inc., Maple Lynn Foods Limited, L.H. Gray & Son Limited, William Harding Gray, John Klei and the Estate of Johannes Klei, Defendants

BEFORE: Kiteley J.

COUNSEL: *Donald R. Good,* for the Plaintiffs/Respondents

Allison Webster, for the Defendants/Moving Parties L.H. Gray & Son Limited and William Harding Gray (the L.H. Gray defendants)

HEARD: May 26, 2014

ENDORSEMENT ON MOTION FOR LEAVE TO APPEAL COSTS

[1] In an earlier endorsement[1] I dismissed the motion by the L.H. Gray defendants for leave to appeal an order dismissing their motion for summary judgment. On May 26, 2014 I heard submissions on their motion for leave to appeal the order as to costs that the Justice Carole J. Brown had made[2]. At the conclusion of submissions, I indicated that I dismissed the motion for leave to appeal the costs order, with reasons to follow. These are the reasons.

[2] The plaintiffs had delivered a costs outline that reflected full indemnity costs (described as 90% of the total) in the amount of $109,000 or partial indemnity costs in the amount of

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[1] 2014 ONSC 3016

[2] 2013 ONSC 7160

$86,321.62. The motions judge ordered the L.H. Gray defendants to pay costs to the plaintiffs in the amount of $55,000 all inclusive.

[3] Counsel for the L.H. Gray relies on both rule 62.02(4)(a) and (b) and concedes that, with respect to an appeal of a costs award, leave should only be granted in obvious cases, where there are strong grounds upon which the appellate court could find that the judge erred in exercising her discretion and that leave is rarely granted because of the high degree of deference accorded to the judge at first instance.[3]

[4] Counsel provided copies of the costs outline that had been submitted to the motions judge along with the detailed reply costs submissions and the authorities on which the L.H. Gray defendants relied. It is the case that in response to the costs outline, counsel for the L.H. Gray defendants made a number of submissions with respect to the level of recovery, the "grossly excessive" hours spent on the motion for summary judgment; the lack of itemized dockets for fees; the inappropriate inclusion of travel and accommodation costs; the lack of detail for a counsel fee of $10,000; the fees charged for a second counsel who did not participate in the motion; and other concerns.

Analysis

[5] I do not agree that the decision of the motions judge conflicts with other decisions. It is very difficult to argue conflict between and among costs decisions on motions for summary judgment because the applicable factors and the variables mean that comparison is not useful. It may be that the amount awarded appears to be higher than in other motions for summary judgment. But there is no conflict in the context of rule 62.02(4)(a).

[6] I am also not persuaded that it is desirable for leave to appeal to be granted. In our system where motions for summary judgment are routine, the broad discretion of the motions judge to order costs must be respected unless it is obvious that the judge erred. It is not obvious in this case.

[7] Counsel argues that there is good reason to doubt the correctness of the decision for various reasons including the failure to identify the level of recovery of costs and, based on the succinct reasons contained in the endorsement, the failure to consider the detailed submissions of counsel for the L.H. Gray defendants referred to above. It is the case that the motions judge did not specify the level of recovery. But it is an inference one can readily draw from an amount that is approximately 50% of the full indemnity costs, that an award of substantially less than partial indemnity costs was made. Furthermore, while the motions judge did not specifically refer to each of the challenges to the costs outline, she summarized them and then rationalized her award

[3] 2156384 Ontario Inc. v. C & K Property Management Inc., 2012 ONSC 6759

on the basis of the application of the factors in rule 57.01. I am not persuaded that there is good reason to doubt the correctness of the decision.

[8] In order to meet the criterion of "general importance" in rule 62.02(4)(b), the importance must transcend the interests of the immediate parties to the litigation. I understand the submission that motions for summary judgment and the costs associated with them are matters that transcend the interests of the parties to the litigation, particularly following the decision of the Supreme Court in *Hryniak v Mauldin*[4]. But the motion for leave creates a gatekeeping function to ensure that only appeals that do transcend the interests of the litigants receive the attention of a three judge panel of the Divisional Court. I am not persuaded that this is such a case.

ORDER TO GO AS FOLLOWS:

[9] The motion for leave to appeal is dismissed. The amount of costs having been agreed subject to success, the L.H. Gray defendants shall pay to the plaintiffs costs in the amount of $5000 all in.

Kiteley J.

Date: July 2014

[4] 2014 SCC 7

TAB 21

CITATION: 1554366 Ontario Inc. v. Fryett, 2015 ONSC 5089
COURT FILE NO.: DC-15-0059-00ML
DATE: 2015-08-12

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
1554366 Ontario Inc.	Yadvinder S. Toor, for the Plaintiff
- and -	
James Fryett Architect Inc. and Harrington Construction Inc.	Charles Simco and Megan Marrie, for the Defendant
	HEARD: July 13, 2015

RULING

M. J. Donohue, J.

[1] This motion for leave to appeal was heard by way of written submissions.

[2] The Defendant, Fryett, seeks leave to appeal to the Divisional Court from a motion involving the interlocutory order of LeMay, J. dated May 25, 2015. He

dismissed the Defendant's motion seeking an order for security for costs pursuant to Rule 56.01(1)(d).

[3] Rule 56.01(1)(d) provides that the Court has discretion to award security for costs where the plaintiff is a corporation and there is good reason to believe that the Plaintiff has insufficient assets in Ontario to pay the costs of the defendant.

[4] The Defendant sought an order for $200,000 for security for costs on the basis that the Plaintiff, an incorporated company, had liabilities in excess of its assets.

[5] The most significant liability cited by the Defendant was a shareholder loan of $1,487,793 shown as a debt on the financial statements.

[6] The Plaintiff argued that the shareholder loan was equity as stated by the principal shareholder, Mr. Dhaliwal, in his affidavit. The Court accepted this evidence, that it was equity to the company.

[7] Excluding the shareholder loan as an asset, the justice concluded, on the facts, that there was $400,000 in assets after other debts were satisfied and that the company had an annual income of approximately $100,000. On that basis

he found the plaintiff company retained sufficient assets to meet an award for costs and denied the motion.

Test for Leave to Appeal to Divisional Court

[8] The test for granting leave to appeal is set out under Rule 62.02(4) and is not easily granted. Leave shall not be granted unless either Rule 62.02(4)(a) or Rule 62.02(4)(b) are satisfied. Each involves a two-part test and in each case, both aspects of the two-part test must be met before leave is granted.

[9] Rule 62.02(4)(a) allows for leave where there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted.

[10] Rule 62.02(4)(b) allows for leave where there appears, to the judge hearing the motion, good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

[11] In considering whether there is good reason to doubt the correctness of the decision the court is to "ask itself whether the correctness of the decision is open to "very serious debate" and, if so, is it a decision that warrants resolution

by a higher level of judicial authority". See *Brownhall v. Canada* 80 O.R. (3d) 91 para 30.

Analysis

[12] The defendant cited the decision of *Unisource Canada Inc. v. Hongkong Bank of Canada*, [1998] O.J. No. 5586 (Ont. Ct-Gen Div.)(QL) as standing for a conflicting decision on the treatment of shareholder's loans. In that decision there was discussion as to whether the loan was a current liability or a long-term debt and determined it was a secured debt to the shareholders. It was nonetheless described as a liability.

[13] In this case, the justice did not set out, in his reasons, what assets were totalled and what liabilities were deducted such that I find it unclear what all is considered. For this reason it is desirable that leave to appeal be granted.

[14] The defendant, therefore, has grounds for leave to appeal under Rule 62.02(4)(a).

Conclusion

[15] Accordingly, leave to appeal is granted.

M. J. Donohue, J.

Released: August 12, 2015

CITATION: 1554366 Ontario Inc. v. Fryett, 2015 ONSC 5089
COURT FILE NO.: DC-15-0059-00ML
DATE: 2015-08-12

SUPERIOR COURT OF JUSTICE – ONTARIO

1554366 Ontario Inc.

Plaintiff

- and -

James Fryett Architect Inc. and Harrington Construction Inc.

Defendant

RULING

M.J. Donohue, J.

Released: August 12, 2015

TAB 22

CITATION: McDonald v. The United State of America, 2014 ONSC 5819
COURT FILE NO.: 11-51871
DATE: 20141008

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
SANDRA MCDONALD	)	
Plaintiff	)	Bijon Roy/François Larocque, for the Plaintiff
– and –	)	
THE UNITED STATES OF AMERICA	)	George G. Vuicic and Cheryl A. Waram, for the Defendant
Defendant	)	
	)	**HEARD:** August 22, 2014

REASONS FOR DECISION

BEAUDOIN J.

[1] The Plaintiff brings this motion seeking leave to appeal the decision of Justice Ray dated March 12, 2014 setting aside the Default Judgment that the Plaintiff had obtained against the Defendant.

Background

[2] The Plaintiff was previously employed for 29 years with the Defendant, a foreign state under the *State Immunity Act*, RSC 1985, c. S-18 ("*SIA*"). The Plaintiff commenced an action on July 14, 2011 for wrongful dismissal and ultimately obtained default judgment on July 17, 2012 after the Defendant failed to defend the claim for more than five months after it was served pursuant to the *SIA*.

[3] In granting the Defendant's motion setting aside the default judgment, Justice Ray expressly rejected the Plaintiff's argument that subsection 10(4) of the *SIA*, which provides that

foreign states seeking to have a default judgment set aside or revoked may do so within 60 days after the service of the judgment, imposes a mandatory time limitation barring the Defendant's motion. At paragraph 9 of his decision, Justice Ray concluded:

> 9 The Defendant contends that the SIA provides that the Defendant was required to move within 60 days of the certificate from DFAIT to set aside the Judgment, and that its failure is fatal to its motion to set aside[4]. I accept that the use of 'may' is usually permissive and that the permissive 'may' is an odd choice in a statute that is intended to carve out a code for dealing with the usual rule for state immunity. The inference that a motion to set aside brought 'after' 60 days is therefore impermissible does not therefore follow. This provision on its plain reading is intended to set out a procedural guideline for states against whom a default Judgment had been obtained. It would be strange if a foreign state were given more limited rights than would be available to a domestic Defendant against whom a default Judgment had been obtained. The Ontario rules permit evidence to be adduced to explain delay without a mandatory time limit. The use of 'may' in its permissive sense is consistent with these rules, and the inference that it is to be given a mandatory meaning fails. I do not accept the Defendant's argument on this point.

Analysis and Discussion

[4] Rule 62.02 (4) of the *Rules of Civil Procedure* set out the grounds on which leave to appeal may be granted. It provides:

> (4) Leave to appeal shall not be granted unless,
>
> (a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or
>
> (b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted. R.R.O. 1990, Reg. 194, r. 62.02 (4).

[5] The provision of the *SIA* in issue reads as follows:

> (4) a foreign state may, within 60 days after the service on it of a certified copy of a judgment under subsection (2), apply to have the judgment set aside or revoked.

Is there a conflicting decision?

[6] The Plaintiff maintains the "conflicting decision" requirement is met by showing that the Court applied a different legal principle or interpretation of a statutory provision than in other decisions. In the present case, the Plaintiff argues Justice Ray's reasons conflict with the approach and other decisions[1] to interpreting and applying the *SIA*'s procedural provisions and their interaction with the *Rules of Civil Procedure*.

[7] The Plaintiff argues that Justice Ray's analysis relied on different principles of statutory interpretation concerning the use of the term "may" in the provision at issue and interprets the *SIA* by reference to and in the context of Ontario's *Rules of Civil Procedure*. The Plaintiff cites case law from Ontario and Québec[2] that have held that procedural rules established under the *SIA* do not augment corresponding provisions under the rules, but instead, displace the ordinary procedural requirements for litigation involving foreign states. Moreover, the Plaintiff maintains that Justice Ray's approach to the *SIA* conflicts with the reasoning in other Canadian jurisprudence on this point.

[8] The Defendant agrees that the accepted test to establish a conflict between two court decisions is whether there is a difference in the principles chosen to guide the decisions.[3] The Defendant notes that the Plaintiff relies on decisions dealing with section 9 of the *SIA* (manner in which service can be effective on a foreign state) and one decision dealing with section 10(1) of the *Act* (minimum waiting time prior to obtaining default judgment).

[9] The Defendant argues that the law is clear that a decision based on different circumstances is not a conflicting decision for the purposes of granting leave to appeal. The Defendant argues that since the decisions relied upon by the Plaintiff do not engage section 10(4) of the *SIA*, there are no conflicting decisions. Moreover, the Defendant notes that there are no

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[1] *Brownhall v. Canada (Ministry of Defence)* (2006), 80 O.R. (3d) 91 (Ont. Sup. Ct.); *Andrushko v. Ontario*, 2010 ONSC 1780, [2010] O.J. No. 1201.
[2] *Softrade Inc. v. United Republic of Tanzania (Ministry of Water and Livestock Development*, [2004] O.T.C. 482, [2004] O.J. No. 2325 (Ont. Sup. Ct.).
[3] *Comtrade Petroleum Inc. v. 490300 Ontario Ltd.* (1992), 7 O.R. (3d) 542 at para 7 (Div. Ct.).

reported decisions in Canada interpreting or applying section 10(4) of the *SIA*. For this reason alone, the Defendant argues that the first available ground for granting leave to appeal is not met.

[10] In addition, the Defendant argues that the principles guiding the decisions relied upon by the Plaintiff are in fact consistent with the analysis undertaken by Justice Ray. In each of the four decisions regarding service upon a foreign state, the Courts determine that service is not effective unless and until performed in accordance with section 9 of the *SIA*. As stated at para. 10 in the *Softrade* decision cited by the Plaintiff, to allow otherwise would be to contradict the principle of state immunity expressed in section 3 of the *SIA*.

[11] In *Cegir Inc. Banque alegerienne de developpement*, [1989] R.J.Q. 1965, 1989 CarswellQue 1715, also cited by the Plaintiff, the Court held at para 80 that the purpose of the *SIA* is to ensure that a foreign state receives a process addressed to it in the context of the immunity it enjoys. The Court's concern was for the protection of foreign states that enjoy general immunity. The Defendant states that this is entirely consistent with Justice Ray's interpretation of section 10(4).

[12] The Defendant adds that the same principle is found in another decision cited by the Plaintiff; namely, *Croteau v. United States of America (Federal Trade Commission)*, [2006] O.J. No. 158, 22 C.P.C. (6th) 320 (Ont. C.A.). There, the Court gave effect to the mandatory waiting time under section 10(1) which ensured that foreign states had a minimum level of protection, not necessarily available to regular litigants.

Correctness and public importance test Rule 62.04 (b)

[13] With respect to this ground of appeal, the Plaintiff correctly cites established case law that it is not necessary to demonstrate that the impugned decision is wrong for even probably wrong. Rather, it is sufficient to show that there is good reason to doubt the correctness of the decision. To this end, the Court must simply consider whether the correctness of the decision is open to various serious debate and, if so, whether resolution by higher level of judicial authority is warranted.

[14] The Plaintiff argues that there is good reason to doubt the correctness of Justice Ray's decision, as it is based on misinterpretation and misapplication of specific provisions of the *SIA*, as well as its overall purpose of affording procedural protections to those involved in litigation with foreign states. Moreover, the Plaintiff maintains that Justice Ray's decision misinterpreted or misapplied established principles of statutory interpretation and other jurisprudence regarding the interaction between the procedural provisions of the *SIA* and the *Rules of Civil Procedure*.

[15] The Plaintiff further argues that the interpretation, application, and interaction of the *SIA* with the *Rules of Civil Procedure* is of central importance to any litigation involving foreign states, and that parties must be afforded clarity and consistency in banality in circumstances where the *SIA*'s procedural provisions are engaged. For this reason, the Plaintiff maintains that leave to appeal this matter to the Divisional Court ought to be granted.

[16] The Plaintiff states that Justice Ray's decision is based on an interpretation and application of the *SIA* that does not comport with principles of statutory interpretation or the scheme and object of the act. The Plaintiff relies on *Sullivan and Driedger on the Construction of Statutes* 4th ed. (Markham: Butterworths, 2002) at 1, that states that the words of an act are to be read in their entire context in the grammatical and ordinary sense, harmoniously with the scheme and object of the act in accordance with the intention of Parliament.

[17] The Plaintiff maintains that the *SIA*'s purpose is to confirm and codify a departure from the broad, absolute approach to state immunity under the common law and to move toward a more modern and restrictive notion of state immunity. The Plaintiff relies on the House of Commons common debates prior to the enactment of the *SIA* and argues that it is clear that Parliament's intent in enacting the *SIA* was to ensure that rules of procedure for litigation involving foreign states afford both clarity and fairness to individual litigants.

[18] Since procedural rules vary from province to province, the Plaintiff argues that a federal statute applicable to all litigation involving foreign states in any Canadian court cannot be interpreted by reference to anyone set of provincial rules of civil procedure. The Plaintiff argues that this would lead to different results depending on each province's rules of procedure.

[19] The Plaintiff concludes that the *SIA* must be read as a comprehensive procedural code that reflects Canada's adherence to the principle of restrictive immunity, balancing the need to respect the rights of foreign states operating within Canada by giving litigants in Canada the maximum rate of recovery, right of action and the right to assert their interests in Canadian courts.

[20] The Defendant argues that section 10(4) permits a foreign state to obtain an order setting aside a default judgment within 60 days, and if the foreign state does so, the default judgment will be set aside without further condition. [Emphasis added]. The Defendant maintains that there is nothing in section 10(4) that prevents provinces from establishing procedural rules which provide an additional basis for setting aside a default judgment such as provided under rule 19.08 of Ontario's *Rules of Civil Procedure*.

[21] Contrary to the Plaintiff's submission, the Defendant argues that this interpretation is the only one which accords with the text of the provision, in both languages, and the context and the purpose of the *SIA* as a whole. On the issue of statutory interpretation, the Defendant accepts the principle as cited by the Plaintiff and as articulated in the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1988] 1. S.C.R. 27.

[22] The Defendant submits that the Plaintiff's interpretation misstates the purpose of the *SIA* and the intention of Parliament, while ignoring the overall context of the *Act* and the relevant provisions at issue. The Defendant puts particular emphasis on the purpose of the *SIA* which is stated expressly in its preamble: "An act to provide for state immunity in Canadian courts".

[23] The Defendant maintains that the intent of the *Act* is clear: to codify the general immunity of foreign states before Canadian courts, as it already existed at common law, subject to certain enumerated activities which are excepted from immunity. Contrary to the argument put forward by the Plaintiff, the Defendant argues that there is nothing in the *SIA* that codifies an intent to give citizens express protections against foreign states. The intent was not to place foreign states on weaker footing in civil litigation than ordinary litigants. The Defendant argues that section 17 of the *SIA* provides for states to have at least as many procedural rights as regular litigants under local rules of procedure.

[24] As to the references to the debates of Parliament regarding the enactment of the *SIA*, the Defendant notes that none of the passages cited by the Plaintiff refer to section 10(4) and furthermore, the Defendant maintains that the Plaintiffs' submissions misrepresent the subject of the parliamentary debate. The Defendant emphasizes that nowhere in the debates did a member of Parliament state that foreign states should be given more restrictive rights than ordinary citizens in responding to litigation.

[25] The Defendant then refers to other sections of the SIA which confer privileges on foreign states.

1. Section 3(2) ensures that a foreign state will enjoy its immunity even if it does not respond to an action.
2. Section 9 ensures that a foreign state can only be served in a very specific manner, namely, by the Department of Foreign Affairs, Trade and Development or by some other method to which it expressly agreed.
3. Section 10(1) establishes a minimum waiting period of 60 days before a litigant can obtain a default judgment against a foreign state
4. Section 11 prohibits courts from imposing certain kinds of orders against foreign states: including injunctions, orders for specific performance in the recovery of land or property. *The Defendant notes that the default judgment which the plaintiff seeks to reinstate contains orders of this nature.*
5. Even if judgment is rendered against a foreign state, section 12 protects its property from attachment and execution, arrest, detention, seizure and forfeiture subject to narrow exceptions.
6. Section 13 protects a foreign state from any court imposed penalties or fines arising out of the state's failure or refusal to produce documents or information in the course of legal proceedings.

[26] The Defendant argues that these provisions demonstrate that the *SIA* was intended to codify and guarantee special privileges for foreign states before Canadian courts, subject only to limited excepted activities. The Defendant states that an interpretation of section 10(4) which also confers a special privilege to foreign states is consistent with the scheme of the rest of the A*ct*, and more importantly, the Defendant argues that if section 10 bore the interpretation proposed by the Plaintiff, it would be the only provision in the *SIA* which imposes a harsh penalty against foreign states which is not necessarily imposed on other litigants. Such an

interpretation would be inconsistent with international diplomacy, and could not have been intended by Parliament.

[27] Finally, the Defendant relies on section 17 of the *SIA* which gives express direction on the manner in which all provisions of the *Act* must be interpreted. It states:

> S. 17 Except to the extent required to give effect to this Act, nothing in this Act shall be construed or applied so as to negate or affect any rules of the court, including rules of a court relating to the service of a document out of jurisdiction of the court.

[28] The Defendant argues that Justice Ray's interpretation of section 10(4) accords with section 17 by minimizing the possibility for direct conflict with local rules of procedure.

Conclusion

[29] I accept the submissions of the Defendant and for the additional reasons that follow, I dismiss the Plaintiff's motion for leave to appeal.

A conflicting decision

[30] A "conflicting decision" exists where a court chooses different legal principles to decide a comparable legal problem or to guide the exercise of the court's discretion.[4] A "conflicting decision" does not exist where a court applies established legal principles appropriate to the facts, but exercises its discretion differently.[5] More importantly, a "conflicting decision" also does not exist where different facts require the application of different legal principles. As Justice Molloy held in *MD Management Ltd. v. Campbell*, 2010 ONSC 4217, [2010] O.J. No. 3439, at para 15:

> A party relying on subrule (a) must establish that there is a conflicting decision in Ontario or elsewhere on the point in issue...[emphasis mine]

[31] There are no conflicting decisions in Ontario on the point in issue; namely interpreting section 10(4) of the *SIA*.

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[4] *Paglia v. Favot*, 2014 ONSC 2382, [2010] O.J. No. 1780.
[5] *Couchiching First Nation v. Canada (Attorney General)*, 2010 ONSC 4373, 103 O.R. (3d) 745.

Correctness of the decision

[32] I have no reason to doubt the correctness of Justice Ray's decision. In my view he properly interpreted section 10(4) in a manner that is consistent with the objective and purpose of the *SIA*.

[33] I agree with the Defendant's argument that the purpose of the *SIA* is to codify the protections afforded to foreign states and to set out limited exceptions. Section 3(1) of the *Act* provides:

> **3.** (1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada

[34] While the sections 5, 6, 6.1,7 and 8 of the *SIA* narrow the scope of state immunity, the purpose of the legislation, as set out in the preamble and section 3(1), remains unchanged. In that context, Justice Ray's interpretation of section 10(4) is entirely consistent with the other procedural provisions of the *Act*. Having regard to the number of additional procedural protections extended to foreign states as noted by the Defendant, it is inconsistent to interpret section 10(4) in such a way that a foreign state would have fewer procedural protections than an ordinary litigant.

[35] The parties have agreed that costs of the motion will be fixed on the amount of $5,000 and the Defendant shall be therefore entitled to costs in that amount.

Mr. Justice Robert N. Beaudoin

Released: October 8, 2014

CITATION: McDonald v. The United State of America, 2014 ONSC 5819
COURT FILE NO.: 11-51871
DATE: 20141008

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

SANDRA MCDONALD

Plaintiff

-and-

THE UNITED STATES OF AMERICA

Defendant

REASONS FOR DECISION

Beaudoin J.

Released: October 8, 2014

TAB 23

See para. 14

1998 CarswellOnt 3769
Ontario Court of Justice, General Division

R. v. Steele

1998 CarswellOnt 3769, [1998] O.J. No. 3821, 36 M.V.R. (3d) 312, 39 W.C.B. (2d) 443

Her Majesty The Queen, Respondent and Michelle Steele, Appellant

McWilliam J.

Judgment: September 23, 1998
Docket: 96-60803

Counsel: *James X.P. McGillivary*, for the Appellant.
David Roberts, for the Respondent.

Subject: Criminal; Public

Headnote

Criminal law --- Driving offences — Impaired driving/care or control — Proof of impairment — General

Accused driver was charged and convicted of operating motor vehicle while her ability to do so was impaired by alcohol contrary to s. 253(a) of Criminal Code — Accused appealed — Appeal dismissed — Trial judge did not fail to make credibility findings but expressly rejected accused's view of accident — Trial judge found accused ran red light and drove on wrong side of road as Crown witnesses testified — Trial judge not required to state expressly that he disbelieved accused when it was implicit in acceptance of version of accident put forth by Crown witnesses — Trial judge rejected evidence of accused's co-worker who testified that she only shared three drinks with accused — Grounds for rejection existed because co-worker arrived at party two hours after accused and was unable to say what accused drank in that period — Criminal Code, R.S.C. 1985, c. C-46, s. 253(a).

Criminal law --- Driving offences — Refusing to comply with roadside screening demand — Nature and elements of offence — Operating, care or control

Accused drove on wrong side of road, ran red light and struck vehicle — After accident when accused tried to move her car she was swaying, moving abnormally and smell of alcohol was apparent — Accused admitted to police officer that she was driver of vehicle — Trial judge admitted evidence of accused's failure of screening device test, failing to comply with demand

to provide breath sample and found that accused was still operating motor vehicle at time s. 254 (2) demand for breath sample made — Accused driver charged and convicted of operating motor vehicle while her ability to do so was impaired by alcohol contrary to s. 253(a) of Criminal Code — Accused appealed — Appeal dismissed — Trial judge found objective test of care and control met, applied extended definition of "is operating" and found that officer had right to demand breath sample — Accused continued to have care and control of vehicle which she attempted to move after accident — Care and control continuum never faltered — Demand justified and accused's refusal to comply coupled with evidence of alcoholic breath, drinking and poor driving justified conviction — Criminal Code, R.S.C. 1985, c. C-46, ss. 254(2), 253(a).

Criminal law --- Search and seizure — Unreasonable search and seizure — Nature of search — Person — Breath sample

Accused drove on wrong side of road, ran red light and struck vehicle — When accused tried to move her car she was swaying, smell of alcohol was apparent, and her movements were slightly abnormal — When officer arrived at scene accused admitted that she was driver of vehicle — Trial judge denied motion pursuant to s. 8 of Charter to exclude evidence of accused's failure of screening device test for failing to comply with demand to provide breath sample — Accused driver charged and convicted of operating motor vehicle while her ability to do so was impaired by alcohol contrary to s. 253(a) of Criminal Code — Accused appealed — Appeal dismissed — Demand justified and accused's refusal to comply coupled with evidence of alcoholic breath, drinking and poor driving justified conviction — No unreasonable search and seizure made in violation of s. 8 of Charter — Canadian Charter of Rights and Freedoms, s. 8 — Criminal Code, R.S.C. 1985, c. C-46, ss. 254(2), 253(a).

APPEAL by accused from conviction of operating motor vehicle while her ability to do so was impaired by alcohol.

***McWilliam J.*:**

1 Following an accident, the appellant was charged with [1] operating a motor vehicle while her ability to do so was impaired by alcohol under s. 253(a) and [2] operating a motor vehicle having consumed alcohol such that the concentration of it in her blood was "over 80" pursuant to s. 253 (b).

2 The facts in this case raise yet another, opportunity to consider the statutory framework of s. 254(2) and 254(3) of the *Criminal Code* involving the preliminary and ultimate demands by police officers for breath samples to determine the alcohol in a defendant's body.

3 As the headnote states in *R. v. Bernshaw* (1994), 8 M.V.R. (3d) 75 (S.C.C.):

> Parliament has set up a statutory scheme whereby a screening test can be administered by the police merely upon entertaining a reasonable suspicion that alcohol is in a person's body. A 'fail' result may be considered, along with any other indicia of impairment, in order to provide the police officer with the necessary reasonable and probable grounds to demand a breathalyzer. A 'fail' result per se, however, may not provide reasonable and probable grounds. Where there is evidence that the police officer knew that the suspect had recently consumed alcohol and expert evidence shows that the subsequent screening test would be unreliable due to the presence of alcohol in the mouth, it cannot be decreed, as a matter of law, that both the subjective and objective tests have been satisfied. The requirement in s. 254 (3) that reasonable and probable grounds exist is not only a statutory but a constitutional requirement as a pre-condition to a lawful search and seizure under s. 8 of the Canadian Charter of Rights and Freedoms.

4 Consequently, the majority of the court found that to allow a 15-minute pause to elapse before giving the screening test under ss. 2 in appropriate circumstances, and so permit mouth alcohol to dissipate was reasonable within the "forthwith" time limits of the statutory scheme. As Sopinka J. observed at p. 23:

> The purpose behind this screening test is evidently to assist police in furnishing the reasonable grounds necessary to demand a breathalyzer. The roadside screening test is a convenient tool for confirming or rejecting a suspicion regarding the commission of an alcohol-related driving offence under s. 253 of the Code

5 Such a "flexible approach" permits police officers to carry on and have an honest belief based on reasonable and probable grounds to make the breathalyzer demand under ss. (3) which consist of [1] subjectively, the officer's honest belief that the suspect has committed the offence and [2] objectively, the existence of reasonable grounds for this belief. Presumably the majority felt such an interpretation helped to perfect the statutory scheme using a "flexible interpretation" of both "forthwith" and "proper analysis." (p. 29) As the headnote observed:

> It strikes the proper balance between Parliament's objective in combating the evils of drinking and driving, on the one hand, and the rights of citizens to be free from unreasonable search and seizure.

6 The minority in the result gave a more imperative interpretation to forthwith when Cory J. said at p. 17:

> The relatively rare occasions on which an ALERT test may be erroneous as a result of the driver consuming a very recent drink must be tolerated in the interest of the safety of the public. This requirement to undergo the ALERT testing immediately should be regarded as one of the obligations that flows from the right to drive. ... I can see no valid reason for

changing the uniform interpretation of s. 254 (2) to accommodate those who risk failing an ALERT test by taking a drink immediately before they drive their cars.

Trial Judgment

7 The trial judge gave these reasons for judgment:

All right, dealing with the impaired driving charge.

We have the evidence of the driving, which strongly indicates that the defendant was not acting in the norm. She was on the wrong side of the road, and she had gone through a red light and confronted a vehicle that was going on the green light and struck it. So, the driving certainly left some cause for explanation as to why she was driving in this manner.

She has given evidence, and she really does not know how the accident happened. I accept the evidence of the Crown witnesses as to their involvement in the accident and as to what they saw, so that she was driving in an abnormal manner. Her behaviour immediately after the accident in getting out, and some signs of swaying, etc., the smell of alcohol, the slight abnormalities in her movement, *coupled with the readings of .14 and .14, shows that there is a substantial amount of alcohol in her system, and that obviously explains why she was driving in the manner that she was.* (Italics not in the original text, but the clause is relevant to a ground of appeal raised by counsel.)

Consequently, I am satisfied that the elements of the impaired driving have been made out, and I have to find her guilty of impaired driving.

THE COURT: In respect of the over .08, the Crown will be staying the proceedings?

MR. CAVANAGH: Yes

THE COURT: Count two, therefore will be noted as being stayed.

8 Defence counsel also argued a s. 24(2) *Charter* motion to exclude the evidence of the accused's failure of the screening device test for failing to comply with the demand provisions of s. 254(2) of the *Criminal Code*. At the conclusion of counsel's submission the trial judge said:

THE COURT: You are going to have to give me really convincing superior court cases to go along with that idea. The officer, where he arrived investigated an accident. He determined who the drivers were -- one of them was the accused -- and proceeded with his investigation, and you are saying that he has no evidence to conclude that the person was in care and control of the vehicle?

MR. McGILLIVRAY: Yes

9 After adjourning over the lunch hour, the trial judge heard further submissions. He denied the *Charter* motion. He applied an extended definition of "is operating" the vehicle from the Courts of Appeal in Manitoba and Alberta. He did not think that it could be "successfully argued that the fact that an individual should be standing at the side of the road, his motor vehicle having been involved in a car accident, and simply by the fact that he is standing there that the court should come to the conclusion that therefore he was not in care and control of the motor vehicle...." (Transcript, p. 62) After the accident the Crown witnesses testified the accused tried to move her car, and after the officer arrived she admitted she was the driver of the car, and then he smelled alcohol on her breath. He then made his demand knowing the facts of the accident itself and the driving involved. The trial judge found that there was no failure to meet the "objective test" of care and control, and that the case fell under the question of "is operating". Therefore the officer had the proper right to make his demand under s. 254 (2) of the *Criminal Code* and constitutionally.

Failed to Make Credibility Findings?

10 Defence counsel asked with respect to the s. 253(a) conviction:

> Did the Honourable Trial Judge err in law in failing to make any credibility findings, with reasons, despite the fact that both the Appellant and another witness testified for the Defence?

11 The defendant and her passenger both testified about the accident which happened between 11:30 and midnight, and which followed a "supper, an after-work supper," a farewell for a fellow employee. It began at 7 p.m. The defendant said she drank "a total of three 20-ounce drinks" of beer. She said she was not driving on the wrong side of the road at any point that evening. She did not think she was impaired, and she had no trouble "in the manipulation" of her car as a result of alcohol. She said if she went through a red light, it meant that she had "burnt a stop," something she did not do "often." She would do that only when the light was amber, never when it was red, she said. She said the driver of the other car involved in the collision had to be facing a red light since she had a "yellow." She said it was that driver who "blew" the light, not her.

12 The defendant's friend was at the restaurant, and she had more than one beer which she "shared" from the defendant's "three beers." She saw no signs of impairment in the defendant because if she had she would not have let her drive. She did not see the defendant get into her car, but she knew where she was going because of the plan: one vehicle was to be dropped off at the defendant's house; and her friend was to drive the other one "downtown." She got to the party at 9:30. That was two hours after the defendant arrived, and two hours and a half after the supper and drinks party had begun. She said she did not know how much the defendant had drunk before her arrival, if anything.

13 It is apparent that the trial judge expressly reject the defendant's view of the accident. He found she did not know how it happened. He accepted the evidence of the witnesses for the Crown.

He found that the defendant went through the red light, and was driving on the wrong side of the road. Consequently, the trial judge found, expressly, that the Crown's witnesses did not go though a red light. He found their light was green. The red light facing the other driver was a central theme in the defendant's explanation of the accident, and perforce of the trial judge's findings as to the substance of the Crown's evidence, regarding the smell of alcohol and the defendant's "swaying" and the defendant's "abnormal" driving, meant that this theme was rejected.

14 In my view those findings constitute "credibility findings." A witness who does not know what happened cannot give credible evidence. When that witness' evidence is compared to that of two witnesses saying diametrically opposed things which are accepted as credible and explanatory, then by necessary implication that acceptance becomes a credibility finding, and the reasons justifying it are implicit in the recounting of how the accident happened by those witnesses. The trial judge heard those four witnesses, and he preferred the explanation of the accident offered by the two Crown witnesses. He was clearly entitled to do that on the evidence he heard. Trial judges are not required to say they expressly "disbelieve" a witness in order to make "credibility findings."

15 As far as the opinion of the co-worker as to the defendant's impairment, obviously, he did not accept it. There was evidence on which he could have done that because the defendant's friend's lock-step drinking and sharing of 60 ounces (three 20-oz. cans) of beer with the defendant only began at 9.30 when she arrived. The defendant testified "her body" did not tell her she was impaired. If her friend used the same body test, (and she might very well have because there is evidence that she also drove after leaving the party) and assuming she had 30 ounces of beer (her equal share) in about two hours, then the friend might well believe that she would have felt about the same alcohol effects as the defendant. In short, if I can drive, she can drive. This, of course, assumes that the defendant had nothing to drink between 7:30 and 9:30 p.m. The defendant testified that the "total" amount she had to drink was just the three beers. Her friend testified she only "shared" three beers with the defendant. On their combined evidence it was impossible for the defendant to have had anything to drink between 7:30 and 9:30 p.m. since all of the three beers shared must have come after the friend's arrival at 9:30 p.m. because they constituted the "total" beers consumed. That assumption, which is implicit in the reconciliation of the evidence of the Defence witnesses, might very well have induced the trial judge to discount the opinion of the defendant's friend and co-worker as to the defendant's not being impaired (arguably based on the friend's body telling her she, herself, was not so impaired). In a word, the friend's evidence might have been rejected, not because it was not honest, but because it was mistaken. Most people who drink alcoholic beverages do not wait for two hours after their arrival at a party to take their first drink. If, in fact, such a parched throat policy was followed that night, one would have thought, in a case like this, it would be worth a mention.

16 The observation of McLachlin J. in *R. v. B. (R.H.)* (1994), 89 C.C.C. (3d) 193 (S.C.C.) is apposite:

Trial judges are presumed to know the law with which they work day in and day out. If they state their conclusions in brief compass, and these conclusions are supported by the evidence, the verdict should not be overturned merely because they fail to discuss collateral aspects of the case.

Section 254(2) and the Charter

17 Defence counsel raised a further issue:

With respect to the Charter Motion, did the Honourable Trial Judge err in law finding that the Appellant was still operating a motor vehicle, at the time the 254(2) demand was made? [underlining in counsel's question]

18 Section 254(2) is the statutory authority for a peace officer to demand a sample of breath for an "approved screening device." It requires that the officer have a reasonable suspicion that a person who "is operating...or who has care and control of a motor vehicle..." has alcohol in his or her body.

19 The Trial Judge said at p. 61:

I am glad to see that some common sense prevails in some of these decisions, if not from our courts, at least from courts from other provinces, in interpreting "is operating." It seems to be going from the sublime to the ridiculous where we have situations where it can be successfully argued the fact that an individual should be standing at the side of the road, his motor vehicle having been involved in a car accident, and simply by the fact that he is standing there that the court should come to the conclusion that therefore he was not in care and control of that motor vehicle.

I think common sense must prevail, and I accept the interpretation of the Court of Appeal of Manitoba and Alberta in expanding what is meant by "is operating." To do otherwise would be creating a ridiculous situation.

The facts of this case differ, in my view, from those that have been advanced as authority for the principle of lack of objectivity in determining whether or not there was care and control. The question is, "Is the defendant operating that motor vehicle?" and it seems to me, in the facts of this case, that the officer attended at the scene approximately ten minutes after the accident occurred.

We have heard the evidence from witness as to the defendant standing in the area, trying to move her car - obviously, in care and control of that motor vehicle. It was her vehicle.

> The officer arrived. Inquiries were made by the officer. She admitted that she was the driver of the motor vehicle, and the officer then smelled a slight odour of alcohol, and from his investigation determined that he should make the demand, and that is what he did. The officer, obviously, from what he observed, was of the belief that this defendant is, if you want to use that term, "operating" her motor vehicle at the time, some ten minutes before, and is involved in the accident.
>
> I do not see anything that the court should consider the legalese of determining whether there is care and control, and whether she was sitting in the car, or if she was not. Therefore the objective test is not met. I do not see anything to that here. I think it falls under the question of "is operating," and there is an expansion, in my view, of the words "is operating," and he was satisfied that he had the proper right to make the demand, and he did so.
>
> I would, therefore, find that the motion be denied.

20 The trial judge did not believe this was a case like *R. v. Burns* (1991), 32 M.V.R. (2d) 173 (Ont. Gen. Div.) where the officer stopped the accused on the highway in order to speak to him about a matter unrelated to his driving. He then went with the accused to the accused's house, and only then noticed he had the smell of alcohol on his breath The officer took him back to the police cruiser where he demanded a breath sample. Loukidelis J. held that when the sample was demanded at his home, the accused was no longer in care and control of his vehicle. Consequently one of the conditions justifying a roadside test was not fulfilled. Similarly, the accused was not found in care and control when a police officer arrested him and made the breathalyzer demand, and while at the police station during a delay while waiting for the breath technician to arrive, demanded an ALERT or roadside sample: *R. v. Campbell* (1988), 9 M.V.R. (2d) 1, 66 C.R. (3d) 150 (Ont. C.A.), per Morden J.A. Both of these cases had what Loukidelis J. called a "break in the care and control," or a "hiatus" as he later referred to it in his case (p. 178). Cases with similar hiatuses were cited by the defendant's counsel such as *Rainey*, unreported, Tab 5 where the accused was arrested for marijuana possession and subsequently alcohol was noticed on his breath.

21 Sometimes courts get involved in these situations with considerations of time and the application of "forthwith" in s. 254(2) of the *Criminal Code*, e.g. *Rainey*. In *R. v. Sahal* (October 5, 1994), Doc. Ottawa 94-61005 (Ont. Prov. Div.), Judge Nicholas dealt with a "domestic" investigation where the accused was seen by an officer turning normally into his driveway. Initially the officer noted nothing unusual about the accused's physical actions or his breath. He went in the house, and the spouse told him her husband had been drinking. He then detected the odour of alcohol. Crown conceded that absent the result of the roadside test neither officer had the reasonable and probable grounds to demand a breathalyzer test. Judge Nicholas applied *Burns*, *supra*, and said she could not accept the Crown's submission that there was no hiatus in this case as there was in Burns. She found the gap between speaking to the accused by his car and going

into the home and speaking to his wife, and returning (about seven minutes) constituted a similar gap to the six minutes in Burns from the car to the apartment and back. The continuum of care and control was broken. She also found that the other officer who had arrested the accused ought to have made the demand (to comply with forthwith in the circumstances), but he declined to do so although he had detained the accused by his side, and had smelled the alcohol. The fact that the accused stayed by his car did not distinguish the case from the *Burns* case where the accused did not, Judge Nicholas found.

22 Obviously, if an accused does something to reconnect the care and control continuum such as ordering towing, or putting the keys back in the ignition after the breath demand is made then the courts will generally find that care and control has been established, or re-established if that is more accurate: *R. v. Toews*, [1985] 6 W.W.R. 158 (S.C.C.); *R. v. Ford*, [1982] 1 S.C.R. 231 (S.C.C.). As McIntyre, J. said in *Toews*, supra, at p. 165:

> Each case will depend on its own facts and the circumstances in which acts of care and control may be found will vary widely. In *Ford*, the appellant's vehicle and others were in a field open to the public. A drinking party was in progress in the car, and the appellant had occupied the driver's seat and had turned on the ignition on various occasions to operate the heater as the party progressed. These facts were considered sufficient to establish care or control. In the case at bar the car was on private property and the respondent was not in occupation of the driver's seat. He was unconscious and clearly not in de facto control. The fact of his use of a sleeping bad would support his statement that he was merely using the vehicle as a place to sleep. There remains the fact that the key was in the ignition and that the stereo was playing. Strangely enough, however, there is no direct evidence that the respondent put the key in the ignition or turned on the stereo, and the evidence is that the last driver of the vehicle was his friend, who drove him to the party and who was to drive him home. I consider that in view of all the circumstances described above no adverse inference should be drawn in this case on the basis of the ignition key evidence alone. It has not been shown then that the respondent performed any acts of care or control and he has therefore not performed the actus reus.

23 In *R. v. Cadieux* (February 6, 1997), Doc. Ottawa 95-60676 (Ont. Prov. Div.), Judge Wright found that the accused did none of those things, but he was simply "wandering around," and he was not exercising care and control.

24 In *R. v. Swietorzecki* (1995), 97 C.C.C. (3d) 285 (Ont. C.A.) the issue before the court was that the appellant has pleaded guilty to refusing to provide a breath sample after a s.254 (2) demand. He said he was not driving but his counsel told the court that was not a defence to a charge of refusing to blow. Counsel told the accused that if an officer believes a person was driving, it makes no difference that he was not in fact. Morden J.A. said at p. 287 in ordering a new trial:

> Section 254(2) makes the reasonable suspicion of the peace officer applicable only to whether the person in question "has alcohol in that person's body." This is one element of the offence. It is a separate element of the offence that the person be operating a motor vehicle or have the care and control of a motor vehicle. This is an element which must exist in fact - and not as a matter of reasonable suspicion on the part of the peace officer.

25 In other words, without the existence of a person who "is operating" a motor vehicle or who "has the care and control" of one in fact, the existence of a peace officer's reasonable suspicion that the person has alcohol in his body counts for naught in terms of complying with s. 254(2).

26 As discussed at the outset in more detail in *Bernshaw*, supra, the Supreme Court of Canada held that the "fail" result from the ALERT test under s. 254(2) of the *Criminal Code* can be considered, along with other indicia of impairment, in order to provide a police officer with the necessary reasonable and probable grounds to demand a breathalyzer test under 254(3). A fail result, per se, may not, however, provide reasonable and probable grounds for either s. 254(3) or the appropriate constitutional standards under s. 8 of the *Charter*.

27 In *R. v. Lackovic* (1988), 9 M.V.R. (2d) 229 (Ont. C.A.) the headnote states:

> A roadside demand should be made as soon as is reasonably possible, that is, allowing only such delay as is reasonably necessary to enable the police officer to carry out his duties. On the basis of the sparse record before the Court, it was not possible to conclude whether the demand was made within a reasonable time of the driving. *However, the accused had care and control of his vehicle at the time of the demand. He was standing by his vehicle when the officer arrived at the scene and he identified himself as the driver. Following the demand and abortive attempt to comply, he had authorized the towing of his vehicle from the scene and had accompanied the tow truck driver. He had therefore not surrendered care and control of his vehicle at the time the demand was made of him, and had continued to exercise care or control after the demand. Accordingly, the officer was authorized under the provisions of the Code to make the demand.* (*italics added*)

28 In *Lackovic*, supra, the Ontario Court of Appeal adopted its own reasoning in *R. v. Campbell* (1988), 9 M.V.R. (2d) 1 (Ont. C.A.) and said that "the phrases 'is driving' and 'has care and control' have some degree of past signification." (p. 233) The past signification in *Lackovic* had to relate to the evidence of a demand made 25 minutes after the accident happened and 13 minutes after the officer arrived to investigate. The Court then found that the sparsity of the record precluded a finding as to whether the delay to allow the officer to carry out his duties was reasonable. It did nevertheless conclude that the accused "had the care or control of his motor vehicle at the time the demand was made." The central finding in *Lackovic* in my view is that there was never any "surrender of care and control." It is true that the court also found that the accused "continued to exercise care and control," by ordering towing services after the demand but I would construe that

finding was not crucial to the antecedent "surrender" finding. Care and control simply continued and was not surrendered. I say that because earlier in his judgment Griffiths J.A. said at p. 235 that the word care may also mean custody, charge, safe keeping, preservation, oversight or attention. He applied *R. v. Drapeau* (1985), 23 C.C.C. (3d) 376 (N.S. C.A.) where the towing arrangement was completed *before* the roadside screening demand was made. It would seem, therefore that acts of care and control done after the roadside demand are not a condition *sine qua non.*

29 It seems to me that even if the words "is operating" cannot be given the past significance on the facts of this case that the trial judge gave them, nevertheless the care and control reasoning in *Lackovic* would make it a controlling case in any event. Having said that, I agree with the trial judge that the hiatus cases cited by the appellant's counsel do not apply, and the care and control continuum which was described by all the witnesses in this case never faltered. Since the demand was justified and the appellant refused, that coupled with all the other evidence of alcoholic breath and drinking and very poor driving, is sufficient to justify the conviction for impaired driving. As Labrosse J.A. said in *R. v. Stellato* (1993), 78 C.C.C. (3d) 380 (Ont. C.A.) at p. 384:

> Specifically, I agree with Mitchell J.A. in *Campbell* that the *Criminal Code* does not prescribe any special test for determining impairment. In the words of Mitchell J.A., impairment is an issue of fact which the trial judge must decide on the evidence and the standard of proof is neither more nor less than that required for any other element of a criminal offence: courts should not apply tests which imply a tolerance that does not exist in law. ... If the evidence of impairment is so frail as to leave the trial judge with a reasonable doubt as to impairment, the accused must be acquitted. If the evidence of impairment establishes any degree of impairment ranging from slight to great, the offence has been made out.

30 The fact that the trial judge referred to the readings obtained without expert evidence to relate them back on the impaired driving case is mere surplusage in all the circumstances of the conviction. In the result the appeal is dismissed.

Appeal dismissed.

TAB 24

CITATION: Gill v. Walters, 2014 ONSC 5364
BARRIE DIVISIONAL COURT FILE NO.: CV-13-202-00
DATE: 20140916

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Baldev Gill, by his Litigation Guardian Gorpreet Gill and Gorpreet Gill, Plaintiffs/Responding Parties

AND:

Opal Juliet Walters, Defendant/Moving Party

BEFORE: THE HON. MR. JUSTICE G.M. MULLIGAN

COUNSEL: S. Subramaniam, Counsel for the Plaintiffs

R. Truax, Counsel for the Defendant

HEARD: August 19, 2014

ENDORSEMENT

[1] Opal Juliet Walters ("Walters") as respondent, brings a motion seeking leave to appeal the interlocutory order of DiTomaso J., dated July 29, 2014. The plaintiffs, Baldev Gill and Gorpreet Gill ("Gills") oppose the relief sought. The order focused on a defence in home future care costs analysis. It was ordered that a student-at-law could be present at Mr. Gill's home while he was undergoing an assessment conducted by the defence expert. Further, the defence request to conduct a functional capacity evaluation in conjunction with the future care costs analysis was denied.

Background Facts

[2] This action arises out of a motor vehicle accident on May 14, 2012. It is alleged that Mr. Baldev Gill while walking as a pedestrian, was struck by a motor vehicle operated by Walters. His claim is that he suffered a traumatic brain injury, as well as other impairments. The plaintiffs' expert report suggests that he requires 24-hour supervisory care as a result of his injuries. In addition, Mr. Gill underwent a capacity assessment and was found to be incapable of managing his property and personal care under the *Substitute Decisions Act,* 1992.

[3] At the request of his own counsel, Mr. Gill underwent a future care needs and cost analysis by Margie Van Hook, an occupational therapist. The defence requested that Mr. Gill be subject to a future care assessment in his home by Reema Shafi, an occupational therapist. It was the plaintiffs' position that they would only consent to such an assessment on terms. Those terms dealt with the length of time for the interview and the

request that a student-at-law be present for support purposes. Those conditions were not acceptable and the motion proceeded to a hearing. After considering the issues, the motions judge, after brief reasons, gave the following orders:

> A student-at-law may accompany Mr. Gill at the In-Home Future Care Costs Analysis (defence). I have noted and found this is necessary due to the emotional problems experienced by Mr. Gill.
>
> ...the articling student and Mr. Gill shall not communicate with one another during the Assessment. The articling student shall not be called by the plaintiff as a trial witness. The sole purpose and function of the articling student is to be a passive support person. There shall be no functional capacity evaluation testing which is not necessary for or required for a Future Care Costs Analysis.

Rule 62.02(4)

[4] A motion for leave to appeal an interlocutory order engages a consideration of rule 62.02 of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194 ("the *Rules"*). The grounds upon which leave may be granted are set out in subrule 62.02(4):

> (4) Leave to appeal shall not be granted unless,
>
> (a) There is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or
>
> (b) There appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

[5] The purpose of the rule is not to retry the issue on the leave application but rather to determine if there are conflicting decisions by another court and if it is desirable that leave be granted under clause (a) or, under clause (b), if there is a reason to doubt the correctness of the order and the appeal involves matters of importance.

Position of the Moving Party

[6] The defence suggests that the motions judge was incorrect in coming to a decision enabling a student-at-law to be present during the assessment, and incorrectly shifted the onus from the plaintiff to the defendant as to satisfying whether or not there should be conditions for the assessment. The defence also suggested that the motions judge was

incorrect in determining that the defence expert did not require a functional capacity evaluation in order to prepare a future care needs and costs analysis. On this issue, the defence suggests in its Factum, "This is especially true, considering that functional testing was performed in the plaintiff's own Future Care Needs and Costs Analysis." The defence also suggests that the motions judge's decision gave an unfair tactical advantage to the plaintiff in placing conditions on the defence expert. As to the test under rule 62.02(4), the defence suggests that there are conflicting decisions and the proposed appeal involves matters of importance such that leave should be granted.

Position of the Plaintiff

[7] The plaintiff opposes the relief sought. The material before the motions judge showed that Mr. Gill was a vulnerable person, that the defence assessment in the plaintiff's home was intrusive, and that the presence of a support person, including an articling student, was not without precedent. The plaintiff also argued that Ms. Van Hook's report dealt with future care needs and costs analysis, but she did not conduct functional testing.

[8] Both sides want a report from an occupational therapist as to future care needs and costs analysis. As noted, the plaintiffs received a report from Margie Van Hook. As stated in her report, the basis of her analysis was:

> An interview with Mr. Baldev Gill and his daughter-in-law, Ms. Amandep Gill, and functional observations of Mr. Gill at their place of residence in Brampton, Ontario, on March 31, 2014. Ms. Kim Khanna provided Punjabi interpretation.

[9] Ms. Van Hook also conducted a paper review of medical and rehabilitation documents, and conducted telephone consultations with other health care providers. In her report, she dealt with his symptoms, and stated at p.10:

> The following chart outlines the residual and ongoing symptoms that Mr. Baldev Gill is experiencing subsequent to the injuries sustained. The information provided is based on report by Mr. Baldev Gill, and his daughter-in-law, Mrs. Amandep Gill, during clinical interview and review of the medical documentation.

There is nothing noted in her report that she conducted any specific testing.

[10] The affidavit of Reema Shafi, the occupational therapist proposed by the defence, takes issue with the presence of third party observers and its potential to skew results. As to her task, she indicates at para. 1, "I am an occupational therapist ... to assess Baldev Gill for the purposes of establishing future care needs and costs, resulting from impairments sustained in a motor vehicle accident." Her affidavit does not specifically address the issue of whether she would be conducting formal functional testing in addition to or as part of her future care needs and costs analysis. Nor does she indicate whether she has conducted assessments with observers present in other cases.

Rule 33.05

[11] The issue of who may attend on an examination is addressed in rule 33.05, which provides:

> No person other than the person being examined, the examining health practitioner, and such assistance as the practitioner requires for the purpose of the examination shall be present at the examination, unless the court orders otherwise. [Emphasis added.]

Rule 33.03

[12] Rule 33.03 provides further guidance, "The court may, on motion, determine any dispute relating to the scope of an examination."

[13] The Court of Appeal acknowledged the important role of a defence medical in *Bellamy v. Johnson,* [1992] O.J. No. 864. As Doherty J.A. stated at para. 16:

> The "defence medical" provided for by s.105 and Rule 33 forms an integral part of the discovery process where the physical or mental condition of a party to the proceedings is in issue. Discovery in several proceedings said to be ...
>
> > The most effective procedural device for learning the case, one has to meet and as a result, is an important condition of increased and reasonable settlements, and more effective and fair trials. [Citations omitted.]

In *Bellamy,* the Court did not allow the plaintiff to record the examination and stated at para. 8, "The plaintiff has no right to determine how the examination is to be conducted or whether it is to be recorded."

[14] In *Souza v. Akulu,* [2006] O.J. No. 3061, Master Brott acknowledged the important role of fairness in such examinations. As he stated at para. 15:

> In order to maximize fairness, and attempt to keep the parties on an equal basis at a pre-trial and trial, the parties should, as much as possible, be granted equivalent tactical and strategic advantages.

[15] As to the presence of third party observers, the issue was addressed by Browne J. in *Petrushko v. Great-West Life Assurance,* [2001] O.J. No. 5471. Justice Browne reviewed rule 33.05 and the Court of Appeal's guidance in *Bellamy v. Johnson, supra.* On the facts of the case before him, he concluded at para. 17:

> I accept the position advanced, even on a hearsay basis, from Dr. Bail, that the type of psychiatric examination would be adversely

> affected by the attendance of anyone except the plaintiff, which attendance should not be recorded.

[16] In response, the plaintiffs made reference to a number of decisions of the Superior Court, allowing the presence of a student-at-law. In *Moore v. Wakim,* [2010] ONSC 1991, Howden J. considered the issue, noted the court's inherent jurisdiction to exercise its discretion and ordered that the occupational therapist "... may be accompanied by a student-at-law from the office of the plaintiff's counsel as a support person whose role is to be passive and not interventionist."

The Test for Granting Leave to Appeal

[17] In *Farmer's Oil and Gas Inc. v. Ontario* (2013), ONSC, 1608, Molloy J. expressed the test as follows:

> [4] The test for granting leave to appeal under Rule 62.02(4) is well-settled. It is recognized that leave should not be easily granted and that the test to be met is a very strict one. There are two possible branches upon which leave may be granted. Both branches involve a two-part test and in each case, both aspect of the two-part test must be met before leave may be granted.
>
> [5] Under Rule 62.02(4)(a), the moving party must establish that there is a conflicting decision of another judge or court in Ontario or elsewhere (but not a lower level court) and that it is in the opinion of the judge hearing the motion "desirable that leave to appeal be granted". A "conflicting decision" must be with respect to a matter of principle, not merely a situation in which a different result was reached in respect of particular facts.
>
> [6] Under Rule 62.02(4)(b), the moving party must establish that there is reason to doubt the correctness of the order in question and that the proposed appeal involves matters of such importance that leave to appeal should be granted. ... In addition, the moving party must demonstrate matters of importance that go beyond the interest of the immediate parties and involve questions of general or public importance relevant to the development of the law and the administration of justice. [Citations omitted.]

Conclusion

[18] The motions judge allowed a student-at-law to attend during the in-home interview. In my view, it was within his discretion to do so. The cases referred to do not demonstrate a conflict with respect to the law, rather, they illustrate that these decisions are discretionary based on the particular facts before the motions judge. Having made that determination, it follows that it would not be desirable that leave be granted with respect

to this issue. Having found that the decision was within the motions judge's discretion, I am unable to doubt the correctness of the order, or that it is of such importance that leave be granted.

[19] I am of the same view with respect to the motions judge's decision to deny functional capacity testing in addition to the future care costs analysis, which was permitted on terms outlined in the order. Clearly, the plaintiffs' expert conducted a future care costs analysis based on an interview and a paper review of the medical record. Rule 33.03 gives the motions judge discretion with respect to this issue. His order gave the defence expert the same opportunity, but not the expanded opportunity to do functional capacity testing. Under rule 62.04(4), I do not find that there are any conflicting decisions on this issue. Nor do I have any reason to doubt the correctness of the order rising to the level of such importance requiring leave to be granted.

[20] The defendant's motion for leave to appeal is dismissed.

Costs

[21] By agreement between counsel at the end of the motion, it was agreed that the successful party would receive an award of costs of $4,000. It is therefore ordered that the defendant pay to the plaintiffs the sum of $4,000 for costs all inclusive, forthwith.

MULLIGAN J.

Date: September 16, 2014

TAB 25

See para. 30

Brownhall et al. v. Her Majesty the Queen in Right of Canada (Ministry of National Defence)

[Indexed as: Brownhall v. Canada (Ministry of Defence)]

80 O.R. (3d) 91
[2006] O.J. No. 672
Barrie Court File No. 05-0109

Ontario Superior Court of Justice,
DiTomaso J.
February 21, 2006

Crown -- Actions against Crown -- Plaintiff bringing action against Crown for damages flowing from assault by fellow soldiers and from defendant's response to that assault -- Plaintiff receiving pension pursuant to Pension Act as result of disability allegedly resulting from assault -- Motion judge dismissing defendant's motion to strike statement of claim -- Motion judge refusing to stay any part of action not barred by s. 9 of Crown Liability and Proceedings Act as mandated by [page92] s. 111(2) of Pension Act -- Defendant's application for leave to appeal granted -- Decision dealing with issue of whether member of Canadian Forces who claims damages against military resulting from injuries or disability can maintain tort action in face of pension paid, payable or not applied for -- Good reason existing to doubt correctness of ruling in light of statutory framework -- Conflicting reasons existing on issues raised in decision -- Decision dealing with matter of general importance -- Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 9 -- Pension Act, R.S.C. 1985, c. P-7, s. 111(2).

The plaintiff alleged that, while serving with the Canadian Armed Forces in Afghanistan, he was physically and sexually assaulted by two of his section members, and that his superior

officers disparaged him for reporting the attack and took no steps to prevent it from happening again or to protect him from the consequences of the reporting. When he returned to Canada, the plaintiff was diagnosed with post-traumatic stress disorder. He applied for and was granted a disability pension from the Department of Veterans Affairs. The pension was granted pursuant to s. 2(1) of the Pension Act as a result of the plaintiff's having been on "special duty service" at the time that the disability arose. The plaintiff brought an action against the defendant for damages for intentional infliction of mental suffering, sexual assault, assault, battery, breach of fiduciary duty, negligence, breach of s. 7 of the Canadian Charter of Rights and Freedoms, breach of statutory obligations and duties owed to him, and punitive, aggravated and exemplary damages. The defendant brought a motion to strike all or part of the statement of claim, and in the alternative sought a stay, pursuant to s. 111(2) of the Pension Act for any parts of the action not barred by the operation of s. 9 of the Crown Liability and Proceedings Act ("CLPA"), which provides that "No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made." The motion was dismissed. The defendant brought an application for leave to appeal that order.

Held, the application should be granted in part.

There was good reason to doubt the correctness of the ruling that the entirety of the statement of claim disclosed a reasonable cause of action, given the statutory framework in question as well as conflicting decisions from the Supreme Court of Canada, the Ontario Court of Appeal and the Federal Court of Appeal. Furthermore, the motion judge did not grant a stay of any parts of the action not barred by s. 9 of the CLPA, as mandated by s. 111(2) of the Pension Act, and his ruling contained no reasons for his refusal or failure to do so. Accordingly, there was good reason to doubt the correctness of that part of the ruling. There was good reason to doubt the correctness of the motion judge's ruling on the defendant's

challenge to the statement of claim based on the immunity provisions of s. 8 of the CLPA, and there were conflicting decisions both in Ontario and elsewhere on the matter. It was not clear that the claim in respect of the fiduciary obligation owed by the defendant and the breach thereof had been insufficiently or inadequately pleaded such that all or part of the paragraphs of the claim regarding the existence of a fiduciary relationship or breach of such a relationship should be struck, and it was not established that there were conflicting decisions on that point. Leave was not granted to appeal in respect of that ground.

It was desirable that leave be granted with respect to the grounds of appeal other than the sufficiency of the claim for breach of fiduciary obligation. The decision went to the very heart of the issue as to whether a member of the Canadian [page93] Forces who claims damages against the military resulting from injuries or a disability can maintain a tort action in the face of a pension paid, payable or not applied for. It transcended the interests of the plaintiff alone and was a matter of general importance. Given conflicting decisions, it was important to clarify whether the defendant could rely upon the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 or binding decisions to deal with these types of actions on a summary basis, in Ontario and elsewhere, without such claims simply proceeding to trial.

Begg v. Canada (Minister of Agriculture), [2005] F.C.J. No. 1819, 261 D.L.R. (4th) 36, 341 N.R. 314, 2005 FCA 362 (C.A.); Dionne v. Canada (2002), 59 O.R. (3d) 566, [2002] O.J. No. 2012, 159 O.A.C. 109, 114 A.C.W.S. (3d) 443 (C.A.); Dumont v. Canada, [2004] 3 F.C.R. 338, [2003] F.C.J. No. 1857, 323 N.R. 316, 2003 FCA 475 (C.A.); Sarvanis v. Canada, [2002] 1 S.C.R. 921, [2002] S.C.J. No. 27, 210 D.L.R. (4th) 263, 284 N.R. 263, 2002 SCC 28, consd

Other cases referred to

Ash v. Lloyd's Corp. (1992), 8 O.R. (3d) 282, [1992] O.J. No. 894 (Gen. Div.); Berneche v. Canada, [1991] F.C.J. No. 515,

[1991] 3 F.C. 383 (C.A.); Brake v. Canada (Attorney General), [2005] O.J. No. 2282, 140 A.C.W.S. (3d) 67 (S.C.J.); Comtrade Petroleum Inc. v. 490300 Ontario Ltd. (1992), 7 O.R. (3d) 542, [1992] O.J. No. 652, 6 C.P.C. (3d) 271 (Div. Ct.); Deep v. Ontario, [2004] O.J. No. 2734, [2004] O.T.C. 541, 131 A.C.W.S. (3d) 964 (S.C.J.); Duplessis v. Canada, [2002] F.C.J. No. 1277, 293 N.R. 388, 2002 FCA 338, affg [2001] F.C.J. No. 1455, 2001 FCT 1038, 211 F.T.R. 214, 12 C.C.E.L. (3d) 148, 109 A.C.W.S. (3d) 147, affg [2000] F.C.J. No. 1917, 197 F.T.R. 87, 8 C.C.E.L. (3d) 75, 79 C.R.R. (2d) 287, 101 A.C.W.S. (3d) 723; Greslik v. Ontario Legal Aid Plan (1988), 65 O.R. (2d) 110, [1988] O.J. No. 525, 30 O.A.C. 53, 28 C.P.C. (2d) 294 (Div. Ct.); Hainsworth v. Canada, [2003] O.J. No. 6162 (S.C.J.); Hainsworth v. Canada, [2003] O.J. No. 6163 (S.C.J.); Levesque v. Canada (Attorney General), [2004] A.J. No. 108, 2004 ABCA 43, 346 A.R. 88, 129 A.C.W.S. (3d) 416 (C.A.); Marsot v. Canada, (Ministry of National Defence) [2003] F.C.J. No. 453, 2003 FCA 145, 122 A.C.W.S. (3d) 455, affg [2002] F.C.J. No. 313, 2002 FCT 226, [2002] 3 F.C. 579, 217 F.T.R. 232, 112 A.C.W.S. (3d) 865; Mrineau v. Canada, [1983] 2 S.C.R. 362, [1983] S.C.J. No. 76; Oberlander v. Canada (Attorney General), [2004] O.J. No. 1574, [2004] O.T.C. 332, 130 A.C.W.S. (3d) 683 (S.C.J.); Paquet v. Canada (Attorney General), [2001] O.J. No. 1468, [2001] O.T.C. 275, 104 A.C.W.S. (3d) 682 (S.C.J.); Perkins v. Canada, [1990] F.C.J. No. 603, 39 F.T.R. 69, 24 A.C.W.S. (3d) 1093; Stopford v. Canada, [2003] F.C.J. No. 1255, 2003 FC 994, [2004] 1 F.C.R. 431, 124 A.C.W.S. (3d) 1069, affg [2001] F.C.J. No. 1255, [2002] 1 F.C. 360, 2001 FCT 887; Traynor v. Unum Life Insurance Co. of America (2002), 61 O.R. (3d) 191, [2002] O.J. No. 3610, [2002] I.L.R. para. I-4126, 2002 CanLII 8677 (S.C.J.)

Statutes referred to

Canadian Charter of Rights and Freedoms, s. 7

Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, ss. 8, 9

National Defence Act, R.S.C. 1985, c. N-5

Pension Act, R.S.C. 1985, c. P-7, ss. 2, 3, 21, 91.1, 91.2, 111

Veterans Review and Appeal Board Act, S.C. 1995, c. 18, s. 18

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 21, 21.01, 25, 25.05(2), 62.02(4)

Authorities referred to

Hogg, P.W., and P. Monahan, Liability of the Crown, 3rd ed. (Toronto: Carswell, 2000) [page94]

APPLICATION for leave to appeal the order of Marchand J. of the Superior Court of Justice, dated November 30, 2005.

Susan E. Healey, for plaintiffs.

Joel Levine, for defendant (moving party).

DITOMASO J.:--

The Proceedings

[1] The defendant, Her Majesty the Queen in Right of Canada (Ministry of National Defence) (the "defendant"), seeks an order granting her leave to appeal from the order Marchand J. dated November 30, 2005, wherein the defendant's motion to strike all or part of the statement of claim herein, pursuant to Rule 21 and/or Rule 25 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 was dismissed.

[2] In the alternative, the defendant moved for a stay, pursuant to s. 111(2) of the Pension Act [See Note 1 at the end of the document], for any parts of this action not barred by the operation of s. 9 of the Crown Liability and Proceedings Act ("CLPA") [See Note 2 at the end of the document].

[3] The defendant, pursuant to rule 62.02(4)(a), submits there are conflicting decisions by other courts on the matters involved in the proposed appeal and it is desirable that leave to appeal be granted.

[4] Further, the defendant submits, pursuant to rule 62.02(4)(b), there are good reasons to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that leave to appeal should be granted.

[5] The plaintiff Glenn Brownhall ("Private Brownhall") submits that the defendant's motion for leave to appeal be dismissed with costs fixed and payable forthwith on the basis that the defendant has not met the tests set out in either rule 62.02(4)(a) or rule 62.02(4)(b).

Nature of the Action

[6] The alleged factual background giving rise to these proceedings are accurately reflected and summarized in the reasons of Marchand J., paras. 3-15 inclusive. For the sake of further reference only, the factual context giving rise to these proceedings is as follows. [page95]

[7] Private Brownhall enlisted in the Royal Canadian Regiment of the Canadian Armed Forces, based at Canadian Forces Base Petawawa, Ontario. On November 14, 2003, his unit was deployed to Camp Julien in Kabul, Afghanistan.

[8] Approximately one week after arriving in Afghanistan, Private Brownhall was physically and sexually assaulted by two of his section members in an unprovoked attack in the presence of five other members of his section. The attack occurred in Private Brownhall's tent. Allegedly, he was wrestled with and overpowered, pinned to his bed by his attackers, touched and violated in a sexual manner, verbally threatened, had knuckles rammed into his face, was punched in the ribs, shoved, pushed, grabbed by the throat, slapped, thrown into his bed, the wall and to the ground, spoken to in a degrading and humiliating manner and was told that he would be killed.

[9] He alleges that after reporting the incident to his commander, on the morning following the attack, the matter was turned over to a warrant officer. The allegations therefore are that as of November 25, 2003, the defendant had full knowledge of the assault, sexual assault, and/or battery perpetrated upon him.

[10] As a result of the attack, Private Brownhall alleges that he sustained physical injuries as well as fear for his physical safety and for his life, shock, degradation, humiliation, pain and suffering and further now alleges post-traumatic stress disorder. He sought medical assistance from the unit medical service. He alleges that upon learning of such report, his warrant officer expressed anger and disgust towards him for reporting the attack and referred to him in explicitly derogatory terms. A request was made for him to be permitted to return to Canada and a contact was made to his Member of Parliament and to the Ombudsman. He was warned to cease and desist from pursuing such efforts as it would tarnish the defendant's reputation. He alleges being told that he was being criminally investigated in relation to the incident. He made an immediate request that he be returned to Canada and made it known to superior officers that he felt unsafe due to fear of retribution from his attackers and other members of his section and platoon.

[11] Private Brownhall alleges that the acts and/or omissions of his superior officers in the affair had the effect of intimidating him and stifling his report of the attack. He claims receiving no support or inadequate support in guidance from his superior officers during the whole episode. He alleges that except for moving him to a new tent, nothing was done to prevent him from having continued contact with his attackers. He was refused [page96] return to Canada even in the face of medical personnel recommendation that he was not fit for duty and should be returned to this country.

[12] Private Brownhall further alleges that his superior officers were well aware of previous similar instances but that they tolerated or condoned such "hazing rituals" contrary to

his statutory and common-law rights and further, took no steps to prohibit or prevent such attacks from continuing.

[13] On February 14, 2004, three months following his deployment to Afghanistan, he was returned to CFB Petawawa. At all times during the period of November 14, 2003 to February 14, 2004, while in Afghanistan, Private Brownhall was on what is designated by s. 3 and ss. 91.1 and 91.2 of the Pension Act as "special duty service".

[14] When Private Brownhall returned to his post at CFB Petawawa in February 2004, he made several requests to be transferred to another base for the reasons that the circumstances relating to his reporting of the attack were common knowledge at the base and he feared for his and his family's safety. Allegedly, the defendant refused to take Private Brownhall's concerns seriously and failed or refused to move him to a new military base. Following his return to CFB Petawawa, Private Brownhall was diagnosed with post-traumatic stress disorder ("PTSD"). He applied for, and was granted, a disability pension from the Department of Veterans Affairs based upon the PTSD arising from the assault in Afghanistan and the traumatic events arising from his service there. Private Brownhall admits that a pension assessed at 60 per cent from the Department of Veterans Affairs became effective on March 24, 2004. The defendant states that the pension was granted pursuant to s. 21(1) of the Pension Act, as a result of his having been on "special duty service" at the time that the disability arose.

[15] On March 14, 2004, Private Brownhall was involved in a fight in a bar in Pembroke, Ontario. He alleges that he was "threatened" by "individuals who claimed to be friends of" the two Privates who assaulted him in Afghanistan. The bar in which the fight took place was a private establishment and had nothing to do with the Canadian Armed Forces.

[16] The statement of claim in this action was issued on February 2, 2005. Private Brownhall seeks damages on the following bases:

(a) Intentional infliction of mental suffering;

(b) Sexual assault, assault and battery; [page97]

(c) Breach of fiduciary duty;

(d) Negligence;

(e) Breach of s. 7 of the Canadian Charter of Right and Freedoms;

(f) Breach of statutory obligations and duties owed to him;

(g) Punitive, aggravated and exemplary damages.

[17] The defendant alleges that in this action Private Brownhall claims he is disabled as a result of the assault in Afghanistan together with subsequent acts of alleged misfeasance occurring in Afghanistan. Also, Private Brownhall seeks damages for the subsequent injuries he allegedly sustained in the fight in the Pembroke bar. Each and every one of the acts and omissions complained of, with the sole exception of the Pembroke bar incident, occurred during Private Brownhall's service in Afghanistan.

[18] Private Brownhall complains of acts which occurred in Afghanistan and for post-Afghanistan events, including failure to transfer him to another military base which yet again caused him to be assaulted in the Pembroke bar.

[19] At paras. 37 and 38 of the statement of claim, Private Brownhall sets out allegations of negligence and breaches of fiduciary duties owed to him which allegations are identical.

Motion Before Marchand J.

[20] Before Marchand J., the defendant attacked the statement of claim on a variety of grounds. The defendant attacked the statement of claim on the basis that it disclosed no reasonable cause of action [See Note 3 at the end of the document], i.e. it was plain and obvious that the claim disclosed no reasonable

clause of action. Further, the statement of claim was attacked on the basis that it was plain and obvious the claim should be dismissed as being clearly immaterial, frivolous, embarrassing or abusive [See Note 4 at the end of the document].

[21] Further, pursuant to Rule 25, the pleading was attacked for failing to contain a concise statement of material facts on which Private Brownhall relied for his claim and, in particular, the claim based on a fiduciary duty.

[22] In addition to the above, the following issues were before Marchand J.: [page98]

(a) Did the defendant's agents, employees or servants owe a duty of care to Private Brownhall?

(b) Is the defendant vicariously liable for the acts and omissions of its agents, employees or servants?

(c) Does the receipt of a military pension necessarily bar the plaintiffs' action?

(d) Does s. 111 of the Pension Act require that the action be stayed?

[23] Marchand J. dismissed the defendant's motion in its entirety. Furthermore, he did not grant the defendant's request for a stay of this action pursuant to s. 111(2) of the Pension Act.

Motion Before this Court for Leave to Appeal

[24] Private Brownhall and the defendant approach this motion for leave to appeal from two very different perspectives. On behalf of Private Brownhall, it is submitted that the issues before Marchand J. were technical matters related to principles of pleading. Simply put, the motion before Marchand J. was a "pleadings" motion. The law regarding the test for striking out a claim for failing to disclose a cause of action is clear. Further, the law regarding the test for dismissing or staying an action as being frivolous, vexation or abusive is also

clear. There are no conflicting decisions and the law is well settled. This motion for leave to appeal raises the simple question of whether Marchand J. misapprehended or incorrectly applied the tests involved in the application of rule 21.01(1)(b) and rule 21.01(3)(d). Private Brownhall submits that Marchand J. made no error in applying these tests. Further, such procedural questions could not be of sufficient importance to warrant leave to appeal.

[25] To the contrary, the defendant submits that this is not just a "pleadings" motion where issues of substantive fact and law are not to be determined in motions court but rather at trial. With respect, the defendant submits that Marchand J.'s decision is the conflicting decision in an area of the law which has otherwise been settled. Accordingly, there are conflicting decisions which also supports the argument that there is good reason to doubt the correctness of Marchand J.'s ruling. It is argued that the effect of Private Brownhall's entitlement to a pension under s. 21(1) and potential entitlement to a pension under s. 21(2) of the Pension Act would render his claims statute barred pursuant to s. 9 of the CLPA. Further, there are both conflicting decisions and good [page99] reasons to doubt the correctness of Marchand J.'s refusal to order a stay, pursuant to s. 111(2) of the Pension Act, of any part of this action which is not barred by operation of s. 9 of the CLPA. The defendant submits that there is case law both in Ontario and in other jurisdictions in Canada to the effect that s. 8 of the CLPA grants the Military a sweeping immunity from liability in tort and other types of proceedings. It is asserted that the statement of claim fails to allege sufficient material facts both to establish a fiduciary relationship as between Private Brownhall and the defendant and a breach of any such alleged fiduciary relationship. The interplay between Private Brownhall's claims and the statutory framework set out in the Pension Act, CLPA and other related statutes such as the National Defence Act [See Note 5 at the end of the document] and Veterans Review and Appeal Board Act [See Note 6 at the end of the document] significantly impact on whether Private Brownhall can advance his claims now and not subsequently at trial. These issues are of such importance that they transcend the questions as between

the parties and are relevant to members of the Military across the nation.

Test for Leave to Appeal

[26] The parties agree that the test for leave to appeal and leading authorities are accurately set out in paras. 18 and 20-23 of the defendant's factum. The test is governed by rule 64.02(4)(a) and (b) of the Rules of Civil Procedure.

[27] In order to satisfy the "conflicting decision" requirement of rule 62.02(4)(a) it is necessary to demonstrate a difference in the principle chosen as a guide to the exercise of such discretion [See Note 7 at the end of the document].

[28] Where there are conflicting decisions in Ontario or elsewhere on an interpretation of a Supreme Court decision or other matter of law of general importance, it is desirable that the same be referred to the Divisional Court to deal with the apparent conflict [See Note 8 at the end of the document].

[29] As for rule 62.02(4)(b), "good reason to doubt the correctness/matters of importance test", in Greslik v. Ontario Legal Aid Plan, the Divisional Court stated:

> The conditions for granting leave are conjunctive. A judge hearing such an application must have good reasons to doubt the correctness of the decision. [page100] He must also be satisfied that the matters involved are of "such importance" that in his opinion leave should be granted. We wish to draw to the attention of the members of this court and the profession at large that those words referred to matters of general importance, not matters of particular importance relevant only to the litigants. General importance relates to matters of public importance and matters relevant to the development of the law and the administration of justice [See Note 9 at the end of the document].

[30] However, it is not necessary for the moving party to convince the court that the decision it seeks to appeal from is wrong or even probably wrong. It is sufficient for the moving

party to show this court that there is good reason to doubt the correctness of the decision. Thus, the court should ask itself whether the correctness of the decision in question is open to "very serious debate" and, if so, is it a decision that warrants resolution by a higher level of judicial authority [See Notes 10 and 11 at the end of the document].

[31] To these considerations, Private Brownhall would add the following. Where there is a question as to the applicability of a statutory mechanism such as s. 9 of the CLPA because of findings of fact that are at issue in the proceeding, a triable issue is raised. In such circumstances leave to appeal should not be granted as it would be premature to conclude that there is good reason to doubt the correctness of the order [See Note 12 at the end of the document].

Grounds Upon Which Leave to Appeal is Sought

[32] The defendant asserts that there are four grounds upon which leave to appeal is sought. The tests set out in rule 62.02(4)(a) and (b) apply to grounds 1, 2 and 3. The test set out in rule 62.02(4)(a) applies to ground 4 only. The grounds are as follows:

Ground #1: There is good reason to doubt the correctness of the Ruling that the entirety of the statement of claim discloses a reasonable cause of action given the statutory framework (s. 9 of the CLPA and the Pension Act) in question as well as conflicting decisions from the Supreme Court of Canada, the Court of Appeal [page101] of Ontario and two rulings from the Federal Court of Appeal;

Ground #2: Although the defendant applied, in the alternative for an order striking out all or part of the action, for a stay of the action until the statutory preconditions under s. 111(2) of the Pension Act were met, the ruling does not even address that particular issue. Accordingly, there is good reason to doubt that the ruling properly addresses the law in this regard and there are most certainly conflicting decisions, both in Ontario and elsewhere, on this point;

Ground #3: There are conflicting decisions in Ontario and elsewhere, and there is good reason to doubt the correctness of the ruling as to whether the immunity clause in s. 8 of the CLPA acts to bar all or part of this action; and

Ground #4: Does the claim adequately set out the existence of a fiduciary relationship and breach of same?

Ground #1

Statutory framework: CLPA and Pension Act

[33] Section 9 of the CLPA states:

> 9. No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.

[34] Section 2 of the Pension Act speaks to the liberal construction of the Act to provide compensation to those members of the forces who have been disabled or have died as a result of Military service and to their dependants. Section 3(1) of the Pension Act sets out the definition sections for "disability", "member of the forces", "military service" or "service" and "special duty service". Section 21(1) deals with service during war, or special duty service and provides:

> 21(1) In respect of ... service as a member of the special force, and special duty service,
>
> (a) where a member of the forces suffers disability resulting from an injury or disease or an aggravation thereof that was attributable to or was incurred during such military service a pension shall, on application, be awarded to or in respect of the member ... [page102]

Section 21(2) of the Pension Act deals with service in militia or reserve army and in peace time as follows:

> 21(2) In respect of military service rendered ... in peace time,
>
> (a) where a member of the forces suffers disability resulting from an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service, a pension shall, on application, be awarded to or in respect of the member ...

A definition of "action" can be found at s. 111(1) as follows:

> 111(1) In this section, "action" means any action or other proceeding brought by or on behalf of
>
> (a) a member of the forces,
>
> . . . . .
>
> against Her Majesty, or against any officer, servant or agent of Her Majesty, in which damages are claimed in respect of an injury or disease or aggravation thereof resulting in disability or death.

Section 111(2) speaks to a stay of action against the Crown until a pension is refused and provides:

> 111(2) An action that is not barred by virtue of s. 9 of the Crown Liability and Proceedings Act shall, on application, be stayed until
>
> (a) an application for a pension in respect of the same disability or death has been made and pursued in good faith by or on behalf of the person by whom, or on whose behalf, the action was brought; and,
>
> (b) a decision to the effect that no pension may be paid to or in respect of that person in respect of

> the same disability or death has been confirmed by an appeal panel of the Veterans Review and Appeal Board in accordance with the Veterans Review and Appeal Board Act.

[35] Pursuant to s. 18 of the Veterans Review and Appeal Board Act, the defendant asserts that [the] federal Board has full and exclusive jurisdiction to hear, determine and deal with all applications for review that may be made to the Board under the Pension Act, and all matters related to those applications.

Case law on section 9 CLPA and Pension Act

[36] The defendant submits that decisions in recent cases have settled the law in respect of s. 9 of the CLPA and its interplay with s. 21 of the Pension Act (pertaining to the pension rights of soldiers sustaining injuries and/or disabilities during the course of their service). It is argued that the seminal 2002 Supreme Court of Canada decision in Sarvanis v. Canada, together with follow-up decisions by the Ontario Court of Appeal in Dionne v. Canada in 2002, the Federal Court of Appeal decision in [page103] Dumont v. Canada in 2004 and the November 3, 2005 Federal Court of Appeal decision in Begg v. Canada (which was not available to Marchand J. at the hearing of the motion) appear to have settled the law [See Notes 13, 14, 15 and 16 at the end of the document].

[37] The defendant asserts that in Dumont v. Canada, the Federal Court of Appeal has overturned or set aside the earlier line of decisions in cases such as Stopford, Marsot and Duplessis on which Private Brownhall relies [See Notes 17, 18 and 19 at the end of the document].

[38] Private Brownhall relies upon the decisions in cases such as Stopford, Marsot and Duplessis to establish that it is not clear whether the disability for which the pension was awarded is the same as the damages claimed in the action. Where it is unclear, the defendant's motion should fail. If it is not plain and obvious that the injuries claimed in the action are not identical to the injuries for which the pension was

awarded, the statutory bar provided by s. 9 of the CLPA may not apply. It is for the Crown to prove at trial that the damages giving rise to the plaintiff's action are identical to the psychological difficulties for which the plaintiff is receiving his pension. This is a triable issue regarding which the court lacks the evidentiary record to draw conclusions on a Rule 21 motion. Complete evidence as to the nature and extent of the injuries claimed by the plaintiff should not be evaluated in the context of the motion to strike. Instead, it is a matter that requires full pleadings and discoveries.

[39] Further, Private Brownhall relies on the decisions in Merineau v. Canada [See Note 20 at the end of the document] and Berneche v. Canada [See Note 21 at the end of the document] to support the argument that the link between the plaintiff's claim for damages [page104] and his military service may be too tenuous so as to be barred by the Pension Act or the CLPA. It is submitted that Merineau and Berneche represent binding authority on this court and that only a trial judge can determine whether the plaintiff's injuries are barred as suggested by the defendant.

[40] In considering this ground of appeal, this court has reviewed and considered each line of cases relied upon by Private Brownhall and the defendant. In doing so, this court concludes that there do exist conflicting decisions pursuant to rule 62.02(4)(a) and it is desirable that leave to appeal be granted.

[41] The entitlement of Private Brownhall to a s. 21(1) "special duty" pension is predicated solely on the injury or disability being "attributable to" or having been "incurred during" special duty service. Likewise, the s. 21(2) "peace time" entitlement is predicated on the same having arisen "out of or was directly connected" with military service. In Dumont, the Federal Court of Appeal reviewed in detail the allegations contained in the respective statements of claim of the two soldiers in question. The Federal Court of Appeal held that the action was a tort action regardless of whether the claims were framed in negligence or breach of fiduciary duties.

[42] Referring to the "peace time" test in s. 21(2) of the Pension Act, the court stated:

> The damages claimed by the appellants in the allegations bearing upon the fiduciary relationship are all connected to their military service. They are all the result of "an injury or disease or an aggravation thereof". They arise from, or are connected to, their military service. They all give entitlement to a pension. They could all be the subject to a tort action absent the prohibition provided by s. 9 of the Act [See Note 22 at the end of the document].

[43] Striking out the two claims in Dumont, the Federal Court of Appeal stated:

> ... even if the appellants rely on the fiduciary relationship of the Crown, their actions are essentially tort actions. These actions are prohibited under s. 9 of the Act because any loss or damage that is claimed gives entitlement to payment of a pension. These actions must be struck because it is "plain and obvious beyond a reasonable doubt" that they cannot succeed [See Note 23 at the end of the document].

[44] In Sarvanis, the Supreme Court stated that, by way of the Pension Act, Parliament has given servicemen like Private Brownhall a right to compensation, without regard to liability, for any disability resulting from an injury or disease, or an aggravation thereof, attributable to or incurred during their military service. [page105] In contrast to the Canada Pension Plan, which the defendant in Sarvanis sought to rely upon for the purposes of the s. 9 immunity, the Supreme Court deemed that the Pension Act amounted to a "comprehensive scheme designed to ensure the efficacious compensation of persons for their injuries and losses incurred in the public service" [See Notes 24 and 25 at the end of the document].

[45] In arriving at the conclusion [that] the two claims in Dumont were barred by operation of s. 9 of the CLPA, the Federal Court of Appeal cited the following passages from the Supreme Court of Canada's 2002 decision in Sarvanis v. Canada:

In my view, the language in s. 9 of the Crown Liability and Proceedings Act, though broad, nonetheless requires that such a pension or compensation paid or payable as will bar an action against the Crown be made on the same factual basis as the action thereby barred. In other words, s. 9 reflects the sensible desire of Parliament to prevent double recovery for the same claim where the government is liable for misconduct but has already made a payment in respect thereof. That is to say, the section does not require that the pension or payment be in consideration or settlement of the relevant event, only that it be on the specific basis of the occurrence of that event that the payment is made.

This breadth is necessary to ensure that there is no Crown liability under ancillary heads of damages for an event already compensated. That is, a suit only claiming for pain and suffering, or for loss of enjoyment of life, could not be entertained in light of a pension falling within the purview of s. 9 merely because the claimed head of damages did not match the apparent head of damages compensated for in that pension. All damages arising out of the incident which entitles the person to a pension will be subsumed under s. 9, so long as that pension or compensation is given "in respect of", or on the same basis as, the identical death, injury, damage or loss [See Notes 26 and 27 at the end of the document].

[46] In Dionne v. Canada, a pre-Sarvanis decision, this court granted summary judgment based on s. 9 of the CLPA dismissing the action of a soldier who, like Private Brownhall, received a s. 21 Pension Act pension but then sought to enhance his recovery by way of a tort action against the military alleging that medical negligence following the initial injury aggravated the same [See Note 28 at the end of the document].

[47] The motions court decision in Dionne v. Canada was subsequently upheld by the Court of Appeal post-Sarvanis. [page106] The Ontario Court of Appeal held:

Section 21(2) of the Pension Act is similar to s. 21(1)(a) of the Pension Act, considered in Sarvanis, in that it

provides for the granting of the pension only where disability is the result of an injury that arises out of, or is directly connected with, military service. We are satisfied that a pension paid under s. 21(2), as in the case of one under s. 21(1)(a), forecloses an action pursuant to s. 9 of the Crown Liability and Proceedings Act [See Note 29 at the end of the document].

[48] The defendant also takes the position that the decision of the Federal Court of Appeal in Begg v. Canada defeats Private Brownhall's argument that the defendant's negligence in not having taken all reasonable steps to eradicate "hazing" prior to the incident in question somehow removes this case from the operation of s. 9 of the CLPA.

[49] Based on the case law and the statutory framework of s. 9 CLPA and s. 21 of the Pension Act, the defendant asserts that Private Brownhall's tort claims resulted in an injury or disability attributable to or that was incurred during the period of Private Brownhall's special duty service in Afghanistan and therefore his pension entitlement falls within s. 21(1) of the Pension Act test. The remainder of the allegations pertaining to the injury allegedly sustained by Private Brownhall in the Pembroke bar fight arise from or are directly connected to his military service as per the s. 21(2) Pension Act test. Accordingly, the damages Private Brownhall claims have either been "paid" by the pension he is receiving or "payable" upon the application so that it is plain and obvious, following Dumont, that they too are barred by the operation of s. 9 of the CLPA.

[50] Notwithstanding the defendant's submissions that [the] Dumont case has settled the law in this area, Marchand J. held that Dumont:

... is not an answer to the plaintiff's allegations in the case at bar. It seems to me that the basis upon which such claims should be barred (by s. 9 of the CLPA) is to prevent "double recovery". It is appears to this court that to grant the relief sought at this stage of the proceedings would deprive the plaintiff of his right to establish at a

trial, that the claim falls outside of the basis upon which his pension was awarded or could have been awarded. It also further appears to this court that only after a trial of the action can the court determine whether the claim falls within the Pensions Act of Canada [See Note 30 at the end of the document].

[51] It is submitted that Marchand J. had misconstrued the Supreme Court's dictum as to what exactly "double recovery" means in the circumstances. The defendant submits that what the Supreme Court meant by that phrase, as cited at para. 35 of Sarvanis, [page107] is to prevent the same "event", not "injury" or "disability" from being compensated twice. Here, Private Brownhall appears to assert that, although he has been compensated for the PTSD he suffers arising from the specified factual events, he also has other "injuries" or "disability" arising from those same events for which he has not been adequately compensated and it is those additional items which form the basis of this claim. I find the defendant has established that there is good reason to believe that Marchand J. had used a very different principle as a guide to coming to the decision that he did and one that is clearly contrary to noted decisions on this point.

[52] Further, the defendant submits that, at the very least, Private Brownhall received a pension further to the assault committed in Afghanistan. That being the case, it is plain and obvious that the portion of the claim seeking damages from the defendant for that assault ought to have been held barred by virtue of the operation of s. 9 of the CLPA and the court decisions in Sarvanis, Dionne, Dumont and Begg. Marchand J. did not deal with this argument raised by the defendant that at least those parts of the claim which covered the same factual basis upon which Private Brownhall is already receiving a pension should and ought to be barred. Again, I find the defendant has established that there is good reason to doubt the correctness of the ruling in question when it permits Private Brownhall to proceed with a claim which both the governing statutes and the case law purport quite clearly to bar [See Notes 31 and 32 at the end of the document].

[53] At para. 45 of his ruling, Marchand J. states that had the injuries complained of in the statement of claim entirely arisen 'out of his duties as a soldier this action might well be barred'. However, the statement of claim contains no allegation that any of the matters complained of while the plaintiff was in Afghanistan did not arise out of or pursuant to this duties as a soldier. He was, as a soldier on special duty posting, in effect 'on duty' that entire period as asserted by the defendant. Further, the meaning of the last sentence of para. 45 is unclear. Private Brownhall was awarded a pension the basis of which is set out in the letter from the pension adjudicator of April 14, 2004 [See Note 33 at the end of the document]. [page108]

[54] Once again, in reference to para. 51 of the ruling, Marchand J. decided that only after a trial of the action can the court determine whether the plaintiff's claim falls within the Pensions Act of Canada (sic). This raises an issue of jurisdiction as to whether this court can rule on the pension issue only after trial of the action. Once again, I find the defendant has established that there is both a conflicting decision and good reason to doubt the correctness of Marchand J.'s ruling in regards to the jurisdiction of this court pertaining to Pension Act issues.

[55] The defendant further asserts that there is good reason to doubt that the court has any jurisdiction to hear or award damages pertaining to a Pension Act entitlement, or to even entertain a tort claim such as in this case, in circumstances in which an application has not met the preconditions set out in s. 111(2) of the Pension Act. It is argued that since there is no allegation contained in the statement of claim such that Private Brownhall did apply to the Board for compensation or a pension for any injuries, damages or disabilities sustained for which Private Brownhall feels he has not already been compensated by his current pension, the defendant submits it is plain and obvious that this action discloses no reasonable cause of action.

[56] For the reasons given, regarding ground #1, there are both conflicting decisions and good reason to doubt the

correctness of the ruling of Marchand J.

Ground #2

[57] This ground deals with the stay of the action pursuant to s. 111 of the Pension Act. Private Brownhall submits that the stay provisions of s. 111(2) of the Pension Act do not apply to his claim for the reasons that the wrongs claimed by him were not sustained by him during the course of carrying out his military duties.

[58] The cases upon which the defendant relies to argue its position that the action should be stayed are Dumont, Levesque v. Canada and Paquet v. Canada [See Notes 34, 35 and 36 at the end of the document]. It is submitted that each of these cases is distinguishable from Private Brownhall's [page109] circumstances where in those cases the plaintiffs all incurred their damages as a result of military services as contemplated by the Pension Act.

[59] Although Marchand J. did not specifically state that this was the reason he was not granting the stay, his deliberations and reasons for not granting the stay, according to Private Brownhall, are clearly outlined in para. 51 of his reasons.

[60] The defendant submits that much argument during the course of the hearing before Marchand J. was directed towards the issue of the stay. In fact, Marchand J. states at para. 50 of his ruling:

> Section 111 of the Pensions Act (sic) now requires the court, in all cases dealing with an action not barred by virtue of s. 9 of the Act, to stay the action until a pension application has been made.

[61] Marchand J. did not grant a stay of any parts of the action not barred by s. 9 as mandated by s. 111(2) of the Pension Act. Further, his ruling contains no reasons for his refusal or failure to do so. Accordingly, the defendant has established that there is good reason to doubt the correctness

of the ruling in regards to Marchand J.'s failure to stay any parts of this action not already barred by s. 9. To the extent that Marchand J. found that it was not "plain and obvious" that any parts of the claim are barred as such, s. 111(2) required a stay of the entirety of the action so that Private Brownhall could meet the statutory prerequisite for bringing an action such as this. Rather, Private Brownhall was required to exhaust all his remedies under the Veterans Review and Appeal Board Act and a stay was required so as to permit Private Brownhall to do so. In addition, the defendant has established that there are also conflicting decisions in respect of this issue namely, decisions of the Federal Court of Appeal in Dumont, the Alberta Court of Appeal in Levesque, and the Superior Court of Justice (Ontario) in Paquet.

[62] Accordingly, this court finds that the defendant has satisfied the test that there are conflicting decisions and good reason to doubt the correctness of the order in question. In respect of ground #2, it is desirable that leave to appeal be granted.

Ground #3

[63] This ground deals with whether the immunity clause in s. 8 of the CLPA operates to bar all or part of this action. Section 8 of the CLPA provides:

> Nothing in sections 3 to 7 makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority that, if those sections had not been passed, would have been exercisable by virtue of the prerogative of the Crown, or any power or authority conferred on the Crown [page110] by any statute, and, in particular, but without restricting the generality of the foregoing, nothing in those sections makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority exercisable by the Crown, whether in time of peace or of war, for the purpose of the defence of Canada or of training, or maintaining the efficiency of, the Canadian Forces.

[64] Section 3 of the CLPA referred to provides for the vicarious liability of the Crown for the tortious acts of her authorized agents or servants.

[65] In specifically referring to s. 8, Professor Hogg observes:

> Military activity is uniquely governmental--and often dangerous. No doubt, this is why the federal CLPA, by s. 8, exempts the Crown from tortious liability. This provision is a sweeping immunity for military activity, drawing no distinction between war and peace; between combat, training and discipline; or between injured civilians and injured members of the forces [See Note 37 at the end of the document].

[66] In a 1990 decision, the Federal Court dismissed an action by a former soldier claiming, amongst other things, false representations and "unlawful detention". As to those parts of the claim based on tort liability, the court stated that:

> There is no doubt that an individual who joins the Armed Forces is subject to a special legal regime ... As to whether the facts alleged constitute an offence for which the defendant might be liable, it is sufficient to refer to s. 8 of the Crown Liability Act ... [See Note 38 at the end of the document].

[67] Recently, s. 8 was cited with approval by this court in dismissing two actions brought by another former soldier in the companion cases of Hainsworth v. Her Majesty and Jean Chretien and Hainsworth v. Her Majesty and John McCallum. The plaintiff, a former military lawyer, alleged that the Armed Forces had, amongst other things, illegally prosecuted him, committed abuses of power and was in contempt of a court order. O'Connell J., of this court, cited s. 8 and stated:

> Even if the Statement of Claim did disclose a reasonable cause of action, the moving parties are immune from civil liability pursuant to s. 8 ... This section grants the

> Crown sweeping immunity from actions in tort arising out of military activity. The case before this Honourable Court involves the exercise of "power of authority by the Crown ... for the purpose of the defence of Canada ... or maintaining the efficiency of the Canadian Forces" ... Thus, even if the Plaintiff had a legitimate cause of action, he would be barred from suing the Crown [See Notes 39 and 40 at the end of the document].
> [page111]

[68] In his ruling, Marchand J. acknowledges, at para. 36, the defendant's assertion that the s. 8 immunity clause acts as a bar to this proceeding. However, the effect of that section on this claim appears to be limited to the discussion contained at para. 41 wherein he states:

> I believe that I am doing justice to counsel in finding that neither of them could find any decision of the courts as to the constitutionality of the aforementioned statutes, and on that issue alone, I find that it would be premature, at this stage of the proceedings, for this court to find that the statement of claim should be struck on the ground that it is scandalous, frivolous and vexatious, and/or an abuse of process of this court.

[69] With due respect to Marchand J., the defendant asserts not that this action is barred by s. 8 as being scandalous, frivolous and vexatious, and/or an abuse of process of this court, but, rather, that the statement of claim discloses no reasonable cause of action on the basis of the immunity provision in question.

[70] Further, and of significance, the statement of claim does not purport to challenge the constitutionality of the section in question and there is absolutely no allegation, material or otherwise, that raises any such constitutional issue. To the extent that the claim raises the Charter of Rights and Freedoms, it does so only in the context of allegations that the acts and omissions of members of the Canadian Forces complained of violated such rights and that Private Brownhall is entitled to a monetary remedy as a result.

[71] In respect of ground #3, the defendant has established that there is both good reason to doubt the correctness of Marchand J.'s ruling on the defendant's challenge to the statement of claim based on the immunity provision of s. 8 of the CLPA. As well, there are conflicting decisions both in Ontario and elsewhere on the matter.

Ground #4

[72] This ground deals with the question of whether the statement of claim adequately sets out the existence of a fiduciary relationship and breach of same. Regarding ground #4, the defendant relies upon the test in rule 62.02(4)(a) -- "the conflicting decision" test -- only. It is asserted that the statement of claim failed to allege sufficient material facts both to establish a fiduciary relationship as between Private Brownhall and the defendant and a breach of any such alleged fiduciary relationship. Accordingly, the defendant's position is that the statement of claim offends both rule 21.01(b) and rule 25.05(2) of the Rules of Civil Procedure and should be struck on those bases.

[73] Marchand J. considered the sufficiency of the statement of claim as it related to the allegations of fiduciary obligation and [page112] breach thereof. In his reasons, reference to this issue can be found at paras. 13, 15, 30, 31 and 33.

[74] In his ruling, after citing the law from Deep v. Ontario [See Note 41 at the end of the document] at paras. 20-23, Marchand J. commented [at para.25]:

> I agree with the respondent plaintiff that it is plain and obvious that a person enrolling in the Armed Forces of Canada, are (sic) by virtue of the Defence Act unable to leave the Force until certain events occur (see below -- paragraph 38, section 23(1) of the National Defence Act). The plaintiff did list some 15 or so ways upon which he proposed to rely at trial to show that the Crown in fact did breach this statutory duty. It seems to this court that there

is sufficient material in the pleading to satisfy the basic requirements of the aforementioned rules.

[75] At para. 30, Marchand J. stated:

> It is clearly arguable that the Crown stands in a fiduciary relationship to individual members of the Canadian Armed Forces.

And further at para. 31:

> In Duplessis v. Canada, [2004] S.C.J. No. 226, the Supreme Court of Canada has ruled unequivocally that the categories of fiduciary, like those of negligence, should not be considered closed. It is the nature of the relationship not the specific categories of actors involved that gives rise to the fiduciary duty.

[76] At para. 33, Marchand J. concluded:

> I find that the statement of claim, as constituted, sufficiently lays out the cause of action as required by the rules and should not be struck or stayed on that ground.

[77] Marchand J. at para. 29 of his reasons accepted the proposition that on a motion to strike, the court must read the statement of claim generously with allowance for inaccuracies due to drafting deficiencies.

[78] In respect of ground #4, this court is not satisfied that the claim in respect of the fiduciary obligation and breach thereof has been insufficiently or inadequately pleaded such that all or parts of the paragraphs of the claim regarding the existence of a fiduciary relationship or breach of such a relationship should be struck. The court is not persuaded that there are conflicting decisions on this point making it desirable that leave to appeal be granted. Further, although this position was not taken by the defendant in argument, this court finds that there is no good reason to doubt the correctness of Marchand J. in ruling that the statement of claim, as constituted, sufficiently lays out the cause of

action as required by the rules and should not be struck or [page113] stayed on that ground. Therefore leave is not granted to appeal in respect of ground #4 advanced by the defendant.

[79] Lastly, this court has considered the question whether it is desirable that leave to appeal be granted and are the matters involved of general importance to the development of the law and the administration of justice. This question forms part of the conjunctive test found in rule 62.02(4)(b).

[80] This question is answered in the affirmative for the following reasons.

(a) The decision in question goes to the very heart of the issue as to whether a member of the Canadian Forces who claims damages against the military resulting from injuries or a disability can maintain a tort action in the face of a pension paid, payable or not applied for. As such, it transcends the interests of Private Brownhall alone. Further, the decision is of great concern to the defendant, the federal Crown, which is the defendant in all such claims against the Canadian Forces. Without doubt, this decision deals with a matter of "general importance" which goes well beyond the immediate interests of the parties herein;

(b) The decision in question is of importance both nationally and in Ontario. It deals with statutes such as the Pension Act, the Crown Liability and Proceedings Act and the Veterans Review and Appeal Board Act which are federal statutes and equally applicable to all Superior, Provincial and territorial courts in Canada, as well as the Federal Court of Canada, which has concurrent jurisdiction over this type of action;

(c) Given conflicting decisions, it is important to clarify whether the defendant Crown can rely upon the Rules of Civil Procedure or binding decisions to deal with these types of actions on a summary basis, in Ontario and elsewhere, without such claims simply proceeding to trial.

It is important and in the public interest that the decision in question be the subject of appellate review by the Divisional Court;

(d) The decision in question goes well beyond a mere discretionary order on a procedural matter made by a motions court judge and is of general importance. The statutory framework including the statutory bar provision found in s. 9 of the CLPA together with Sarvanis and the post-Sarvanis cases require the consideration of a higher court. The decision in the case at bar is in conflict with recent decisions of [page114] higher courts. An appeal to the Divisional Court raises important issues pertaining to the administration of justice and the development of the law in this specific area; and,

(e) Section 8 of the CLPA also raises the issue of Crown immunity from lawsuits such as in this case. As with the s. 9 issue, the question of the applicability of s. 8 goes directly to the heart of the issue as to whether a lawsuit such as Private Brownhall's lawsuit, brought by members of the Canadian Forces, can and ought to be sustained in light of the immunity provision. Once more, this issue transcends the immediate interest of the parties and involves the administration of justice and the development of the law [not] only in Ontario, but throughout Canada.

Disposition

[81] Accordingly, the defendant is granted leave to appeal the ruling of Mr. Marchand J. dated November 30, 2005 to the Divisional Court of Ontario in respect of grounds 1, 2 and 3. No leave is granted in respect of ground 4 as it is dismissed. Costs of this motion for leave to appeal is reserved to the panel of the Divisional Court hearing the appeal.

Application granted in part.

Notes

Note 1: Pension Act, R.S.C. 1985, c. P-7.

Note 2: Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50.

Note 3: Rule 21.01(1)(b) of the Rules of Civil Procedure.

Note 4: Rule 21.01(3)(d) of the Rules of Civil Procedure.

Note 5: National Defence Act, R.S.C. 1985, c. N-5.

Note 6: Veterans Review and Appeal Board Act, S.C. 1995, c. 18.

Note 7: Comtrade Petroleum Inc. v. 490300 Ontario Ltd. (1992), 7 O.R. (3d) 542, [1992] O.J. No. 652 (Div. Ct.) at p. 544 O.R.

Note 8: Traynor v. Unum Life Insurance Co. of America (2002), 61 O.R. (3d) 191, [2002] O.J. No. 3610, 2002 Can LII 8677 (S.C.J.), at paras. 35-36.

Note 9: (1988), 65 O.R. (2d) 110, [1988] O.J. No. 525 (Div. Ct.), at pp. 112-13 O.R.

Note 10: Ash v. Lloyd's Corp. (1992), 8 O.R. (3d) 282, [1992] O.J. No. 894 (Gen. Div.), at pp. 284-85 O.R.

Note 11: Oberlander v. Canada (Attorney General), [2004] O.J. No. 1574, [2004] O.T.C. 332 (S.C.J.), at paras. 8-9.

Note 12: Brake v. Canada (Attorney General), [2005] O.J. No. 2282, 140 A.C.W.S. (3d) 67 (S.C.J.).

Note 13: Sarvanis v. Canada, [2002] 1 S.C.R. 921, [2002] S.C.J. No. 27, 2002 SCC 28.

Note 14: Dumont v. Canda [2004] 3 F.C.R. 338, [2003] F.C.J. No. 1857, 2003 FCA 475 (C.A.).

Note 15: Dionne v. Canada (2002), 59 O.R. (3d) 566, [2002] O.J. No. 2012 (C.A.).

Note 16: Begg v. Canada (Minister of Agriculture), [2005] F.C.J. No. 1819, 261 D.L.R. (4th) 36 (C.A.).

Note 17: Stopford v. Canada, [2001] F.C.J. No. 1255, [2002] 1 F.C. 360, affg [2003] F.C.J. No. 1255, [2004] 1 F.C.R. 431.

Note 18: Marsot v. Canada (Ministry of National Defence), [2002] F.C.J. No. 313, [2002] 3 F.C. 579, affg [2003] F.C.J. No. 453, 2003 FCA 145.

Note 19: Duplessis v. Canada, [2000] F.C.J. No. 1917, 197 F.T.R. 87 affd [2001] F.C.J. No. 1455, 211 F.T.R. 214, affd [2002] F.C.J. No. 1277, 293 N.R. 388 (C.A.).

Note 20: Mrineau v. Canada, [1983] 2 S.C.R. 362, [1983] S.C.J. No. 76, at p. 363 S.C.R.

Note 21: Berneche v. Canada, [1991] F.C.J. No. 515, [1991] 3 F.C. 383 (C.A.).

Note 22: Dumont, supra, at para. 63.

Note 23: Dumont, supra, at para. 73.

Note 24: Dumont, supra, at para. 70.

Note 25: Sarvanis, supra, at para. 35.

Note 26: Dumont, supra, at para. 64-67.

Note 27: Sarvanis, supra, at para. 28-30.

Note 28: Dionne v. Canada, supra, at para. 15.

Note 29: Dionne, supra, at para. 6.

Note 30: Ruling on Motion, para. 51.

Note 31: Begg, supra, at paras. 27-28, 32-33.

Note 32: Dumont, supra, para. 63.

Note 33: Letter dated April 14, 2004, M.E. Gard, Pension Adjudicator, Defendant's Supplementary Motion Record, Tab 60, s. 117 of the Pension Act was cited by Marchand J. - likely in error. That section was not relevant to this issue and was not cited by the parties. Marchand J. might have meant, rather, s. 9 of the CLPA being the section that acts as a bar to claim such as this.

Note 34: Dumont, supra, at paras. 72, 79, 81-82.

Note 35: Levesque v. Canada (Attorney General), [2004] A.J. No. 108, 346 A.R. 88 (C.A.).

Note 36: Paquet v. Canada (Attorney General), [2001] O.J. No. 1468, [2001] O.T.C. 275, at paras. 82, 83 (S.C.J.).

Note 37: Hogg and Monahan, Liability of the Crown, 3rd ed. (Toronto: Carswell, 2000), at p. 181.

Note 38: Perkins v. Canada, [1990] F.C.J. No. 603, 39 F.T.R. 69, at p. 71 F.T.R., p. 2 (Q.L.).

Note 39: Hainsworth v. Canada, [2003] O.J. No. 6162, at paras. 32-34 (S.C.J.).

Note 40: Hainsworth v. Canada, [2003] O.J. No. 6163, at paras. 32-34 (S.C.J.).

Note 41: Deep v. Ontario, [2004] O.J. No. 2734, [2004] O.T.C. 541 (S.C.J.).

TAB 26

CITATION: Sirdi Sai Sweets et al. v. McCarthy Tetrault et al., 2015 ONSC 3060
DIVISIONAL COURT FILE NO.: 109/15
DATE: 20150602

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: SIRDI SAI SWEETS AND RAMESH MEHTA, Applicants/Moving Party

AND:

MCCARTHY TETRAULT AND SARI E. BATNER, Respondents/Responding Parties

BEFORE: Lederman J.

COUNSEL: *Ramesh Mehta*, in person, the Moving Party

Katherine A. Booth, for the Responding Parties

HEARD at Toronto: In Writing

ENDORSEMENT

[1] The moving party, Ramesh Mehta ("Mehta") is a former client of the responding parties. He seeks leave to appeal to the Divisional Court from the Order of Mr. Justice Spence (the "Motion Judge") dated February 13, 2015.

NATURE OF THE ISSUE BEFORE THE MOTION JUDGE

[2] Mehta moved before the Motion Judge for an order requiring the respondents to refund various amounts paid to them pursuant to their solicitor's invoices. His motion was brought in the context of a proceeding that Mehta commenced seeking an assessment of the respondents' invoices. The assessment hearing is scheduled for August 18 – 20, 2015.

[3] Mehta asserted that the billing agreement he entered into with the respondents included a hand-written term requiring the respondents to apply a 50% discount to all of his invoices but that in fact the discount had not been applied. The respondents contended that Mehta falsified the billing agreement, adding terms after the fact and without the respondents' knowledge or consent.

[4] After reviewing all of the parties' materials including the documents in issue and after hearing submissions from both Mehta and the respondents, the Motion Judge concluded that the 50% discount did not form part of the true billing agreement and that the term had been

fraudulently added by Mehta after the fact. He therefore dismissed Mehta's motion with costs to the respondents on a substantial indemnity scale.

THE TEST FOR GRANTING LEAVE TO APPEAL

[5] The test for granting leave to appeal under Rule 62.02(4) is well-settled. It is recognized that leave should not be easily granted and that the test to be met is a very strict one. There are two possible branches upon which leave may be granted. Both branches involve a two-part test and in each case, both aspects of the two-part test must be met before leave may be granted.

[6] Under Rule 62.02(4)(a), the moving party must establish that there is a conflicting decision of another judge or court in Ontario or elsewhere (but not a lower level court) and that it is in the opinion of the judge hearing the motion "desirable that leave to appeal be granted". A "conflicting decision" must be with respect to a matter of principle, not merely a situation in which a different result was reached in respect of particular facts: *Comtrade Petroleum Inc. v. 490300 Ontario Ltd.*,(1992), 7 O.R. (3d) 542 (Div.Ct.).

[7] Under Rule 62.02(4)(b), the moving party must establish that there is reason to doubt the correctness of the order in question and that the proposed appeal involves matters of such importance that leave to appeal should be granted. It is not necessary that the judge granting leave be satisfied that the decision in question was actually wrong; that aspect of the test is satisfied if the judge granting leave is satisfied that the correctness of the order is open to "very serious debate": *Nazari v. OTIP/RAEO Insurance Co.*, [2003] O.J. No. 3442 (S.C.J. per Then J.); *Ash v. Lloyd's Corp.* (1992), 8 O.R. (3d) 282 (Gen Div., per Farley J.). In addition, the moving party must demonstrate matters of importance that go beyond the interest of the immediate parties and involve questions of general or public importance relevant to the development of the law and the administration of justice: *Rankin v. McLeod Young Weir Ltd.* (1986), 57 O.R. (2d) 569 (H.C.J. per Catzman J.); *Greslik v. Ontario Legal Aid Plan* (1988), 65 O.R. (2d) 110 (Div.Ct.).

[8] Mehta has attempted to introduce fresh evidence on this motion. It would appear that there is no jurisdiction to entertain fresh evidence on a motion for leave to appeal: *SMF soft.com Inc. v. Rompart Services (Trustee of)* [2005] O.J. No. 4847. In any event, Mehta has not shown that the test for adducing fresh evidence has been met.

RULING

[9] On this motion for leave, Mehta has not made any submissions on how either test for leave to appeal under Rule 62.02(4) has been met. Rather, he complains that the Motion Judge should not have accepted the respondents' affidavit evidence over the "original" copy of the billing agreement that he produced; failed to consider the significance of the signatures at the bottom of the page of the "original"; and further that, the Motion Judge required him to present his argument out of turn. Basically, Mehta seeks to re-argue the issues raised before the Motion Judge

[10] The decision of the Motion Judge was fact specific and his findings of credibility were based on the evidence before him. There is no jurisprudence or legal principle that conflicts with his decision. Moreover, in my opinion, it is not desirable that leave to appeal be granted. The test under Rule 62.02(4)(a) has not been met.

[11] Further, with respect to Rule 62.02(4)(b), I do not have good reason to doubt the correctness of the Motion Judge's Order. There was sufficient evidence before him to permit the conclusion that he reached.

[12] The Motion Judge allowed the respondents to put their oral submissions first in order that Mehta, who was self-represented, would see clearly and specifically the case that he had to meet regarding the validity of the agreement and that Mehta could make sure that none of the respondents' points were missed. Although the Motion Judge permitted the respondents to proceed first in this fashion, there is no basis whatsoever to suggest that Mehta was denied full opportunity to be heard.

[13] Furthermore, the proposed appeal is not of any particular importance for anyone but the parties. It does not have broad significance that warrants resolution by an appellate court. No issues are raised as to matters relevant to the development of the law and the administration of justice. Thus neither branch of the the test under Rule 62.02(4)(b) has been met.

[14] The same can be said for the Motion Judge's order as to costs. There was a sound basis for the order as to costs and Mehta made no submissions as to why there should be an appeal from that order.

DISPOSITION

[15] Accordingly, the motion for leave to appeal is dismissed. The responding parties will have their partial indemnity costs of the motion for leave, as set out in their costs outline, in the amount of $4,621.25, all inclusive, payable by Mehta within 30 days.

Lederman J.

Date: June 2, 2015

TAB 27

See para. 7

1988 CarswellOnt 436
Ontario Divisional Court

Greslik v. Ontario Legal Aid Plan

1988 CarswellOnt 436, [1988] O.J. No. 525, 10 A.C.W.S. (3d) 13, 28 C.P.C. (2d) 294, 30 O.A.C. 53, 65 O.R. (2d) 110

GRESLIK v. ONTARIO (LEGAL AID PLAN)

Callaghan A.C.J.H.C., Galligan and Labrossé JJ.

Judgment: April 8, 1988
Docket: Div. Ct. No. 1213/86; S.C.O. No. 25776/78

Counsel: *J.W. Quinn*, for appellant (defendant).
A.C. Taylor, for respondent (plaintiff).

Subject: Civil Practice and Procedure

Headnote

Practice --- Disposition without trial — Dismissal for delay — Discretion of court

Practice --- Practice on appeal — Leave to appeal — Appeal from refusal or granting of leave

Disposition without trial — Dismissal for delay — Discretion of Court — Defendant failing to comply with undertakings — Defendant moving to dismiss action for delay — Failure being fatal to motion — Appeal dismissed — Ontario Rules of Civil Procedure, r. 24.01.

Practice on appeal — Leave to appeal — The application — Grounds — Leave to appeal from interlocutory order — Leave not to be granted where issue to be raised on appeal not being of general importance — Ontario Rules of Civil Procedure, r. 62.02(5)(b).

In May 1978, the plaintiff sued the defendant for damages for being deprived of legal aid. Two years later, the plaintiff delivered her statement of claim. A statement of defence was served and 2 years later the defendant was examined for discovery. One and a half years after the examination for discovery, the plaintiff requested compliance with undertakings. No answers were forthcoming and 2 years later a similar request for compliance was made. The

defendant then moved to dismiss the plaintiff's claim for delay. The Master dismissed the motion on the basis of the defendant's failure to comply with undertakings. An appeal from the Master was dismissed. The defendant obtained leave to appeal to the Divisional Court on the basis that the Master may have misconstrued the meaning of the word "default" in r. 24.01 in making a finding of default against the defendant.

Held:

The appeal was dismissed.

The words "not in default" in r. 24.01 were a condition that was required to be satisfied before a defendant could launch a motion to dismiss an action for delay. However, those words could not and should not be read to take away the jurisdiction of the Master to exercise his discretion to dismiss such a motion where it appeared that a defendant, although not in technical default of any specific rule or rules, had been dilatory in complying with undertakings and had ignored requests for compliance over a lengthy period of time. The Master correctly exercised his discretion in the circumstances of this case.

Leave to appeal an interlocutory order of a Judge should only be granted where there was both good reason to doubt the correctness of the decision and the matters involved were of general importance to the public and to the development of the law and the administration of justice. The issue raised on this appeal was not a matter of general importance.

APPEAL by defendant from order dismissing motion to dismiss action for delay.

The judgment of the Court was delivered by *Callaghan A.C.J.H.C.* (orally):

1 This appeal comes to the Divisional Court by way of leave granted on December 12, 1986.

2 In granting leave the Court stated that the Master found delay and prejudice and may have misconstrued the meaning of "default" in making a finding of default against the appellant herein.

3 The writ of summons in this matter was issued May 23, 1978 and the plaintiff claimed "damages accrued and compounded as a result of being deprived of Legal Aid". An appearance was entered on June 1, 1978 and over the next 2 years the plaintiff requested from the solicitor representing the defendant indulgences with respect to serving a statement of claim which was finally delivered on May 15, 1980. On August 6, 1981 a statement of defence was delivered and the area director of the Legal Aid Plan for the Judicial District of Niagara South was examined for discovery on September 30, 1982. No further steps of substance were taken until February 24, 1984 when the plaintiff's solicitor requested compliance with undertakings given on the examination

for discovery. Again nothing happened until March 10, 1986 when a similar request was made of the defendant's solicitor.

4 On May 16, 1986 the Master dismissed the defendant's motion to dismiss the plaintiff's claim for delay. The Master stated:

> In the circumstances of this case the defendant has not complied with undertakings given on discovery and apparently ignored requests for compliance over which is admittedly a lengthy period of time. Such failure of compliance is in my view sufficient to warrant the dismissal of the motion today. It might be fair to note that the defendants had recently changed solicitors. In my view both sides of this action should take all the necessary steps to move this matter on for trial as expeditiously as possible.

The order of the Master was appealed on July 25, 1986 and Madam Justice Boland of this Court dismissed the appeal. Leave to appeal was granted by another Judge of this Court as above mentioned.

5 The appellant submits that the Master after finding that the plaintiff was guilty of delay erred in holding that that delay was excused by the conduct of the defendant. In so ruling it is submitted the Master misconstrued the meaning of the word "default" in r. 24.01 of the Rules of Civil Procedure. That Rule provides as follows:

> 24.01 A defendant who is not in default under these rules or an order of the court may move to have an action dismissed for delay where the plaintiff has failed, ...

6 In our view when the drafters of the new Rules used the words "not in default" in r. 24.01, they intended those words as a condition that must be satisfied before a defendant could launch a motion to dismiss but those words cannot and should not be read to take away the jurisdiction of the Master to exercise his discretion to dismiss such a motion where it appears that a defendant, although perhaps not in technical default of any specific Rule or Rules, has been dilatory in complying with undertakings and has ignored requests for compliance over a lengthy period of time. That is this case and in this case the Master correctly, in our view, exercised his discretion in the circumstances before him.

7 This case also raises another matter of concern and significance which we propose to deal with. On applications for leave to appeal from interlocutory orders a Judge is granted jurisdiction to grant leave where inter alia:

> (b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

(Rule 62.02(5)(*b*)) The conditions for granting leave are conjunctive. A Judge hearing such an application must have good reason to doubt the correctness of the decision. He must *also* be satisfied that the matters involved are of "such importance" that in his opinion leave should be granted. We wish to draw to the attention to the members of this Court and the profession at large that those words refer to matters of *general* importance, not matters of particular importance relevant only to the litigants. General importance relates to matters of public importance and matters relevant to the development of the law and the administration of justice. See *Rankin v. McLeod, Young, Weir Ltd.* (1986), 57 O.R. (2d) 569, 13 C.P.C. (2d) 192 (H.C.) per Catzman J.; see also *Poce v. Geranium Enterprises Ltd.* (9 February 1988), Doc. No. 1539/87, O'Driscoll J. (Ont. H.C.); *Whitelaw v. Van Donkersgoed* (1986), 11 C.P.C. (2d) 263 (Ont. H.C.) [leave to appeal to Ontario Divisional Court granted (1986), 56 O.R. (2d) 409, 11 C.P.C. 263n (H.C.)]. That was not the situation in the instant case and it has not been the case in many others which have recently come before this Court. We trust that those hearing and bringing such applications in the future will bear in mind the requirements of r. 62.02(5). The appeal in this case must be dismissed with costs.

Appeal dismissed.

End of Document

Divisional Court File No.: 648/15
Court File No.: CV-14-507120

THE CATALYST CAPITAL GROUP INC.
Plaintiff/Moving Party

-and-

BRANDON MOYSE et al.
Defendants/Responding Parties

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

PROCEEDING COMMENCED AT
TORONTO

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