

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

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

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**BRIEF OF AUTHORITIES OF THE DEFENDANT  
WEST FACE CAPITAL INC.  
RE: MOTION TO EXTEND TIME AND  
FOR LEAVE TO APPEAL  
(Returnable January 21, 2016)**

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**DAVIES WARD PHILLIPS & VINEBERG LLP**

Suite 4000  
155 Wellington Street West  
Toronto, ON M5V 3J7

Kent E. Thomson (LSUC #24264J)  
(KentThomson@dwpv.com)  
Matthew Milne-Smith (LSUC #44266P)  
(mmilne-smith@dwpv.com)

Tel.: 416.863.0900  
Fax: 416.863.0871

Lawyers for the Defendant/Responding  
Party, West Face Capital Inc.

**ONTARIO**  
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ONTARIO

SUPERIOR COURT OF JUSTICE  
DIVISIONAL COURT

BETWEEN:

ADDISON CHEVROLET BUICK GMC  
LIMITED, ADDISON ON ERIN MILLLS  
CHEVROLET BUICK GMC LIMITED,  
APPLEWOOD HOLDINGS INC., BUDDS  
CHEVROLET CADILLAC BUICK GMS  
LIMITED, CITY BUICK CHEVROLET  
CADILLAC GMC LTD., COURTESY  
CHEVROLET LIMITED, FROST  
CHEVROLET BUICK GMC CADILLAC  
LTD., GATEWAY CHEVROLET INC.,  
HOGAN CHEVROLET BUICK GMC  
LIMITED, HUMBERVIEW INC.,  
LEGGAT CHEVROLET BUICK GMC  
LTD., LEGGAT CHEVROLET  
CADILLAC BUICK GMC LIMITED,  
MARKVILLE CHEVROLET INC., ROY  
FOSS MOTORS LTD., ROY FOSS  
CHEVROLET LTD., WALLACE  
CHEVROLET CADILLAC BUICK GMC  
LTD., and WILSON NIBLETT MOTORS  
LIMITED

Plaintiffs/Moving Parties

– and –

GENERAL MOTORS OF CANADA  
LIMITED, GENERAL MOTORS  
COMPANY and GENERAL MOTORS  
LLC

Defendants/Respondents

*Jonathan C. Lisus, Rocco DiPucchio, James  
Renihan, for the Moving Parties*

*Kent E. Thomson, James Doris, Sarah  
Weingarten, for the Respondents*

HEARD at Toronto: September 30, 2015

**M.A. SANDERSON J.**

**REASONS FOR DECISION**

**Introduction**

[1] This is a motion brought by the Plaintiffs for leave to appeal the Order of Dunphy J. striking four paragraphs of its Statement of Claim against General Motors of Canada Limited (hereinafter “GMCL”) without leave to amend.

**The Parties**

[2] Each of the 18 Plaintiffs are non-exclusive General Motors dealers in the Greater Toronto Area pursuant to a comprehensive Dealer Sales and Service Agreement franchise agreement with GMCL (the “DSSA”).

[3] GMCL manufactures vehicles, powertrains and components and markets General Motors vehicles through dealers in Canada. Until July 10, 2009, GMCL was a wholly owned subsidiary of GM Corporation subsequently known as Motors Liquidation Company.

[4] GM Company acquired specified assets of Motors Liquidation Company in 2009 in a restructuring transaction administered and approved by the United States Bankruptcy Court. GMCL is now a wholly owned subsidiary of General Motors LLC.

[5] General Motors LLC is a wholly owned subsidiary of the Defendant, General Motors Company “GM Company”.

[6] The dealers have brought this action against GMCL, GM Company and General Motors LLC.

**The Claims**

[7] In their current and Further Amended Statement of Claim, the Plaintiffs have alleged that the Defendants have breached their statutory, common law and contractual obligations by failing to provide them with an opportunity to earn a reasonable return on their investment.

[8] Their claim focuses on the period following the restructuring in 2009 during which GMCL’s market share in the GTA declined substantially and on GMCL’s response or lack of response.

[9] The Plaintiffs have alleged, among other things, that GMCL failed to provide them with the necessary assistance to compete in the GTA. That was a breach of its duties pursuant to the *Arthur Wishart Act* (Franchise Disclosure) 200 SO c3, (“AWA”), the common law, and the DDSA.

[10] As part of their bad faith claim, the Plaintiffs have alleged that when GMCL sought funding assistance from the Ontario and Canadian Governments, it represented that it would use any funds it received to support the Canadian dealer network. However, contrary to those

representations, GMCL sent the funding received from those governments to GM US for the benefit of GM's US dealers.

### **GMCL's Motion**

[11] On January 12, 2015, GMCL brought a motion under Rule 25.11 to strike the four paragraphs quoted below, submitting that they contained speculative and irrelevant statements and allegations made without any evidentiary foundation in the hope that substantiating facts would turn up during discovery. They submitted that the four paragraphs were included solely for the purpose of colour or in an attempt to obtain leverage in a commercially sensitive, confidential area. These four paragraphs raised allegations that could have no effect on the outcome of the action and that had no connection to the relief sought by the Plaintiffs. They were scandalous, frivolous and vexatious allegations that constituted an abuse of process.

[12] Counsel for GMCL submitted that the purpose of its motion was to surgically excise the four paragraphs of the Claim, rather than to strike the claim against GMCL in its entirety.

[13] Dunphy J. ordered the four paragraphs struck from the Statement of Claim with no right to amend.

### **The Motion for Leave**

[14] As mentioned earlier, this is a motion for leave to appeal that order to the Divisional Court.

[15] On this motion for leave to appeal, Counsel for the Plaintiffs submitted that Dunphy J. erred in striking the four paragraphs. He applied an overly restrictive interpretation of the duties of good faith and fair dealing in franchise law, in a manner that will impact franchise disputes generally.

[16] Counsel for GMCL submitted the motions judge did not err.

### **The Four Paragraphs Struck**

[17] The four paragraphs struck from the Statement of Claim read as follows:

**Para. 9:** In breach of their contractual, common law and statutory obligations to support the Plaintiffs and the GMCL brand in the GTA, GMCL and GM have preferred their own interests and the interests of GM dealers in major metro markets in the United States. Almost 3 years ago, GM introduced financial assistance programs in major metro markets in the United States aimed at supporting GM dealers who were facing similar obstacles that the Plaintiffs face in the GTA. Those programs have been funded in substantial part by bailout monies provided to GMCL by the Canadian and Ontario governments, which funds were intended to provide support for GMCL and the Canadian dealer network based on representations and assurances made by GM and GMCL at the time that the bailouts were sought.

**Para. 63:** GM and GMCL represented that any such funds provided would be fairly allocated to both the US and Canadian dealer networks, and in particular to the major metro markets or "A" markets in both networks. GM and GMCL represented that there would be equality of treatment between dealers located in major metro markets in the US and Canada. The Plaintiffs reasonably relied on the assurances above, and GM and GMCL, after having reviewed whether the franchises granted to the Plaintiffs would continue, further assured the dealers that increasing throughput and profitability in "A" markets was a top priority for the companies moving forward through the restructuring process.

**Para. 69:** Despite the fact that the Canadian and Ontario Governments provided bailout funds to GMCL based on the representations made and assurances given by GM and GMCL referred to in paragraph 63 above, all of the \$10 billion received from Canadian taxpayers were directed to GM in the United States. At GM's direction and insistence, GMCL ceded the right to allocate the bailout funds it received from the Canadian and Ontario governments to its parent company in the United States, and GM in turn prioritized the needs of its own dealer network over those of Canadian dealers, as particularized further below.

**Para. 91:** The decision to allocate funds to provide assistance to dealers in the United States nearly three years ago while providing nothing to dealers in Canada is an unjust preference of the former over the latter by GM, and is an improper use of bailout funds provided by the Ontario and Canadian governments to GM and GMCL and a breach of the fundamental statutory and common law duties of good faith and fair dealing.

## **Submissions**

### **Re: Paragraph 9**

[18] In paragraph 9, the Plaintiffs alleged that GMCL breached obligations to support the Plaintiffs, allegations not based on the DSSA or on dealings between GMCL and the Plaintiffs, but on representations allegedly made by GM and GMCL to the Ontario and Canadian Governments.

[19] Counsel for GCML submitted both before Dunphy J and on this motion for leave, that GMCL had sought particulars concerning this alleged representation including dates, the wording of each representation, who at GMCL made each misrepresentation, and full particulars of each.

[20] The Plaintiffs' response to that request for particulars had been as follows:

The particulars requested are within the knowledge of the defendants and contained in their records and are not required for the purpose of pleading.

[21] Counsel for GMCL submitted that these particulars made it clear that the Plaintiffs have no knowledge of those negotiations. At the time the Statement of Claim was issued, they had no factual basis to support those allegations.

### **Re Paragraph 63**

[22] GMCL had also sought particulars about the Plaintiffs' claim in paragraph 63 that GMCL and General Motors had represented to the Ontario and Canadian governments that bailout funds would be fairly allocated among US and Canadian dealer networks. GMCL had asked for dates, wording, by whom made each representation was made and how the Plaintiffs relied on each such representation.

[23] The Plaintiffs had responded, saying that the representations were made, not to individual Plaintiffs, but to government, and that the particulars of such representations were within the knowledge of GM and GMCL, but not within the knowledge of the Plaintiffs. They also referred to GMCL's February 20, 2009 Restructuring Plan [Dunphy J. specifically noted that it contained no assurance or representation that financial assistance provided by the governments would be used for the benefit of the Plaintiffs.]

### **Reasons of the Motion Judge Re Striking Paragraphs 9 and 63**

[24] The Motions Judge held at paragraphs 120 to 123 of his Reasons that because the particulars made it clear that the representations in question were not made to the Plaintiffs, or known by, them, the allegations cannot stand. They were irrelevant. They were made in 2008 and 2009, years before the period that is the focus of the Plaintiffs' Claim.

[25] The Plaintiffs alleged that GMCL and GM US preferred their own interests and the interests of US dealers over the interests of the Plaintiffs. The Motion Judge held it was plain and obvious that neither s3 of the AWA nor the common law duties of good faith on a franchisor could possibly preclude GMCL from placing its own interests ahead of those of the Plaintiffs.

[26] Counsel for GMCL submitted that the Plaintiffs had not identified any duty in the contract at issue (the OSSA) to support their contention that GMCL was somehow precluded from preferring its own interests. Nor could such a duty be found in the statutory duty of fair dealing under the Arthur Wishart Act or the common law doctrine of good faith.

### **Duty of Good Faith**

[27] The Motions Judge held that the representations allegedly made by GMCL to the Canadian and Ontario governments were irrelevant to whether GMCL complied with any duties of good faith and fair dealing.

[28] Counsel for the Plaintiffs submitted that the concept of good faith has a robust meaning in the franchise context. Franchise law has developed specific protections in recognition of the power imbalances that exist in franchise relationships. [see *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (C.A.)] Given the "special relationship" between franchisee and franchisor or franchisor's associate, franchisees must rely on the franchisor's



integrity and are entitled to be treated in good faith. [*Gourmet Express Restaurant v. WP Canada Bistro & Express Co. Inc.*, 2010 ONSC 2644] In recognition of this, s. 3 of the AWA imposes a duty of utmost good faith upon franchisors and requires them to act honestly and reasonably in the exercise of their powers. [see *1323257 Ontario Inc. (c.o.b. Hyundai of Thornhill) v. Hyundai Auto Canada Corp.* (2009), 55 B.L.R. (4th) 265 (Ont. S.C.).

[29] In addition to the AWA, the common law has developed protections for franchisees. Although the AWA has codified some of these protections, it has not codified them all - the common law protections afforded to franchisees continue to exist. [see *1146845 Ontario Inc. v. Pillar to Post Inc.*, 2013 ONSC 4374]

[30] Counsel for the Plaintiffs submitted that at the trial of this action, a court would determine whether GMCL's legal obligation to deal fairly with the Plaintiffs and treat them in good faith would require it to provide them with necessary support to address the serious competitive problems faced by the General Motors brand in the GTA.

[31] They submitted that the Motion Judge erred in treating the good faith claim as if it were a contractual claim. [In a claim for breach of contract, the parties' subjective knowledge is not typically relevant. Subjective intent and knowledge about the other party's needs are relevant to good faith claims.]

[32] Given the broad scope of the duty of good faith imposed on franchisors and the minimum standard required to demonstrate relevance, the Motion Judge's decision is in conflict with the jurisprudence.

[33] Counsel for GMCL submitted that these duties are different from the much higher standard of a fiduciary. Unlike fiduciary duties, the duties of good faith and fair dealing do not impose an obligation of franchisees to put the interests of another first (*Shelanu v. Print Three Franchising Corp.* (2003) 64 O.R. (3d) 533 (C.A.); *Bhasin v. Hrynew*, 2014 SCC 71);

[34] He submitted that the doctrine of good faith is not the source of contractual obligations but rather serves as a guide to their "performance" (*Jaffer v. York*, 2010 ONCA 654 (CanLII)). The duty of good faith is not a free floating stand-alone duty that is independent from the contract that governs the relationship between the parties citing *Transamerica Life Canada Inc. v. ING Canada Inc.*, 2003 68 O.R. (3d) 547 (C.A.) and *Bhasin*, supra.

### **Relevance**

[35] Counsel for GMCL submitted that the Plaintiffs quoted incompletely and out of context statements of the Motions Judge at paragraphs 126 and 127 dealing with relevance. The complete quotation reads as follows:

[126] It is for another day to determine whether the claimed obligations to provide financial support or to modify the re-imaging process exist in light of the silence of the contracts on the subject and the limitations on the doctrines of good faith performance and the statutory obligation of fair dealing. It is sufficient for me to note that the existence of the claimed obligations is not rendered more likely by

representations that might have been made to a third party on what might be done with an equity contribution once made in a foreign bankruptcy proceeding six or more years before the events at issue in this litigation. Allegations of such dealings with third parties can only be viewed as atmospheric allegations designed to embarrass or add colour without moving the needle one centimetre on the question of whether the plaintiffs have an entitlement in the first place.

[127] Allegations such as these which are not relevant to the existence of the claimed obligations in favour of the plaintiffs should be struck. The probative value upon the matter of good faith in exploring unknown facets of a private negotiation process between two governments and the defendants in the context of a bankruptcy supervised by a foreign court in 2009 today is precisely nil whereas the prejudice to the parties and to the legitimate interests of others is high.

[36] Counsel for GMCL submitted that the trial judge's reasons at para 126 and 127 demonstrates that his findings in respect of this issue relate to the unique facts and circumstances here. He concluded the representations alleged in the 4 paragraphs about the use to be made of the financial assistance were not relevant to claims arising years later. The Motions Judge applied well settled principles governing the duties of good faith and fair dealing under s. 3 of the *AWA* and at common law. He did not need to address any general issues of principal with respect to the relevance of the subjective state of mind of a franchisor in deciding whether it has acted fairly or in good faith.

[37] The Plaintiffs could not have relied upon presentations they did not know had been made and that had not been made to them. The representations were alleged to have been made in 2008 and 2009, years before the period that is the focus of the Plaintiffs claim. As such, the motions judge did not clearly err in holding them be irrelevant to the issues between the parties.

[38] Counsel for GMCL submitted that there is no issue in this case about the legal standard to be applied in determining relevance, or about how broad the standard of relevance is or should be. No conflicting legal principle was raised. Rather, the Motion Judge's ruling was based on the unique facts and circumstances at issue here the Motion Judge held that the probative value of matters raised in the Impugned Paragraphs was "precisely nil."

#### **Allegations Re: Unsupported Findings**

[39] Counsel for the Plaintiffs submitted that the Motion Judge's statement that the bailout funds mentioned in the Claim had been invested in equity in the United States bankruptcy process was unsupported. It was not pleaded, not mentioned in the particulars or any of the documents to which the particulars referred. There was no affidavit evidence from anyone referring to those documents or swearing that they were true.

[40] Similarly Counsel for the Plaintiffs/Appellants submitted that Dunphy J.'s statements in paragraphs 123 and 125 of his Reasons, that money is fungible and that funds invested in the equity of a parent in 2009 cannot be said to be relevant, or to be impressed with an obligation to

provide support to a third party in 2014, based on changing circumstances were unsupported by anything in the Claim.

[41] Counsel for the Plaintiffs submitted that it was unfair to the Plaintiffs for the Motion Judge to have based his decision on "facts" that were never before the Court and that were not the subject of any submissions. To make that finding of fact in a complete absence of evidence was a palpable and overriding error [see *Coachman Insurance Company v. Lombard Company*, 2009, ONCA 80]. Given this breach of the rules of procedural fairness, it is desirable that leave be granted to ensure the parties have their dispute resolved fairly.

[42] Counsel for GMCL submitted that during the hearing of the motion, the motions Judge was referred to materials of the parties, including the Plaintiff's particulars and the February 2009 restructuring plan, without any expression of concern or objection by counsel for the Plaintiffs.

[43] Counsel for GMCL submitted that *Coachman*, a brief endorsement of the Ontario Court of Appeal, is not a conflicting decision.

[44] The reasons of the lower court in *Coachman* were held to be conclusory and impossible of review. The Motion Judge's conclusions were supported in the materials filed in respect of the motions of GM US and GMCL.

### **Re Abuse of Process**

[45] The Motions Judge also held that allegations in the four paragraphs were embarrassing, scandalous and an abuse of process. He held at paragraph 128 that if these allegations were permitted to stand, they would send "the parties down rabbit holes of expensive and immaterial inquiry involving sensitive commercial and other interests not pertaining to the plaintiffs." This would allow the Plaintiffs to explore unknown facets of negotiations between the Governments and GMCL, that they played no role in and had no knowledge of.

[46] Counsel for the Plaintiffs submitted that an abuse of process occurs where the "integrity of the adjudicative process" is put at risk. An allegation that GMCL made certain representations in the course of requesting bailout funds does no such thing. There was no evidentiary or legal basis (present or asserted) for the Motion Judge's conclusion that the allegations would involve an expensive investigation into a foreign restructuring. His decision conflicts with the definition of abuse of process accepted in the jurisprudence.

[47] The doctrine of abuse of process evokes the public interest in a fair and just judicial process and is rooted in the Court's inherent power to prevent misuses of its procedure in a way that would be manifestly unfair to a party or would otherwise bring the administration of justice into disrepute. Counsel for GMCL submitted that principles on abuse of process in the context of pleadings are consistent with the Reasons; a plaintiff who starts proceedings simply in the hope that something will turn up (a so-called "fishing expedition") abuses the Court's process; [see *Kastner v. Painblanc*, 58 C.P.R. (3d) 402 and *Lebovic Enterprises Ltd. v. Negru*, 157 A.C.W.S. (3d) 907; ; and making bald, conclusory allegations without any evidentiary foundation is an abuse of process, particularly where (as in this case) the party making the

allegation fails or refuses to provide particulars. [see *AstraZeneca Canada Inc. v. Novopharm Limited*, 2009 FC 1209]

[48] Counsel for GMCL submitted that the four paragraphs did raise irrelevant allegations that should be struck as embarrassing and an abuse of process. The particulars provided by the Plaintiffs to GMCL demonstrated that the allegations were baseless, calculated to result in an expensive and wasteful inquiry involving sensitive commercial and other interests that would have no probative value to the Plaintiffs' claims against GMCL. If they were permitted to stand, they would cause significant prejudice to GMCL.

[49] Counsel for GMCL submitted that the Motions Judge held correctly at paragraph 129 that such an expensive and wasteful inquiry would be "an expensive and irrelevant abuse of process" that would not further the just, expeditious or least expensive determination of the matters at issue between the parties, as required by Rule 1.04.

### *The Test for Granting Leave*

[50] The test for obtaining leave to appeal to the Divisional Court is set out in Rule 62.02(4):

62.02(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.

### General Principles

[51] The tests for granting leave to appeal under Rule 62.02(4) are conjunctive in nature. Leave should not be granted easily. The test is a "very strict one." Each of the two branches of the test involves a two-part test. In each branch, both aspects of the two-part test must be met before leave to appeal can be granted. [see *Hunt v. Carr*, 2014 ONSC 326, [2015] O.J. No. 168 at para. 13]

[52] Leave to appeal should rarely if ever be granted in respect of an interlocutory decision of a motions judge who has exercised her discretion in accordance with well-settled principles of law to determine discrete and idiosyncratic pleadings issues (as the Motions Judge did here). [see *Economical Insurance Co v. Fairview*, 2011 ONSC 7535, [2011] O.J. No. 5863 at para. 9]

**Is the Test Under Rule 62.02(4) (a) Satisfied?-**

**Are there Conflicting Decisions?**

[53] Counsel for the Plaintiffs submitted that the Motion Judge's conclusions conflicted with existing case law concerning the definition of relevance, and also on the duty of good faith and fair dealing owed by franchisors to franchisees.

[54] Counsel for GMCL submitted there is no "conflicting decision" in respect of the principles of law applied by the Motions Judge. The Plaintiffs have not established that there are conflicting decisions. A "conflicting decision" is where different legal principles have been applied in deciding a comparable legal problem. Where different judges have reached different conclusions based on different facts, there are no conflicting decisions within the meaning of the Rule [see *Mask v. Silvercorp*, 2014 ONSC 4647].

[55] A decision does not constitute a "conflicting decision" within the meaning of Rule of 62.02(4)(a) if it merely considers the adequacy of pleadings having regard to well-settled principles governing motions to strike, and makes no pronouncement on the law that is inconsistent with principles established in earlier cases [see *Hester v. Canada*, 163 A.C.W.S. (3d) 910].

[56] Counsel for GCML submitted that in his decision, Dunphy J. made no new pronouncement concerning the law of abuse of process or relevant or the scope of the duty of good faith. The law is well settled. [see Rules 25.11 and 25.06(8); see also *Balanyk v. University of Toronto*, 1 C.P.R. (4th) 300, [1999] O.J. No. 2162 at paras. 65-66 (S.C.J.) and *Montgomery v. Seiden*, 2012 ONSC 6235, [2012] O.J. No. 5463 at paras. 53, 54 and 70]

**Conclusion Re Conflicting Decisions**

[57] The Plaintiffs have not shown that there are conflicting decisions applying different legal principles on the standard of relevance, the scope of the duties of good faith and fair dealing or the law of abuse of process.

[58] The Motions Judge's conclusions that the duties of good faith and fair dealing (under the *AWA* or at common law) do not prohibit a franchisor from preferring its own interests in its dealings with franchisees, provided that it administers its agreement with the franchisees fairly and in good faith were consistent with, and supported by the authorities.

[59] Franchisors are not required to prefer the interests of franchisees to their own. [see *Fairview Donut Inc. v. TDL Group Corp.*, 2012 ONSC 1252]. Where the same principles have been applied to different facts and different conclusions have been reached there have been no "conflicting decision" within the meaning of Rule 62.02(4)(a).

**(ii) Is it desirable that leave be granted-**

[60] Counsel for the Plaintiffs submitted that the proposed appeal is of general importance because it involves a matter of principle that transcends the specific facts of the instant case. [see

*Garratt v. CGU Insurance Co. of Canada*, 2003 CanLII 40808 (Ont. Div. Ct.), *Melendez v. Soleimani*, 2011 ONSC 5468 (Div. Ct.)].

### **Conclusion**

[61] I am of the view the Plaintiffs have not demonstrated that the issues here are of general importance in the sense that they involve matters of principle that transcend the specific facts in this case.

### **Is the test met under Rule 62.02 (4) (b)?**

[62] Counsel for the Plaintiffs submitted that the issues canvassed above with relation to conflicting decisions also give rise to good reason to doubt the correctness of the Motion Judge's order. There are three additional reasons to doubt the correctness of the Motion Judge's order: (i) his failure to refer to the test for striking pleadings under Rule 25.11; (ii) his interpretation of s. 3 of the *AWA*; and (iii) his refusal to grant the Plaintiffs' leave to amend.

[63] They submitted that the Motion Judge did not refer to the test to be applied on a Rule 25.11 motion i.e. that pleadings should be struck only in the "clearest of cases". Even claims that "are doubtful in law or factually weak should not be foreclosed." [see *Wernikowski v. Kirkland, Murphy & Ain* (1999), 50 O.R. (3d) 124 (C.A.). The Court is to take a generous approach to the Claim as a whole. As a general rule, allegations should be permitted to proceed to trial to be tested on a full record.

[64] The Motion Judge ignored the instruction that claims that are "doubtful in law" should not be foreclosed. He held that he was "not uncomfortable" in defining the duties that s. 3 of the *AWA* did not impose. Counsel for the Plaintiffs submitted that by embarking on an interpretation of s. 3 of the *AWA* on a pleadings motion and making far-reaching statements about its content, the Motion Judge disregarded the strict test applied on Rule 25.11 motions. There is good reason to doubt the correctness of his decision.

### **Conclusion**

[65] I do not accept the Plaintiffs' submission that the Motions Judge did not apply the correct test for striking pleadings under Rule 25.11. The motions judge referred expressly to the decision of the Ontario Court of Appeal in *Wernikowski*. I accept the submission of counsel for GMCL that the Motions Judge reviewed the applicable test for motions to strike under Rules 21.01, 25.06 and 25.11, and the law relating to these tests. He stated the applicable test correctly, and did not err in its application.

### **The Appeal Involves Matters of Importance**

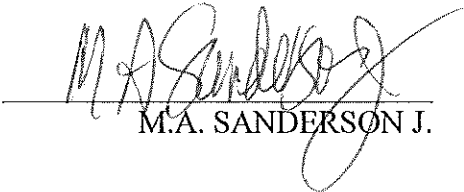
[66] I am not satisfied this appeal involves matters of importance that transcend the interests of the parties. I accept the submissions that the result here turned on the particular facts.

[67] Neither branch of Rule 62 has been satisfied.

**Disposition**

[68] The motion for Leave to appeal the Order of Dunphy J. is dismissed.

[69] The parties may make written cost submissions on or before November 14, 2015.



M.A. SANDERSON J.

**Released:** October 30, 2015

DIVISIONAL COURT FILE NO.: 297/15  
DATE: 20151030

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**DIVISIONAL COURT**

**BETWEEN:**

ADDISON CHEVROLET BUICK GMC  
LIMITED, ADDISON ON ERIN MILLLS  
CHEVROLET BUICK GMC LIMITED,  
APPLEWOOD HOLDINGS INC., BUDDS  
CHEVROLET CADILLAC BUICK GMS  
LIMITED, CITY BUICK CHEVROLET  
CADILLAC GMC LTD., COURTESY  
CHEVROLET LIMITED, FROST CHEVROLET  
BUICK GMC CADILLAC LTD., GATEWAY  
CHEVROLET INC., HOGAN CHEVROLET  
BUICK GMC LIMITED, HUMBERVIEW INC.,  
LEGGAT CHEVROLET BUICK GMC LTD.,  
LEGGAT CHEVROLET CADILLAC BUICK  
GMC LIMITED, MARKVILLE CHEVROLET  
INC., ROY FOSS MOTORS LTD., ROY FOSS  
CHEVROLET LTD., WALLACE CHEVROLET  
CADILLAC BUICK GMC LTD., and WILSON  
NIBLETT MOTORS LIMITED

Plaintiffs/Moving Parties

– and –

GENERAL MOTORS OF CANADA LIMITED,  
GENERAL MOTORS COMPANY and  
GENERAL MOTORS LLC

Defendants/Respondents

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**REASONS FOR JUDGMENT**

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M.A. SANDERSON J.



*Indexed as:*  
**Albert v. Spiegel (Ont. C.A.)**

**Between**  
**Norman Albert, Plaintiff, and**  
**Sidney Spiegel, Defendant**

[1993] O.J. No. 1562

64 O.A.C. 239

17 C.P.C. (3d) 90

41 A.C.W.S. (3d) 773

Action No. M11268

Ontario Court of Appeal  
Toronto, Ontario

**Morden A.C.J.O., Lacourcière and Carthy JJ.A.**

Heard: July 5, 1993.  
Oral Judgment: July 7, 1993.

(3 pp.)

Timothy Pinos, for the Plaintiff (moving party).  
Joel Wiesenfeld, for the Defendant (responding party).

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**1 MORDEN A.C.J.O.** (Orally):-- The plaintiff moves for leave to appeal from an order of Mr. Justice R.A. Blair dismissing the plaintiff's motion for summary judgment. The learned judge also heard a cross-motion by the defendant for summary judgment which was successful and resulted in a judgment dismissing the plaintiff's action. The plaintiff has appealed from this judgment, as of right, to this court.

**2** We have raised the question of this court's jurisdiction to hear the proposed appeal from the order dismissing the plaintiff's motion and, also, to hear the motion which is before us. The plaintiff relies upon s.6(2) of the Courts of Justice Act, which reads:

The Court of Appeal has jurisdiction to hear and determine an appeal that lies to the Divisional Court or the Ontario Court (General Division) if an appeal in the same proceeding lies to and is taken to the Court of Appeal.

**3** The second requirement in this provision is satisfied. The plaintiff has appealed to this court from the judgment dismissing his action. This is a final judgment and, no doubt, this court has jurisdiction to hear and determine this appeal.

**4** It is the first requirement that causes the difficulty. The order sought to be appealed is interlocutory and, by virtue of s.19(1)(b) of the Courts of Justice Act, an appeal lies from it to the Divisional Court with leave as provided in the rules of court. Under rule 62.02(1) leave to appeal this provision must be obtained from a judge of the General Division other than the judge who made the interlocutory order.

**5** In our view, it cannot be said that an appeal "lies to the Divisional Court", within the meaning of these words in s.6(2) applied to the facts of this case, until leave has been granted under s.19(1)(b). The moving party has submitted that the words "has jurisdiction to hear and determine an appeal that lies to the Divisional Court" should be interpreted as including, in the circumstances of a case such as this, the jurisdiction to grant leave to appeal to this court. We do not think that the words are reasonably capable of this interpretation nor is there any warrant for thinking that this court has jurisdiction to exercise the authority granted by s.19(1)(b) and rule 62.02.

**6** Rather than dismissing or quashing this motion, we make an order under s.110(1) of the Courts of Justice Act transferring the motion to the General Division to be heard by a judge of that court.

MORDEN A.C.J.O.  
LACOURCIERE J.A.  
CARTHY J.A.

*Case Name:*

**Bagnulo v. Complex Services Inc.**

**Between**

**Rosa Bagnulo, Moving Party (Plaintiff), and  
Complex Services Inc., Responding Party (Defendant)**

[2014] O.J. No. 2630

2014 ONSC 3311

Divisional Court File No. DC-13-497 ML

Ontario Superior Court of Justice  
Divisional Court

**J.A. Milanetti J.**

May 30, 2014.

(65 paras.)

**Counsel:**

Margaret A. Hoy, for the Plaintiff.

Frank Cesario, for the Defendant.

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**1 J.A. MILANETTI J.:**-- 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. Khoraych 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. Khoraych 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 do 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. Bagnulo 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.

J.A. MILANETTI J.

**Most Negative Treatment:** Not followed

**Most Recent Not followed:** [Prince Edward Island \(Attorney General\) v. Ayangma](#) | 2004 PESCAD 22, 2004 CarswellPEI 85, 135 A.C.W.S. (3d) 35, 4 C.P.C. (6th) 66, 719 A.P.R. 77, 242 Nfld. & P.E.I.R. 77, [2004] P.E.I.J. No. 83 | (P.E.I. C.A., Nov 12, 2004)

2004 CarswellOnt 2521

Ontario Court of Appeal

Boucher v. Public Accountants Council (Ontario)

2004 CarswellOnt 2521, [2004] O.J. No. 2634, 132 A.C.W.S.

(3d) 15, 188 O.A.C. 201, 48 C.P.C. (5th) 56, 71 O.R. (3d) 291

**SALLY ANNE BOUCHER, RANDOLPH BROWN, PAUL TURNER,  
DAVID VENN (Applicants / Appellants) and PUBLIC ACCOUNTANTS  
COUNCIL FOR THE PROVINCE OF ONTARIO, DOUGLAS J. WHYTE,  
ALASTAIR SKINNER, GILBERT H. RIOU, RALPH T. NEVILLE, RONALD  
W. MIKULA, BARRY G. BLAY, DAVID H. ATKINS, JENNIFER L.  
FISHER, JERALD D. WHELAN, PRISCILLA M. RANDOLPH, BRYAN  
D. MEYER, THOMAS A. HARDS and THE INSTITUTE OF CHARTERED  
ACCOUNTANTS OF ONTARIO (Respondents / Respondents in Appeal)**

Abella, Armstrong, Cronk JJ.A.

Heard: December 15, 2003

Judgment: June 22, 2004

Docket: CA C40044

Proceedings: varying *Boucher v. Public Accountants Council (Ontario)* (2002), 2002 CarswellOnt 4142, 166 O.A.C. 281, 28 C.P.C. (5th) 25 (Ont. Div. Ct.)

Counsel: David E. Wires for Appellants

Michael D. Lipton, Q.C. for Public Accountants Council for the Province of Ontario

Cynthia Amsterdam for Douglas J. Whyte, Alastair Skinner, Gilbert H. Riou, Ralph T. Neville, Ronald W. Mikula, Barry G. Blay, David H. Atkins, Jennifer L. Fisher, Jerald D. Whelan, Priscilla M. Randolph, Bryan D. Meyer, Thomas A. Hards

Robert D. Peck for Institute of Chartered Accountants of Ontario

Subject: Civil Practice and Procedure; Family

#### Headnote

##### **Civil practice and procedure --- Costs — Taxation or assessment of costs — Right to — General principles**

Applicants were certified general accountants who challenged licensing scheme for public accountants — Proceedings included application for judicial review of licensing scheme itself — Before application was heard, it was abandoned — Respondents sought costs of judicial review proceeding fixed on substantial indemnity basis — Costs fixed on partial indemnity basis — Applicants appealed — Appeal allowed on other grounds — Rule 57.01(3.1) of Rules of Civil Procedure is discretionary such that in exceptional case, trial judge may, but is not required to, refer costs for assessment — Presumption is that costs shall be fixed by court unless court is satisfied that case is exceptional — Motions judge did not err in determining that this was not exceptional case — If judge is able to effect procedural and substantive justice in fixing costs, then he/she ought to do so.

**Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and client basis — Grounds for awarding — Unfounded allegations**

Applicants were certified general accountants who challenged licensing scheme for public accountants — Proceedings included application for judicial review of licensing scheme itself — Applicants' materials expressed concern about make-up and operation of licensing system — Before application was heard, it was abandoned — Respondents sought costs of judicial review proceeding on substantial indemnity basis due to unfounded allegations — Costs fixed on partial indemnity basis — Applicants did not allege fraud or improper conduct that was seriously prejudicial to character of party — Allegations did not amount to attack on integrity of professionals in course of duties — Criticisms were levelled at people who happened to be part of system and not individuals themselves — Applicants appealed — Appeal allowed on other grounds — Costs awarded were reduced from \$187,682.51 inclusive of disbursements and GST to \$63,000 — Costs awarded were so excessive as to warrant appellate interference — Motions judge erred in principle in exercise of discretion when granting award of costs on partial indemnity basis that was virtually same as award on substantial indemnity basis after having rejected claim for substantial indemnity award.

**Civil practice and procedure --- Costs — Costs of particular proceedings — Abortive proceedings**

Applicants were certified general accountants who challenged licensing scheme for public accountants — Proceedings included application for judicial review of licensing scheme itself — Respondents put applicants on notice about motion to quash application as premature — Applicants eventually abandoned judicial review proceeding after respondents prepared for motion to quash — Respondents sought costs of judicial review proceeding on substantial indemnity basis — Costs fixed on partial indemnity basis — Applicants appealed — Appeal allowed — Costs awarded were reduced from \$187,682.51 inclusive of disbursements and GST to \$63,000 — Costs awarded were so excessive as to warrant appellate interference — Motions judge erred in principle in exercise of discretion when granting award of costs on partial indemnity basis that was virtually same as award on substantial indemnity basis after having rejected claim for substantial indemnity award — Total amounts claimed in bills of costs were not justifiable — Record in this application was same record filed in earlier proceedings, respondents filed no evidence and conducted no cross-examinations, respondents' notices of motion to stay were substantially same, and arguments to be advanced on return of motions to quash were substantially same.

**Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and client basis — Grounds for awarding — General principles**

Applicants were certified general accountants who challenged licensing scheme for public accountants — Proceedings included application for judicial review of licensing scheme itself — Applicants had not yet applied for licences — Applicants also failed to seek judicial review of decision of Public Accountants Council dismissing as premature applicants' motion to disqualify members — Before it was heard, application was abandoned — Respondents sought costs of judicial review proceeding on substantial indemnity basis but were awarded costs fixed on partial indemnity basis at \$187,682.51 inclusive of disbursements and GST — Applicants appealed — Appeal allowed — Costs were reduced to \$63,000, inclusive of disbursements and GST — Costs awarded were so excessive as to warrant appellate interference — Introduction of costs grid in R. 57.01(3) of Rules of Civil Procedure is signal that calculating hours times rates is merely one factor in assessment process, along with other factors in R. 57.01 — Objective is to fix fair and reasonable amount rather than amount fixed by actual costs incurred by successful litigant — Total amounts claimed in bills of costs were not justifiable — Record in this application was same record filed in earlier proceedings, respondents filed no evidence and conducted no cross-examinations, respondents' notices of motion to stay were substantially same, and arguments to be advanced on return of motions to quash were substantially same — Motions judge erred in principle in exercise of discretion when granting award of costs on partial indemnity basis that was virtually same as award on substantial indemnity basis after having rejected claim for substantial indemnity award — Failure to refer to overriding principle of reasonableness when assessing costs can produce result contrary to fundamental objective of access to justice — Chilling effect of costs award exceeded any fair and reasonable expectation of parties.

APPEAL from judgment reported at *Boucher v. Public Accountants Council (Ontario)* (2002), 2002 CarswellOnt 4142, 166 O.A.C. 281, 28 C.P.C. (5th) 25 (Ont. Div. Ct.), awarding costs of abandoned application for judicial review.

**Armstrong J.A.:**

1 This case is another chapter in the long simmering dispute between the Certified General Accountants and the Chartered Accountants concerning the practice of public accounting in Ontario. At issue in this litigation was the control of the licensing granting authority, the Public Accountants Council for the Province of Ontario, by a majority of members who were Chartered Accountants.

2 The appellants, who are Certified General Accountants, brought an application for judicial review against the Public Accountants Council. The appellants alleged reasonable apprehension of bias against the Council in its review of applications for licences to practise public accounting by members of the Certified General Accountants Association of Ontario.

3 Before the appellants' application was heard it was abandoned. The respondents then moved to have their costs fixed by a judge of the Divisional Court on a substantial indemnity basis. After a two-day hearing, Epstein J. fixed the respondents' costs, on a partial indemnity basis, at \$187,682.51 inclusive of disbursements and Goods and Services Tax. The appellants now appeal from this costs order pursuant to leave granted by this court on May 22, 2003.

**Background of the Proceedings**

4 The judicial review application had its genesis in the prior proceeding of *Boucher v. Public Accountants Council (Ontario)*, [2000] O.J. No. 3126 (Ont. S.C.J.) before Lax J. of the Superior Court. In the earlier proceeding, the appellants and two other parties sought to have the court appoint disinterested persons to hear the appellants' applications for public accounting licences. The appellants claimed that the court could do so under the *Public Officers Act*, R.S.O. 1990, c. P.45. The proceeding was stayed by Lax J. on the basis that the court lacked jurisdiction under the *Public Officers Act* to make the order requested.

5 In granting the stay, Lax J. said in *obiter dicta*:

The particulars of bias described by the applicants are sympathetic, compelling and disturbing. They are offensive to fundamental notions of fairness. They invoke a primordial judicial instinct to intervene and second-guess what appears to be a flawed legislative scheme and what is a flawed process.

Professional discipline is not in issue here, but professional licensure by an apparently biased tribunal is. Although the Court lacks jurisdiction to grant the proposed remedy under section 16 of the *Public Officers Act*, there may be other creative ways for the applicants to have their concerns addressed.

6 Lax J. suggested that the appellants had other specific courses of action available to them which they could pursue.

7 The appellants then commenced their judicial review application, naming as parties the same respondents with the addition of the Institute of Chartered Accountants of Ontario who had been an intervenor before Lax J. In their application, the appellants sought a broad range of remedies, including a declaration that the Public Accountants Council is institutionally biased in its granting of licences to practise public accounting. Central to the appellant's allegations of reasonable apprehension of bias is the fact that the *Public Accountancy Act*, R.S.O. 1990, c. P. 37 authorizes the Institute of Chartered Accountants of Ontario to appoint 12 of the 15 members of Council.

8 At the request of the appellants, Lax J. made an order that the materials used in the application before her should be filed in the judicial review application in the Divisional Court. However, this judicial review application was not one of the courses of action suggested by Lax J.

9 The respondents moved to quash or stay the judicial review application as being premature on the basis that the appellants' applications for licence before the Public Accountants Council had not yet been adjudicated on the merits.

10 The appellants then brought a motion to consolidate the motions to quash with two pending statutory appeals arising from the Council's refusal to grant licences. The consolidation motion was dismissed.

11 The motions to quash were scheduled to be heard on May 27, 28 and 29, 2002. On May 8, 2002, counsel for the appellants advised by letter that they had received instructions to withdraw the application for judicial review and agree to the dismissal of the motions to quash on a without costs basis. The respondents insisted on the payment of their costs of the application and the motions to quash and advised that they would continue to prepare for the motions to quash pending resolution of the matter. The appellants served their notice of abandonment on May 17, 2002. The respondents then brought their motion to have their costs fixed.

12 The motions judge fixed the costs of the application for judicial review and the motions to quash on a partial indemnity basis including disbursements and GST as follows:

Public Accountants Council of Ontario	\$ 88,896.45
Individual Respondents	\$ 60,033.96
Institute of Chartered Accountants of Ontario	\$ 38,752.10
Total	\$187,682.51

### Grounds of Appeal

13 The appellants raise the following grounds of appeal:

- (i) the motions judge erred in fixing the costs of the abandoned application rather than referring them for assessment; and
- (ii) the costs awarded are excessive in that they are approximately 178% of the costs awarded in the proceedings before Lax J. that involved substantially the same parties and issues without deduction for any amount claimed.

### *Did the motions judge err in fixing costs?*

14 The appellants accept that the respondents are entitled to their costs of the abandoned application pursuant to rule 37.09(3) of the *Rules of Civil Procedure* which provides:

37.09(3) Where a motion is abandoned or is deemed to have been abandoned, a responding party on whom the notice of motion was served is entitled to the costs of the motion forthwith, unless the court orders otherwise.

However, the appellants submit that those costs ought not to be fixed by a judge in accordance with the costs grid established by rule 57.01(3). The appellants rely upon rule 57.01(3.1) which states:

Despite subrule (3), in an exceptional case the court may refer costs for assessment under Rule 58.

Rule 58 sets out a code of procedure for the assessment of costs by an assessment officer.

15 The motions judge concluded, correctly in my view, that there is now a presumption that costs shall be fixed by the court unless the court is satisfied that it has before it an exceptional case. The appellants submitted to the motions court and to this court that the case at bar is such a case. The motions judge, in deciding that this was not an exceptional case, said:

Only if the assessment process will be more suited to effect procedural and substantive justice should the Court refer the matter for assessment. There must be some element to the case that is out of the ordinary or unusual that would warrant deviating from the presumption that costs are to be fixed. Neither complex litigation nor significant amounts in legal fees will be enough for a case to be exceptional. The judge should be able to fix costs with a reasonable review of the work completed without having to scrutinize each and every docket. If that type of scrutinizing analysis is required, then



perhaps, the matter would fall within the exception and be referred to assessment: *BNY Financial corp.-Canada v. National Automotive Warehousing Inc.*, [1999] O.J. No. 1273 (Commercial List, Gen. Div.) (*BNY Financial*).

16 I agree with the motions judge that if a judge is able to effect procedural and substantive justice in fixing costs, she ought to do so. See *Murano v. Bank of Montreal* (1998), 41 O.R. (3d) 222 (Ont. C.A.), at 245 per Morden A.C.J.O.

17 The appellants argued before us that an abandoned motion falls into the category of an exceptional case because the judge fixing the costs does not have the benefit of a hearing involving the presentation of evidence and legal argument. While there is no doubt that the judge who has heard a case is in the best position to determine a just costs award, it does not follow, that in the circumstances which exist here, the motions judge was obliged to decline the task.

18 I also observe that rule 57.01(3.1) is discretionary. It provides that in an exceptional case, the trial judge *may* refer costs for assessment. It is not required that she do so. This is a somewhat complex case with several parties and a number of counsel, including one party with two senior counsel. Although another judge might have exercised his or her discretion under rule 57.01(3.1) differently, I see no basis upon which to interfere with the motions judge's discretion not to refer the costs for assessment.

#### ***Was the costs award excessive?***

19 The motions judge's decision is entitled to a high degree of deference. The standard of review for interfering with the exercise of the discretion by a judge of first instance was articulated by Lamer, C.J.C. in *Canadian Pacific Ltd. v. Matsqui Indian Band*, 1995 CarswellNat 264 (S.C.C.) at p. 32:

This discretionary determination should not be taken lightly by reviewing courts. It was Joyal J.'s discretion to exercise, and unless he considered irrelevant factors, failed to consider relevant factors, or reached an unreasonable conclusion, then his decision should be respected. To quote Lord Diplock in *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042, at p. 1046, an appellate court "must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently".

20 In a more recent case, Arbour J. said in *Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9 (S.C.C.) at para. 27:

A court should set aside a costs award on appeal only if the trial judge has made an error in principle or if the costs award is plainly wrong (*Duong v. NN Life Insurance Company of Canada* (2001), 141 O.A.C. 307, at para. 14).

21 The appellants point out that the costs awarded in these proceedings are approximately 178% of the costs awarded in the proceedings before Lax J. that involved the same parties and similar issues. The respondents, on the other hand, argue that the proceedings before Lax J. were significantly different from the abandoned judicial review application. However, it is to be noted that the same record was used in the judicial review application. When pressed in argument, counsel for the respondents had some difficulty in explaining the extent to which the factual substrata of the two applications differed. At the heart of both applications is the assertion that the Public Accountants Council of Ontario is effectively controlled by the Institute of Chartered Accountants of Ontario.

22 Counsel for the appellants submitted that there was much duplication of the work done by the three sets of counsel for the respondents. They also drew attention to the fact that the Public Accountants Council retained another senior counsel to prepare their factum, resulting in a duplication of services. We were assured by counsel for the respondents that the bills of costs submitted to the motions judge were appropriately adjusted to take into account such duplication.

23 The respondents also submitted that the appellants were the authors of their own misfortune. The appellants said that they abandoned their application for judicial review because the Ontario Red Tape Commission recommended changes to the *Public Accountancy Act*; and a panel appointed under the Agreement on Internal Trade found that the Act offended provisions of the Agreement. The appellants claimed that the reports of these two bodies addressed the issues of concern to them, causing them to abandon their application for judicial review. However, the respondents observed that the report of the panel appointed

under the Agreement on Internal Trade was released on October 5, 2001 and the Red Tape Commission report was released on December 10, 2001. It was several months later that the appellants abandoned their application. The respondents submit that the lion's share of the costs were generated in this period of delay, and particularly after February 2002 when the dates for the motion to quash were fixed for May 2002. Although this delay caused some concern to the motions judge, she concluded that:

In the circumstances of this case I do not find that the timing of the events that took place in the spring of 2002 leading up to the abandonment of the application was in bad faith or amounted to an abuse of the process of the court.

24 The appellants submit that the motions judge accepted the bills of costs that were presented to her without any deductions. The bills were prepared in accordance with the calculation of hours times dollar rates provided by the costs grid. While it is appropriate to do the costs grid calculation, it is also necessary to step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable. This approach was sanctioned by this court in *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.) at para. 4 where it said:

In our view, the costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant.

See also *Stellarbridge Management Inc. v. Magna International Inc.*, [2004] O.J. No. 2102 (Ont. C.A.) para. 97.

25 *Zesta Engineering Ltd.* and *Stellarbridge Management Inc.* simply confirmed a well settled approach to the fixing of costs prior to the establishment of the costs grid as articulated by Morden A.C.J.O. in *Murano v. Bank of Montreal* at p. 249:

The short point is that the total amount to be awarded in a protracted proceeding of some complexity cannot be reasonably determined without some critical examination of the parts which comprised the proceeding. This does not mean, of course, that the award must necessarily equal the sum of the parts. An overall sense of what is reasonable may be factored in to determine the ultimate award. This overall sense, however, cannot be a properly informed one before the parts are critically examined.

26 It is important to bear in mind that rule 57.01(3), which established the costs grid, provides:

When the court awards costs, it shall fix them in accordance with subrule (1) and the Tariffs.

Subrule (1) lists a broad range of factors that the court may consider in exercising its discretion to award costs under s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43. The express language of rule 57.01(3) makes it clear that the fixing of costs is not simply a mechanical exercise. In particular, the rule makes clear that the fixing of costs does not begin and end with a calculation of hours times rates. The introduction of a costs grid was not meant to produce that result, but rather to signal that this is one factor in the assessment process, together with the other factors in rule 57.01. Overall, as this court has said, the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant.

27 In considering whether the amounts claimed in the bills of costs were appropriate, the motions judge said:

Here there is another point of departure between the applicants and the respondents. The respondents take the position that they are entitled to claim reimbursement for all the time spent and disbursements incurred in responding to the application for judicial review and in preparing the motion to quash. Conversely, the applicants contend that the factual background and the issues raised in the judicial review and the motion to quash are the same, or at least nearly the same, as those fully argued before Lax J. As a result, the time necessary for the respondents to respond to the judicial review application and to prepare for the motion to quash was, [or] should have been, minimal. It follows that the costs fixed should similarly be minimal.

While it is apparent that the various proceedings have centred on the same complaints about the same licensing regime, the issues in each proceeding have differed. For example, the relief claimed in the matter before Lax J. was different than that claimed in the judicial review application. This different perspective requires a different analysis and different research. In

addition, the various proceedings were spread over time and each new matter necessitated new preparation even in respect to issues that were the same or similar as those raised in earlier challenges to the licensing system. In these circumstances I do not consider it appropriate effectively to give the applicants a credit for costs ordered and paid in earlier proceedings .

I agree with what Nordheimer J. said in *Basedo v. University Health Network*, [2002] O.J. No. 597 (Sup. Ct.) that "it is not the role of the court to second-guess the time spent by counsel unless it is manifestly unreasonable in the sense that the total time spent is clearly excessive or the matter has been overly lawyered." As mentioned earlier, counsel for the respondents filed substantial material in support of the detailed bills of costs. In addition, they took me through the various entries, in a general fashion, to explain the nature of the work done and why it was necessary. I have conducted my own detailed review of the functions performed, time spent and amounts claimed. In my view, the amounts for fees and disbursements, on a partial indemnity basis, are appropriate.

28 With respect, I disagree with the motions judge. The total amount of \$187,682.51 was not a fair and reasonable sum to award in the circumstances of this case, even given the respondents' separate bills of costs, which produced totals of \$88,896.45, \$60,033.96, and \$38,752.10. It is my view that the costs awards in this case are so excessive as to call for appellate interference.

29 While I accept that the bills of costs accurately reflect the time spent by all of the lawyers in this matter, it is inconceivable to me that the total amounts claimed are justifiable. In this regard, I accept the submission of the appellants that:

- (a) the record in this application was the same record filed in the earlier proceedings;
- (b) the respondents filed no evidence;
- (c) the respondents conducted no cross-examination of any witness;
- (d) the notices of motion to stay filed by the respondents were substantially the same; and
- (e) the arguments to be advanced on the return of the motions to quash were substantially the same.

30 In addition, I note that the amount claimed on a substantial indemnity scale, including disbursements and Goods and Services Tax, was in total only \$14,528.86 more than the total partial indemnity award. In the result, the respondents received an award which is tantamount to a substantial indemnity award. This is significant in view of the fact that the motions judge expressly rejected the respondents' submission that they be awarded their costs on a substantial indemnity basis.

31 The similarity of the amounts claimed on a substantial indemnity basis and on a partial indemnity basis appears to arise because the hourly rates applied were not significantly different on either scale.

32 The Public Accountants Council employed four lawyers. One of the two senior counsel on the file charged three different hourly rates on a substantial indemnity basis - \$350, \$385 and \$425. On a partial indemnity basis, he claimed \$350 per hour. The time spent by the other senior counsel was listed at a rate of \$300 per hour on both a substantial indemnity scale and on a partial indemnity scale. In addition, one of the two junior counsel charged the same rate on both a substantial indemnity basis and on a partial indemnity basis. The second junior counsel docketed only 17 hours and the difference between the two rates produced a total differential of only \$295.

33 Counsel for the Institute of Chartered Accountants charged his time on the substantial indemnity scale at \$400 per hour and at \$350 per hour on the partial indemnity scale.

34 There were three counsel for the individual respondents. The senior counsel charged hourly rates on a substantial indemnity basis of \$330 and \$350. Her partial indemnity rate was \$300. For the first junior, the substantial indemnity rate was \$230 and the partial indemnity rate was \$225. The second junior had minimal time on the file and her time was claimed at rates of \$85 on a substantial indemnity basis and \$60 on a partial indemnity basis.

35 In *Wasserman, Arsenault Ltd. v. Sone* (2002), 164 O.A.C. 195 (Ont. C.A.) at para. 4, this court referred to a judgment of the Superior Court in *Lawyers' Professional Indemnity Co. v. Geto Investments Ltd.* (2002), 17 C.P.C. (5th) 334 (Ont. S.C.J.), where Nordheimer J. observed at paragraph 16:

As a further direct consequence of the application of the indemnity principle, when deciding on the appropriate hourly rates when fixing costs on a partial indemnity basis, the court should set those rates at a level that is proportionate to the actual rate being charged to the client in order to ensure that the court does not, inadvertently, fix an amount for costs that would be the equivalent of costs on a substantial indemnity basis when the court is, in fact, intending to make an award on a partial indemnity basis.

36 In my view, the granting of an award of costs said to be on a partial indemnity basis that is virtually the same as an award on a substantial indemnity basis constitutes an error in principle in the exercise of the motions judge's discretion, particularly when the judge rejected a claim for a substantial indemnity award. This court took a similar view in *Stellarbridge Management Inc.* at para. 96.

37 The failure to refer, in assessing costs, to the overriding principle of reason-ableness, can produce a result that is contrary to the fundamental objective of access to justice. The costs system is incorporated into the *Rules of Civil Procedure*, which exist to facilitate access to justice. There are obviously cases where the prospect of an award of costs against the losing party will operate as a reality check for the litigant and assist in discouraging frivolous or unnecessary litigation. However, in my view, the chilling effect of a costs award of the magnitude of the award in this case generally exceeds any fair and reasonable expectation of the parties.

38 In deciding what is fair and reasonable, as suggested above, the expectation of the parties concerning the quantum of a costs award is a relevant factor. See *Toronto (City) v. First Ontario Realty Corp.* (2002), 59 O.R. (3d) 568 (Ont. S.C.J.), at 574. I refrain from attempting to articulate a more detailed or formulaic approach. The notions of fairness and reasonableness are embedded in the common law. Judges have been applying these notions for centuries to the factual matrix of particular cases.

39 Turning to what the quantum should be in this case, I would give consideration to the fact that the costs in the earlier proceeding were fixed in the amount of \$97,563 by Lax J. While I accept, as the motions judge did, that there were differences between the two proceedings, the foundation upon which the two applications were prosecuted was based on the control of the Public Accountants Council of Ontario by the Chartered Accountants. The fact that all parties were satisfied to have the same evidentiary record in both cases suggests that there was much in common between the two applications.

40 No doubt there was much more work to be done in respect of the second application. However, having expended partial indemnity costs of nearly \$100,000 in response to the first application, I am confident that counsel were not starting *tabula rasa* when served with the application for judicial review. They would have been fully informed of the licensing application procedure, the make up and operation of the Public Accountants Council, the statutory regime and the issues that divided the Institute of Chartered Accountants for Ontario and the Certified General Accountants of Ontario. I simply cannot accept that counsel for the respondents did not take advantage of the work already done on the first application to better inform themselves in their approach to the second.

41 I also take into account the other factors referred to in paragraph 29 above, i.e. the respondents filed no evidence; conducted no cross-examination; and advanced substantially the same arguments in support of the motions to quash.

42 Finally, I consider that there is no proportionality between the costs claimed on a substantial indemnity scale and a partial indemnity scale.

43 These factors suggest that the amounts claimed on a partial indemnity basis call for a significant reduction. The appellants submitted that the award to each of the three groupings of respondents should be \$2,500 for a total of \$7,500. I do not accept that submission.

44 In my view, a fair and reasonable award, taking into consideration all the factors discussed above, would be:

Public Accountants Council of Ontario	\$ 30,000.00
Individual Respondents	\$ 20,000.00
Institute of Chartered Accountants of Ontario	\$ 13,000.00
Total	\$ 63,000.00

These figures are inclusive of disbursements and Goods and Services Tax.

**Disposition**

45 In the result, I would allow the appeal, set aside the costs award of the motions judge and in its place substitute the award set out in paragraph 44 above.

46 I would also order that the appellants are entitled to their costs of the motion for leave to appeal and the appeal, fixed on a partial indemnity basis in the total amount of \$12,000, including disbursements and Goods and Services Tax.

***Abella J.A.:***

I agree.

***Cronk J.A.:***

I agree.

*Appeal allowed; amount awarded varied.*

*Case Name:*

**Brown v. First Contact Software Consultants Inc.**

**RE: Geoff Brown, Plaintiff, and  
First Contact Software Consultants Incorporated, Defendant,  
AND RE: First Contact Software Consultants Incorporated,  
Plaintiff by counterclaim, and  
Geoff Brown and Runit Consulting Ltd., Daryl Morgans, Mark  
Roque, Matthew Dufresne, 1770158 Ontario Inc. and 1767073  
Ontario Ltd., Defendants to the counterclaim**

[2009] O.J. No. 3782

77 C.C.E.L. (3d) 295

2009 CarswellOnt 5482

180 A.C.W.S. (3d) 492

Court File No. 09-CV-370373

Ontario Superior Court of Justice

**D.G. Stinson J.**

Heard: August 7, 2009.

Judgment: September 14, 2009.

(71 paras.)

*Civil litigation -- Civil procedure -- Injunctions -- Circumstances when not granted --  
Considerations affecting grant -- Balance of convenience -- Irreparable injury -- Serious issue to be  
tried or strong prima facie case -- Sufficiency of damages in lieu of injunction -- Interlocutory or  
interim injunctions -- Application by the defendant for an interlocutory injunction against the  
respondents, who were formerly affiliated with it, from using its confidential information to solicit  
customers and hire employees, dismissed -- Defendant relied on the respondents' alleged breaches  
of restrictive covenants and fiduciary duties -- Defendant either failed to raise triable issues  
regarding the covenants or failed to demonstrate irreparable harm or that the balance of  
convenience favoured it regarding the fiduciary duties.*

Application by the defendant and plaintiff by counterclaim First Contact Software Consultant Incorporated for an interlocutory injunction. The respondents were former employees or contractors of First Contact and its associated corporations. The injunction was sought to restrain them from using its confidential and proprietary business information to solicit customers and hire employees. It would also require the respondents to image the hard drives on their computers. The litigation was initiated by Brown, a former employee, who alleged he was wrongfully dismissed by First Contact. First Contact alleged it subsequently discovered that Brown engaged in activities which breached his contractual obligations to it and which violated the fiduciary duties that he owed. All of the respondents, who had been associated with First Contact, became associated with a consulting company set up by Brown after his termination. This represented a significant loss of the consulting expertise and person-power of First Contact of more than half of its workforce. The claim against the respondents was based on their breaches of restrictive covenants and fiduciary duties.

HELD: Application dismissed. The restrictive covenants that First Contact relied upon were too broad and were not in the public interest of promoting trade and competition. First Contact did not satisfactorily demonstrate their reasonableness. It did not have a strong prima facie case based on the prohibitions against the contractual solicitation of customers and against the solicitation of employees. The agreements that First Contact had with the respondents also included a prohibition against the misuse of proprietary or confidential information. In regard to this contractual provision there was a serious question as to whether any of the allegedly misused information was proprietary to First Contact. First Contact therefore did not make out a strong prima facie case of misappropriation of proprietary information. There was, however, a serious issue to be tried regarding Brown's status as a fiduciary. There was also a serious issue to be tried regarding the fiduciary obligation not to use confidential or proprietary information. First Contact, however, failed to demonstrate irreparable harm. It could not prove that it could not be compensated adequately by an award of damages should it be determined at trial that any of the respondents breached a legal obligation and caused it harm. The balance of convenience favoured the respondents and not First Contact. If the injunction was denied First Contact would have another competitor in the marketplace. If the injunction was granted the respondents would be unable to carry on business. The request to image the respondents' hard drives was not granted. There was no evidence that they engaged in conduct designed to hide or delete electronic or other information.

**Counsel:**

*Karen E. Jolley and Krista Bulmer*, for the moving party First Contact.

*Robert A. Betts*, for the responding parties Geoff Brown, RunIT Consulting Ltd., Daryl Morgans and Mark Roque.

*Albert S. Frank*, for the responding parties Matthew Dufresne and 1767073 Ontario Ltd.

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## **ENDORSEMENT**

**1 D.G. STINSON J.:**-- This is a motion for an interlocutory injunction brought by the defendant and plaintiff by counterclaim First Contact Software Consultant Incorporated ("First Contact"). The responding parties are former employees or contractors of First Contact and their associated corporations. As originally framed, the injunction motion sought to enjoin the responding parties from competing with First Contact until the merits of the case have been decided. It also sought an order enforcing the terms of various employment, confidentiality, non-disclosure and consulting contracts. As ultimately revised, based on the draft order submitted by counsel for First Contact at the hearing before me, First Contact sought an order that would restrain the responding parties from using its confidential and proprietary business information, directly or indirectly soliciting a list of 130 customers, hiring any employees or former employees of First Contact, and would require the responding parties to "image" the hard drives on their computers.

**2** As the foregoing summary indicates, this case involves a claim for injunctive relief in the post-employment context. It is somewhat unusual in that the litigation was initiated by a former employee, Geoff Brown, alleging he had been wrongfully dismissed by First Contact. First Contact asserts that it subsequently discovered that Brown had engaged in the activities following his departure that not only breached Brown's contractual obligations to it, but also fiduciary duties which it asserts he had. Subsequent to his departure from First Contact Brown has provided consulting services to certain First Contact customer, working with several former First Contact employees or contractors who have been added as co-defendants to the counterclaim and against whom the injunctive relief is also sought.

## **FACTUAL OVERVIEW**

**3** I think it is important to mention an initial cautionary point. As is not unusual in many interlocutory injunction motions, the parties before me presented radically different versions of many events and characterizations of the underlying evidence and its significance. A proper determination of what happened and why and what legal consequences ultimately flow from it must await a trial, following production and discovery, and will entail a much more detailed examination of events than is possible in the context of an interlocutory motion. Simply stated, as the motions judge, I am not in a position to make assessments of credibility or findings of fact in the same way that a trial judge can. My references to and comments upon the facts and evidence and the legal issues arising from them are, therefore preliminary only and not in any event determinative of those issues. Rather, my comments on the factual and legal issues are with reference to their significance to the issues raised on this injunction motion.

## **The Parties**

**4** As its full name suggests, First Contact is a software consulting company that provides training and consulting services with respect to automated testing software, principally developed by Mercury Interactive Corp. ("MIC"). First Contact has been a Hewlett-Packard ("HP") authorized



qualified software implementer since Hewlett-Packard acquired MIC in about 2006.

**5** Brown has an extensive background in the IT industry as a technical software consultant. Between 1999 and 2007 Brown was employed with MIC, which had developed a suite of software testing tools for managing software application development. After HP purchased MIC in 2006, Brown continued his employment with HP until April 2007. During Brown's time with MIC and then HP, he built and developed relationships, and contacts, with numerous individuals within both MIC and HP. He also had the opportunity to build and develop relationships with clients of both MIC and HP.

**6** In early 2007, Brown was approached to come and work for First Contact, and was offered a lucrative sales commission plan as well as a guaranteed base salary. In March 2007, First Contact hired Brown. He executed employment and confidentiality agreements, containing several provisions that are material for the present motion. His employment agreement included the following provisions:

You shall not, either during your employment with First Contact or thereafter for a period of one year, directly or indirectly, solicit, canvass, interfere with or endeavour to entice from First Contact, any of the persons who are now or become customers or employees of First Contact, if such soliciting, canvassing, interference or enticement assists or is related to any business similar to or competitive with the business now or hereafter carried on by First Contact.

The confidentiality agreement also contained a non-solicitation provision, as follows:

For a period of two years from the last date of consultant's engagement by the company, consultant shall not directly or indirectly, alone or in conjunction with another person in any manner:

- (a) solicit or encourage any officer or employee of the company or its affiliates to leave the employ of the company or its affiliates or to otherwise harm their relationship with or commitment to the company or its affiliates, as the case may be;
- (b) hire any officer or employee who has left the employment of the company or its affiliates within six months of the termination of such officers or employees' employment with the company or its affiliates as the case may be; or
- (c) solicit or encourage any independent contractors, suppliers or referral sources performing services for the company or its affiliates to cease or modify such performances or to otherwise harm their relationship with or commitment to the company or its affiliates as the case may be.

**7** When Brown first joined First Contact in March 2007 he was a sales representative for consulting services. Brown alleges that he was hired by First Contact because of his extensive network of contacts and relationships that he had built up in the IT industry over the preceding twenty years. Brown believes that First Contact was interested in profiting from his existing contacts and relationships with MIC, HP and their respective clients. Brown asserts that he was never provided with a listing of First Contact's clients nor was he responsible for "managing" existing clients. He asserts he was never provided with documentation relating to First Contact's business model or business plan. He was never given a written job description.

**8** It is not disputed that during Brown's employment with First Contact, he did not have any ownership interest in the company, nor was he an officer or director. He did not have authority to sign contracts and he asserts that he had no authority to hire or fire employees. All sales contracts required the approval of First Contact's principal, Sam Mathi ("Mathi"). At the time Brown was hired, First Contact had approximately seven employees, including four consultants.

**9** The defendant to the counterclaim, Roque, is a 2005 computer science graduate. He began working as a software consultant with First Contact in March 2005. The defendant to the counterclaim, Morgans, is an acquaintance of Roque who began working as a software consultant with First Contact in 2007.

**10** The defendant to the counterclaim, Dufresne, is a software expert with particular expertise in HP software known as "Project and Portfolio Management" ("PPM") and in implementing that software at major companies. Dufresne claims to be one of fewer than ten people in the world who has his high level of software and business knowledge and experience in implementing PPM. Dufresne and/or his personal services company, 1767073 Ontario Ltd. ("176"), began working as consultants of First Contact in approximately June 2008.

**11** Each of Roque and Morgans signed an employment agreement with First Contact that contained the same non-solicitation provision quoted above in Brown's employment contract. Morgans also signed a confidentiality agreement in the same terms as the one signed by Brown.

**12** Although the motion material contained photocopies of fax copies of several similar agreements purportedly executed by Dufresne and/or 176, Dufresne asserts that these documents are "fakes", an issue that clearly can only be determined after a trial.

### **Events of late 2008 and early 2009**

**13** As noted, Brown began employment with First Contact in March 2007. Over the next twenty months he was successful in bringing a number of significant consulting assignments to First Contact. As a consequence, he earned significant commissions. By the fall of 2008, however, a dispute emerged between Mathi and Brown concerning the calculation, amount and timing of payment of commissions to Brown. Matters came to a head on November 21, 2008, when Brown and Mathi had a meeting at which Mathi asked for specific information from Brown. On November

24, Mathi handed Brown a termination letter, informing him that his employment was terminated effective immediately.

**14** I should add that there is some controversy between the parties as to whether Brown resigned or was dismissed and the circumstances under which the severance of the employment relationship took place. Once again, these matters cannot be resolved at the motion stage. What is significant for present purposes is that, as at November 24, 2008, Brown ceased to be an employee of First Contact. On January 16, 2009, he commenced an action claiming damages for outstanding commission in excess of \$190,000 and \$250,000 for damages for wrongful dismissal.

**15** According to Brown, following his dismissal from First Contact, he developed the idea of setting up his own consulting company as a way to earn income. He came up with the name "RunIT Consulting" ("RunIT") and created a website. He asserts that he was subsequently approached by Dufresne, who offered to provide hardware infrastructure in exchange for a 50% interest in RunIT. They agreed and subsequently incorporated RunIT Consulting Ltd. in January 2009.

**16** On December 22, 2008, Morgans and Roque both submitted e-mail applications for positions with RunIT. They were subsequently retained as independent contractors by RunIT and by 176, Dufresne's personal services company. Another employee of First Contact, Amanda Bond, applied for a part-time office position with RunIT and was hired in January 2009.

**17** All of the responding parties, who had been associated in one way or another with First Contact prior to the end of November 2008, were associated with RunIT by February 2009. This represented a significant loss of the consulting expertise and person-power of First Contact of more than half of the workforce.

**18** First Contact subsequently discovered that a number of customers for whom it had performed computer consulting work retained RunIT and 176 to do work for them. Once again, the circumstances under which these customers came to be clients of RunIT and 176 is a topic of some controversy and debate. Brown and Dufresne deny that they approached or solicited any of these customers to direct work to them; rather, the approach was by the customers who were looking for the expertise they knew that Brown and Dufresne could provide. Brown concedes that he did let some of his contacts know that he was no longer working with First Contact and was planning to establish or had set up his own company. Whether any of his or Dufresne's conduct amounted to solicitation will have to await determination at a trial.

**19** Having become aware of the activities of the responding parties and in particular the fact that they were engaged in consulting work for some of its own sometime customers, First Contact sought injunctive relief. It therefore issued a statement of defence and counterclaim on March 3, 2009 and on March 16, 2009 brought this motion returnable March 19, 2009. Following the exchange of further materials between the parties and cross-examinations, the motion came on for argument before me for a full day on August 7, 2009. As I noted at the outset of these reasons, on that occasion the moving party pared down significantly the scope of the relief that it was seeking,

its principal concern now being to restrain the responding parties from soliciting its customers, as opposed to preventing them from competing with it absolutely.

## **ISSUES AND ANALYSIS**

### **The test for an interlocutory injunction**

**20** The test for granting a prohibitory interlocutory injunction was set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 ("RJR"), at 334, as follows:

First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

**21** *RJR* was not meant to be mechanically applied: see Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf (Aurora: Canada Law Book, 2008) (*Sharpe on Injunctions*) at 2.290. It is sometimes preferable to demand a higher burden of proof from the moving party - that is, proof of a strong *prima facie* case, which exists when (1) the granting of an injunction will, in effect, be the conclusive determination of the action; or (2) when only a question of law is at issue; or possibly (3) when facts aren't disputed (*RJR*, *supra* at 338, 340).

**22** The branches of the test are not meant to be treated as watertight compartments in a step-by-step analysis. A proper assessment of an injunction motion considers foremost the substance of the parties' dispute, and:

The checklist of factors ... should not be employed as a series of independent hurdles. They should be seen in the nature of evidence relevant to the central issue of assessing the relative risks of harm to the parties from granting or withholding interlocutory relief: *Sharpe on Injunctions*, *supra*, at 2.630.

**23** It is important to note that First Contact claims both breach of restrictive covenant and breach of fiduciary duty. These claims are not interdependent; one does not rise and fall on the strength of the other. Fiduciary duties originate in the common law, while restrictive covenants arise from contract, and the divergent nature of these claims means they must be addressed individually at the first stage of the test.

### **Restrictive covenants**

**24** Since *RJR*, the strong *prima facie* test has been applied in several employment law cases

involving restrictive covenants: see *Jet Print Inc. v. Cohen*, [1999] O.J. No. 2864 (S.C.J.) (*Jet Print*) at paras. 10 and 11; *Kohler Canada Co. v. Porter*, [2002] O.J. No. 2418 (S.C.J.) at paras. 13 to 16; and *Phytoderm Inc. v. Urwin*, [1999] O.J. No. 383 (S.C.J.) (*Phytoderm*) at para. 9. In *Imperial Sheet Metal v. Landry* (2007), 315 N.B.R. (2d) 328 ("*Imperial Sheet Metal*") at para. 24, Robertson J.A. aptly interpreted these exceptions to the general "serious question to be tried" threshold in the employment context as:

- (1) Those cases involving a question of law, such as the interpretation of a contractual provision; (2) cases in which there has been oral cross-examination; and (3) cases where it is reasonable to predict that the request for injunctive relief will become moot by the time the matter goes to trial.

**25** Restrictive covenant cases can fit in both the first and the third categories, and thus impose upon the moving party the higher onus of establishing a strong *prima facie* case.

**26** In support of its claims against the responding parties, First Contact alleges that Brown, Morgans, Roque and Dufresne are bound by covenants which mandate that they may not, for a period of one year after their employment with First Contact, "directly or indirectly, solicit, canvass, interfere with, or endeavour to entice from First Contact any of the persons who are now or become customers or employees of First Contact, if such soliciting ... assists or is related to any business similar to or competitive with the business now or hereafter carried on by First Contact." First Contact also alleges that Brown, Morgans and Dufresne are bound by two-year non-solicitation obligations that prohibit them from soliciting any employees of First Contact to leave its employ and further prohibits them from hiring any employee of First Contact within six months of the termination of that employee's position with First Contact.

**27** The foregoing contractual provisions are all "restrictive covenants" in an employment context, in that (a) they have their origins in an employer-employee relationship and (b) they purport to limit or restrict the post-employment activities of the ex-employee. As such, the moving party must establish a strong *prima facie* case to obtain injunctive relief.

**28** As was observed by Low J. in *Phytoderm, supra*, at para. 8:

Covenants in restraint of trade are enforceable only if they are reasonably necessary to protect a legitimate interest of the covenantee and are at the same time reasonable from the perspective of the public interest, which requires adequate protection to the covenantor.

**29** To be enforceable, a restrictive covenant must be reasonable between the parties and with respect to the public interest. The court considers whether the plaintiff has a legitimate proprietary interest that is entitled to protection; whether the temporal and spatial restrictions are too broad; and whether the covenant is against competition generally or limited to proscribing solicitation of the clients of a former employer: see *Aon Consulting Inc. v. Watson Wyatt & Co.*, [2005] O.J. No. 3472

(S.C.J.) at para. 16.

**30** Dealing first with the customer non-solicitation covenant, I am prepared to assume that First Contact has a legitimate interest in protecting its established client relationships. I have serious concerns, however, about the scope of the activity prohibited by the covenants in question. In essence, they prohibit any of the individual responding parties from directly or indirectly soliciting business from companies who may have been customers of First Contact at any time after the commencement of their employment. This would include, for example, a company that might have been a client of First Contact several years prior to the date of the employee's termination, but with whom First Contact had no business relationship since that time. The prohibition against solicitation would also extend to customers with whom the responding parties had no contact with whatsoever during the course of their work at First Contact, and even those of whom they had no knowledge whatsoever. Such a sweeping prohibition is overbroad and goes farther than is necessary to protect the legitimate interests of First Contact. Moreover, in the case of at least Brown and Dufresne, it disregards the reality that each of them had extensive industry contact of their own before they joined First Contact. Prohibiting solicitation of their pre-employment contacts is not a reasonable restriction.

**31** These covenants are too broad and are not in the public interest of promoting trade and competition. First Contact has not satisfactorily demonstrated their reasonableness, and I conclude that the moving party does not have a strong *prima facie* case based upon the prohibition against contractual solicitation of customers.

**32** I turn now to the prohibition against solicitation of employees. I note at the outset there are multiple variations on this prohibition. To begin with, the employment contracts and consultant contracts purportedly signed by the individual responding parties prohibit the covenantor from soliciting "persons who are now or become ... employees of First Contact for a period of one year following the termination of the covenantor's employment." In the consultant confidentiality agreements, there is a two-year prohibition against soliciting employees of First Contact and an additional prohibition against hiring an ex-employee of First Contact within six months of the termination of such employee's employment with First Contact.

**33** Once again, I will assume for purposes of this analysis that First Contact has a legitimate interest in preserving its workforce. The true question is whether the covenants in question are reasonable in all the circumstances. As I noted above, the two restrictions against solicitation of employees are temporally inconsistent; one is for two years while the other is for one year. This suggests that First Contact itself may not know how long a prohibition is necessary to protect its interests. Secondly, I note that the one year prohibition extends to anyone who is or may become an employee of First Contact. As such, the prohibition would include persons who have long since ceased to be employed by the First Contact prior to the departure of the covenantor; in other words, the prohibition would extend to someone who was no longer an employee of First Contact at the time the solicitation was made. It is patent that that is an unreasonable prohibition.

**34** With respect to the six months "no hire" provision, I have serious concerns whether this provision is enforceable, given that it would extend to hiring any ex-employee of First Contact, regardless of his or her prior function in the company, the length of their service or the circumstances of their departure. In addition, it imposes limits on the ability of departed First Contract employees to find new positions, where they might legitimately exploit their personal skills and abilities, without violating any obligations they might have to their ex-employer. It therefore seems likely to be more than is reasonably necessary to protect any legitimate interest that First Contact might have.

**35** I therefore conclude that, in relation to the employee solicitation and hiring prohibition, First Contact has not made out a strong *prima facie* case regarding the enforceability of these covenants, either.

**36** Before leaving the topic of the agreements relied upon by First Contact, I note that they also include a prohibition against misuse of proprietary or confidential information.

**37** In the present case, First Contact asserts misappropriation of confidential information; the responding parties deny any misuse of corporate information from their former employer. While it is true that some of the work currently being done by the responding parties is for clients for whom they previously worked at First Contact, there is no direct evidence that in doing so the responding parties have misused or misappropriated information that is proprietary to First Contact. To begin with, there is a serious question in my mind whether any of the allegedly misused information is or was proprietary to First Contact.

**38** Secondly, while it is true that Brown retained certain billing-related customer information following his termination, the fact that he did so does not equate to its misuse. He had a pre-termination dispute with First Contact regarding the sums due to him for sales commissions, the calculation of which depends in part on the information he retained. Whether Brown is due any of the sums for which he has sued First Contact remains to be determined. In the circumstances of this case, however, it does not automatically follow that his retention of that information equates to its misuse or use for an improper purpose. Based on the material before me, I am unable to conclude that First Contact has made out a strong *prima facie* case of misappropriation of proprietary of information.

**39** Although First Contact has failed to establish a strong *prima facie* case in relation to its contractual claims, I must still consider irreparable harm and balance of convenience: see *Sharpe on Injunctions* at 2.310, 2.620. Because the factual allegations concerning the harm suffered due to the breaches of the restrictive covenants overlap with those concerning the harm due to the breach of fiduciary duty, I will consider the second and third branches of the test together, following my analysis concerning the threshold test to be applied when injunctive relief is sought to restrain an alleged breach of fiduciary duty.

### **Fiduciary Duty**

**40** A fiduciary duty exists when (a) the person in question has the power to exercise some discretion that could (b) be unilaterally exercised in a way that affects the beneficiary's interests, especially when (c) the beneficiary is particularly vulnerable to the fiduciary: see *Frame v. Smith* [1987] 2 S.C.R. 99 at 136.

**41** First Contact argues that, by reason of his status as a key employee, Brown was a fiduciary and therefore his post-employment competition with his ex-employer amounts to a breach of fiduciary duty that should be restrained.

**42** The parties disagree as to the appropriate test to be applied where an interlocutory injunction is sought to restrain a breach of fiduciary duty. Relying on *Aon Consulting Inc. v. Watson Wyatt & Co.*, *supra*, *Messa Computing Inc. v. Phipps*, [1997] O.J. No. 4255 (S.C.J.) and *Matrix Photocatalytic Inc. v. Purifics Environmental Technologies Inc.* (1994), 58 C.P.R. (3d) 289 (Ont. Gen. Div.), First Contact submits that the test is merely whether there is a serious issue to be tried. For his part, Brown asserts that the higher test of a strong *prima facie* case must be met, relying on *Phytoderm*, *supra* and *Jet Print*, *supra*.

**43** *Imperial Sheet Metal*, *supra*, at para. 15, examined the applicability of the "serious issue" threshold when dealing with a claim involving a breach of fiduciary duty. The court held that the strong *prima facie* case threshold will apply when (a) the central issue is based on a question of law, (b) oral-cross examination has been conducted, or (c) the decision whether or not to grant an injunction will cause the issue to become moot. In breach of fiduciary duty claims, the court concluded, the less onerous "serious issue" standard applies because an allegation of a breach of fiduciary duty did not fit into one of the prescribed exceptions.

**44** In my opinion, the *Imperial Sheet Metal* exceptions flow from the same principle: if, at the injunction stage, the nature of the dispute is such that it is easier to predict the result at trial, the plaintiff bears the onus of showing a strong *prima facie* case. In such case, interlocutory injunctive relief is only suitable where the plaintiff can demonstrate that it is clearly in the right, since much of the information needed to form a conclusion on the underlying merits is available at this stage; as a result, it should be easier for the moving party to demonstrate that the injunction is appropriate and the court will therefore require it to do so.

**45** Claims for relief based on restrictive covenants will ordinarily fail at trial because the covenants are *prima facie* void. As a consequence, a strong case showing otherwise is needed to convince the court to grant an interlocutory injunction. By contrast, claims based on the existence and scope of a fiduciary duty are ones in which it is much harder to predict an outcome since they raise questions of both fact and law, capable of proper elucidation only at trial.

**46** Unlike a finding of a *prima facie* enforceable restrictive covenant, a preliminary finding of the existence of a fiduciary duty may or may not end a claim: fiduciary duties are of variable duration, scope and nature. There may be some aspects of the enterprise that give rise to a post-employment fiduciary duty that is greater than would be found in a restrictive covenant. Due to the vagueries and



uncertainties in these cases, the court will consider granting interlocutory relief using the lower threshold.

**47** First Contact asserts that Brown was a fiduciary. Brown denies that he was. First Contact describes Brown as a "key employee" who carried out management tasks such as instructing others as to the projects on which they were to work and when and how long they were to be deployed on those projects. Brown also earned a significant income; he had access to client information; he had knowledge of key financial information relating to the business that gave him particular insights into its operation. As such, First Contact asserts that it is peculiarly vulnerable to competition by Brown and he should be therefore considered a fiduciary.

**48** Brown, however, points out that he was not an owner, not an officer and not a director of First Contact. He had no authority as to hiring or firing employees. He had no job description. Although he was well-remunerated, he did not have sufficient seniority or control over the operations to qualify as a fiduciary.

**49** Based on the evidence presented on the motion, I conclude that there is a serious issue to be tried regarding Brown's status as a fiduciary. I therefore propose to continue to evaluate First Contact's submissions with respect to the second and third branches of the test in relation to the relief sought under this head.

### **Confidential information**

**50** First Contact also seeks to enjoin the responding parties from using any of its confidential or proprietary corporate information, including such things as knowledge of particular customer requirements, contacts, financial information and the like, relying on common law principles. There is no dispute that the threshold for the first branch of the test for injunctive relief to prevent a breach of this obligation is a serious issue to be tried.

**51** The moving party's materials indicated that, in relation to certain particular customers, the respondents have "seamlessly" taken over business opportunities that could only have been known to them by reason of confidential information of which they became aware as employees of First Contact. The responding parties concede that they are doing work for two specific former customers of First Contact, but assert that they have not taken advantage of or exploited any confidential or proprietary information of First Contact in either obtaining or performing this work.

**52** First Contact also points to the fact that, subsequent to his departure, Brown submitted a detailed calculation of the amounts he says are owed to him that incorporated information about clients and contracts that First Contact asserts is confidential proprietary information. Once again, Brown denies any misuse and argues, in effect, that without this information he would be unable to advance his claim for payment.

**53** As with other the factual controversies previously described, at this stage I am unable to

resolve this one. I am, however, able to conclude that the assertions and evidence of First Contact relating to this topic meets the threshold of a serious issue to be tried.

### **Irreparable harm**

**54** The second stage in the test for an interlocutory injunction is whether a refusal to grant the injunctive relief could so adversely affect the moving party's interests that the harm could not be remedied by a favourable outcome after the trial. "Irreparable harm" refers to the nature of the harm suffered, rather than its magnitude. It is harm "which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other": see *RJR, supra.* at para. 59.

**55** As was stated in *Medtronic of Canada Ltd. v. Armstrong*, [1999] O.J. No. 4860 (S.C.J.) (at para. 38):

The onus is on the plaintiff to demonstrate that the applicant will suffer irreparable harm if the application is refused. Medtronic has the onus of establishing on the evidence that it will suffer actual harm which is not compensable in damages. The law is reasonably clear that the applicant must lead evidence of irreparable harm which is not founded upon mere speculation.

**56** First Contact has alleged the loss of various clients and contracts as a result of the actions of the responding parties. According to the responding evidence, however, RunIT has only eight contracts, of which only two are with clients identified in First Contact's customer list, which details approximately 130 clients. Counsel for First Contact conceded that her client is not at risk of going out of business by reason of the competition by the responding parties.

**57** The evidence does indicate, however, that the volume of business formerly done by First Contact is down significantly. First Contact has been slow, however, to rebuild its capacity to perform the work in which it is ordinarily engaged. It is important to bear in mind the nature of the services in which all these parties are engaged: computer consulting work of necessity entails harnessing the individual expertise of the particular consultant who has the ability to provide the service requested. It entails carrying out specific contracts, relating to discreet IT services required by a particular customer. It is by no means a situation where generic services or fungible goods are being supplied to customers. That this is so is shown by the evidence of Brown and Dufresne, each of whom has sworn that it is customers who approached them seeking their expertise and not they who solicited business from customers.

**58** Returning to the subject of irreparable harm, First Contact points to the loss of these contracts and the loss of its former employees as establishing that the conduct of the responding parties is responsible for causing it damage to its goodwill and reputation. With respect, I consider that assertion speculative and unsupported by the evidence. Rather, the evidence suggests that First Contact would have been unable to perform this work without the assistance of the responding

parties. None of them was obliged to continue his employment with First Contact indefinitely; indeed on the face of the record, First Contact terminated Brown, the individual it describes as its key employee. To the extent First Contact is experiencing a loss of business, such loss is not necessarily attributable to any improper actions by the responding parties, but rather arising from the natural ebb and flow of the consulting business. This does not equate to irreparable harm.

**59** There is no admissible direct evidence of supposed inappropriate comments by Brown or others to customers of First Contact, and that those allegations were specifically denied. This further supports my view that First Contact's evidence falls short of establishing irreparable harm.

**60** First Contact has failed to persuade me that it cannot be compensated adequately by an award of damages, should it be determined at a trial that any of the responding parties has breached a legal obligation and caused harm to First Contact. For example, to the extent that the responding parties have wrongfully appropriated consulting contracts that would have been awarded to First Contact, the responding parties will have records of the value of that work and the profits earned. As was stated by Kerschman J. in *Henry Co. Canada v. Rust-oleum Corp.*, [2007] O.J. No. 5253 at para. 74:

In Ontario, there are numerous cases that have concluded that lost sales or lost market share can be measured with the availability of sales history, sales projections and sophisticated accounting.

**61** In the confidentiality agreements signed by Brown and Morgans irreparable harm is purportedly established upon any breach of the agreement. By inserting such a clause in an employment agreement, however, an employer cannot (by simple drafting of a document) usurp the exclusive jurisdiction of the court to determine whether injunctive relief is appropriate and, more specifically, whether or not irreparable harm has been established: see *Jet Print Inc.*, *supra*, at paras. 26 to 29.

### **Balance of convenience**

**62** The third branch of the test to be applied in a motion for interlocutory injunction involves a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits. Although First Contact has resiled from its initial request for an order enjoining the responding parties from competing against it at all until the merits of the case has been decided, the relief currently requested would prohibit the responding parties from offering their services to well over 100 significant customers, including many of the major banks and insurance companies in this country. First Contact describes its customer list as a "respected roster of national clients".

**63** The denial of the injunctive relief sought by First Contact would simply result in another competitor in the marketplace. The absence of reliable evidence of significant contact during the course of their employment between the responding parties and the vast majority of First Contact's customers suggest that there is no special relationship that would be exploited were the responding

parties permitted to do business with those companies.

**64** By contrast, the relief sought would put a significant restriction on the ability of the responding parties to exploit their personal expertise for the benefit of customers who choose to do business with them. Indeed, in the case of Dufresne, his expertise is such that granting the relief sought against him would remove that expertise from customers who very well may require it and be unable to obtain it from First Contact.

**65** In the circumstances of this case, I conclude that the balance of convenience clearly favours the responding parties.

### **Conclusion as to injunctive relief**

**66** First Contact has failed to satisfy the prerequisites for obtaining injunctive relief. The motion for an interlocutory injunction is therefore dismissed.

### **ANCILLARY RELIEF**

**67** First Contact requests an order that would require the responding parties to "image" the hard drives or their computers, in order to preserve an electronic copy of all visible and invisible data contained on them. There is no proof, however, that the responding parties are or have been engaged in conduct designed to hide or delete electronic or other information. There is no proper basis for granting this relief, on the material before the court.

### **COSTS**

**68** The responding parties have been successful in resisting the relief sought by First Contact, and they should recover costs of the motion.

**69** With respect to quantum, each of the cost estimates presented by counsel was in the order of \$25,000 to \$30,000, which would indicate significant time was invested by all parties. First Contact argues that there was no need for separate representation of Dufresne and 176. Their position is somewhat different from that of Brown, however, and there may be some adversity of interest. There is no reason to deny them any recovery on that ground.

**70** The principle response to the motion was mounted by Mr. Betts' clients. I would therefore award them a higher proportion of their expenses. Given the amount expended by First Contact, the sums sought by the responding parties are not excessive, nor are they unexpected. As well, only at the hearing before me did First Contact abandon its request for an injunction against all competition by the responding parties.

**71** I order First Contact to pay cost of \$20,000 to Brown et al. and \$15,000 to Dufresne et al, within 30 days. Both sums are inclusive of disbursements and GST.

D.G. STINSON J.

Pgs. 3, 7-11, 13 & 14

*Case Name:*  
**Catalyst Group Inc. v. Moyse**

**RE: The Catalyst Capital Group Inc., Plaintiff, and  
Brandon Moyse and West Face Capital Inc., Defendants**

[2015] O.J. No. 3636

2015 ONSC 4388

Court File No.: CV-14-507120

Ontario Superior Court of Justice

**B.T. Glustein J.**

Heard: July 2, 2015.

Judgment: July 7, 2015.

(88 paras.)

**Counsel:**

*Rocco DiPucchio and Andrew Winton, for the Plaintiff.*

*Matthew Milne-Smith and Andrew Carlson, for the Defendant, West Face Capital Inc.*

*Robert A. Centa, Kristian Borg-Olivier and Denise Cooney, for the Defendant, Brandon Moyse.*

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**ENDORSEMENT**

B.T. GLUSTEIN J.:--

**Nature of motion and overview**

**1** The plaintiff, The Catalyst Capital Group Inc. ("Catalyst"), brings this motion for:

- (i) an order that the defendant, West Face Capital Inc. ("West Face") is prohibited from voting its 35% share interest in WIND Mobile ("WIND") pending a determination of the issues raised in this action (the "Voting Injunction"),
- (ii) an order to authorize the Independent Supervising Solicitor ("ISS") to create and review forensic images of the corporate servers of West Face and the electronic devices used by five individuals at West Face, at the expense of Moyse and West Face, to take place before any examination-for-discovery (the "Imaging Order"), and
- (iii) an order (the "Contempt Order") that the defendant, Brandon Moyse ("Moyse"), is in contempt of an interim consent order of Firestone J., dated July 16, 2014 (the "Consent Order").

**2** At the hearing, the parties prepared extensive material. West Face filed a four-volume motion record with (i) a lengthy affidavit with 163 exhibits from Anthony Griffin ("Griffin"), a partner at West Face, (ii) an affidavit from Assar El Shanawany ("El Shanawany"), the Corporate Planning & Control Officer of WIND, and (iii) an affidavit from Harold Burt-Gerrans, a forensic computer expert retained by West Face.

**3** Moyse filed two motion records, including a lengthy affidavit from Moyse and two affidavits from Kevin Lo ("Lo"), a forensic computer expert retained by Moyse.

**4** The defendants also filed a joint motion record with answers to undertakings from cross-examinations, transcripts, and an affidavit from West Face's head of technology.

**5** Catalyst filed three separate motion records, including (i) two extensive affidavits with approximately 40 exhibits from James Riley ("Riley"), the Chief Executive Officer of Catalyst, and (ii) three affidavits from Martin Musters ("Musters"), a computer forensic expert retained by Catalyst.

**6** In total, the parties filed over 3,000 pages of motion material, three factums totalling more than 110 pages, and 66 authorities.

**7** In this endorsement, I address only the key evidence and law which I find are necessary to consider the issues raised by the parties. For the reasons I discuss below, I dismiss the motion for all grounds of relief sought by Catalyst.

### **The Voting Injunction**

- a) The failure to provide an undertaking*

**8** The Voting Injunction cannot be granted as Catalyst provided no undertaking as to damages.

**9** Rule 40.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "*Rules*"), provides that:

On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party.

**10** The failure to provide an undertaking (or request to be relieved) is fatal to an injunction. Such an undertaking in damages "is almost invariably required in commercial cases" (Sharpe J.A., *Injunctions and Specific Performance*, Looseleaf Edition (Toronto: Canada Law Book, 2014), at paras. 2.470 and 2.500).

**11** The court will dismiss a motion for an injunction if the moving party fails to provide an undertaking under Rule 40.03 (*Mandel v. Morguard Corp.*, [2014] O.J. No. 1088 (SCJ), at paras. 20-21); *Air Canada Pilots Association v. Air Canada Ace Aviation Holdings Inc.*, [2007] O.J. No. 89 (SCJ), at para. 70), affirmed without separate reasons [2008] O.J. No. 2567 (CA)).

**12** West Face raised the lack of an undertaking in its factum, as was appropriate since Catalyst failed to provide the undertaking in its evidence before the court on this injunction.

**13** Catalyst knew and understood the need for an undertaking to obtain an injunction.

**14** At the outset of the hearing, I raised directly with Catalyst's counsel the issue of an undertaking with respect to the injunctive relief sought on this motion.

**15** I advised counsel that Catalyst could consider, prior to argument, whether it was necessary to adjourn the hearing to provide the court with an undertaking. I further advised Catalyst's counsel that if he chose to argue the motion on the basis of the existing evidentiary record, the court could not adjourn the hearing in mid-argument to permit further evidence on the issue. Counsel for Catalyst assured the court that he was prepared to argue the motion on the basis of the evidentiary record and would set out in his oral submissions why the requirement for an undertaking had been satisfied.

**16** During his submissions, when asked to address the issue of the undertaking, Catalyst sought to rely on the undertaking it provided to the court to obtain an interim injunction from Justice Lederer by reasons, dated November 10, 2014, (the "*Interim Injunction*"). Justice Lederer had granted interim relief, by which he, *inter alia*, enjoined Moyse from working for West Face until December 21, 2014 and ordered that an independent supervising solicitor (previously defined as the "*ISS*") be put into place to review the images of Moyse's personal computer and electronic devices that had been conducted pursuant to the Consent Order (Reasons of Lederer J., at para. 83).



**17** In support of the Interim Injunction, Riley swore an affidavit on June 26, 2014 in which he gave an undertaking to the court that Catalyst "will comply with any order regarding damages the Court may make in the future, if it ultimately appears that the injunction requested by the plaintiff ought not to have been granted" (para. 75 of the June 26, 2014 Riley affidavit).

**18** Justice Lederer relied on the evidence from Riley to find that Catalyst had complied with its requirement under Rule 40.03 to provide an undertaking for damages which might arise if the court ultimately found that the injunction requested by Catalyst ought not to have been granted.

**19** Justice Lederer's reasons made it clear that the undertaking related only to the order he made. He stated that Catalyst gave an undertaking (Reasons of Lederer J., at para. 84):

that it will comply with any order regarding damages the court may make in the future, if it ultimately appears that **this order** ought not to have been granted, and that the granting of **this order** has caused damage to Brandon Moyse and West Face Inc. for which The Capital Catalyst Group Inc. should compensate them.  
[Emphasis added.]

**20** At the hearing before me, Catalyst submitted that this undertaking "continued" (in effect, could be transferred) to the present Voting Injunction. Catalyst submitted that Riley was not required to provide a separate undertaking for the Voting Injunction since Riley stated in his affidavit for this motion that "I adopt and re-state the facts set out in those affidavits [filed in support of the Interim Injunction] in this affidavit".

**21** I do not agree that an undertaking for an injunction seeking to prevent employment for a limited time or having documents imaged by an ISS can be "transferred" to an injunction seeking to prevent a 35% shareholder of WIND from exercising voting rights at any time until trial of the action.

**22** First, an undertaking is not a "fact" to be repeated and relied upon in a subsequent affidavit. It is a promise to the court to pay damages arising out of the injunctive relief sought before the court at that time. At no point until this injunction did Catalyst seek an order preventing West Face from exercising its 35% voting interest in WIND.

**23** Second, the damages that could be incurred as a result of the Voting Injunction are exponentially greater than any possible damages that could arise on an order to prevent competition by an analyst (Moyse) who leaves for a competitor. The Interim Injunction, based on the earlier Riley affidavits, protected Catalyst's interests through (i) a review by the ISS of the forensic images of Moyse's computer and electronic devices before discovery, and (ii) orders prohibiting Moyse from competing for six months and using confidential information. Any damage associated with the order sought on the Interim Injunction could pale to the losses West Face could incur as a result of the Voting Injunction if West Face is unable to vote its shares in WIND on all decisions between the present and trial.

**24** Justice Lederer was clear that the undertaking he accepted was based on the relief sought in the specific motion before him, as it was based on the undertaking to pay damages if "it ultimately appears that **this order** ought not to have been granted, and that the granting of **this order** has caused damage to Brandon Moyse and West Face Inc. for which The Capital Catalyst Group Inc. should compensate them" [Emphasis added.] (Reasons of Lederer J., at para. 84).

**25** At the hearing, Catalyst attempted to rely on the evidence in the current Riley affidavit that it "currently has in excess of \$3 billion dollars under management". However, the existence of assets under management is not an undertaking to the court to pay damages for an injunction.

**26** When an undertaking is provided, a responding party has the opportunity to challenge the sufficiency of the undertaking. Regardless of the amount of assets managed or owned by a corporation, its undertaking depends on its ability to pay the damages which could arise from the injunction. A responding party is entitled to cross-examine to test the sufficiency of the undertaking.

**27** Consequently, there is no undertaking before the court on the present injunction, which is between sophisticated commercial parties with Catalyst seeking a Voting Injunction to enjoin West Face from voting any of its 35% share interest in WIND until trial.

**28** This is not a case of West Face's counsel "laying in the weeds" (as submitted by Catalyst). Catalyst knew the requirements for an injunction, as demonstrated by the earlier injunction sought before Justice Lederer. West Face raised the issue directly in its factum. Catalyst was advised by the court at the outset that the court was providing it with an opportunity to consider whether it would seek an adjournment to file further evidence, and Catalyst chose not to do so. West Face is not required to create evidence for Catalyst on cross-examination when Catalyst chose not to provide the evidence.

**29** Consequently, Catalyst made a decision to rely on the earlier undertaking with full knowledge that no adjournment mid-hearing could be obtained if the court was not satisfied that there was a proper undertaking.

**30** For these reasons, I dismiss the Voting Injunction on the basis of the failure to provide an undertaking under Rule 40.03.

*b) The failure to satisfy the requirements of irreparable harm and balance of convenience*

**31** Catalyst's counsel acknowledges that Catalyst has the burden of establishing irreparable harm and that the Voting Injunction cannot be granted if Catalyst does not meet this burden.

**32** The only evidence of harm to Catalyst if the injunction is not granted is Riley's statement in his affidavit that:

As the largest of the four shareholder groups, West Face can use its voting interest in Wind Mobile to harm Catalyst's long-term interest in Wind Mobile. Catalyst has a claim for a constructive trust over West Face's interest. In order to protect Catalyst's contingent interest in Wind Mobile, Catalyst seeks an order restraining West Face from participating in the operations of Wind Mobile pending the resolution of this action.

**33** The above evidence does not meet the test of harm that "could so adversely affect the applicant's own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the results of the interlocutory application", or "harm which either cannot be quantified in monetary terms or which cannot be cured" (*RJR-MacDonald Inc. v. Canada*, [1994] SCJ No. 17, at paras. 58-59).

**34** Evidence of irreparable harm must be clear and not speculative (*Trapeze Software Inc. v. Bryant*, [2007] O.J. No. 276 (SCJ), at para. 52). It is not enough to show that a moving party is "likely" to suffer irreparable harm; one must establish that he or she "would suffer" irreparable harm (*Burkes v. Canada (Revenue Agency)*, [2010] O.J. No. 2877 (SCJ), at para. 18, leave to appeal refused, [2010] O.J. No. 5019 (Div. Ct.)).

**35** Riley's assertion is speculative. He does not state that West Face "will" use its voting interest in WIND to harm Catalyst's purported interest. Rather, he states only that West Face "can" do so without explaining how such conduct would arise.

**36** Even if Catalyst has a contingent interest in WIND, Riley admitted during cross-examination that (i) "West Face wants to maximize WIND's value in the same way that Catalyst claims to want to do"; and (ii) West Face "would obviously have an incentive to maximize the value of its investment in [WIND]" in the same manner as Catalyst claims that it would.

**37** Catalyst submits at paragraph 114 of its factum that West Face could provide capital to WIND (or WIND could seek to raise capital) "on terms to which Catalyst, in West Face's shoes, would not agree". However, there is no evidence to that effect. To the contrary, West Face has been a shareholder and an active part of the management of WIND since September 16, 2014, and Catalyst led no evidence that it is worse off today than it was almost nine months ago.

**38** In essence, Catalyst's position on irreparable harm is that West Face, as a 35% shareholder in WIND, might vote their shares in a manner that decreases the value of the company, and as such, harm Catalyst's "contingent" interest based on Catalyst's claim of constructive trust. However, any claim of constructive trust over property raises a speculative concern that the property may be worth less at trial than at the outset of pleadings. In the present case, there is no evidence to suggest any past or future conduct which will cause irreparable harm, and as such, the injunction must fail.

**39** With respect to the balance of convenience, since Catalyst offers no proper evidence of irreparable harm, it cannot establish that the balance of convenience favours granting the injunction.

**40** Further, West Face filed evidence (in the Griffin and El Shanawany affidavits) that West Face is the single largest investor in WIND, designates two of the ten seats on the board of directors, and plays an important role in WIND's governance, strategic and capital funding direction. An inability for West Face, as the largest WIND shareholder, to vote on issues that affect a significant investment is evidence of the type of harm that cannot be cured in monetary terms, as other shareholders would then have the ability to control the future of WIND without any voting from a 35% shareholder.

**41** For the above reasons relating to Catalyst's failure to provide the undertaking, Catalyst's failure to establish irreparable harm, and given my finding that the balance of convenience is against granting an injunction, I dismiss the motion for a Voting Injunction.

**42** Consequently, I do not address whether there is a serious question to be tried.

### **The Imaging Order**

**43** West Face characterizes the Imaging Order as either an *Anton Piller* order or a Rule 30.06 order. For the purposes of this argument, I make no finding as to whether the higher threshold of an *Anton Piller* order should apply because I agree with West Face that even under the lower "Rule 30.06" threshold as considered in cases where a similar imaging order was sought, the motion must fail.

**44** In the present case, Catalyst proposes to have the ISS conduct a review of West Face's corporate servers and the electronic devices of five West Face representatives and then "prepare a report which shall": (i) "identify whether the Images contain or contained Catalyst's confidential and proprietary information ("Confidential Information") and (ii) provide particulars of who authored or saw any emails which contained or referred to the Confidential Information.

**45** I note that many of the cases relied upon by West Face arise in the context of a request by an adverse party to review the documents sought to be imaged, typically through a forensic expert retained by the moving party. It may be that the discussion in those cases could apply to the Catalyst request for ISS review, since the nature of a review is similarly intrusive, even if not conducted directly by the moving party.

**46** However, it is not necessary to rely on those authorities and I make no finding as to whether the test to permit a moving party to have direct access to the servers of a responding party requires a higher threshold to obtain such relief.

**47** Under Rule 30.06, the principle remains that a party has an obligation under the *Rules* to produce relevant documents, and the court will only order further and better production if there is good reason to believe that the responding party has not complied with its production obligations. I agree that the same approach should apply to a request that a responding party image computer servers and electronic devices.

**48** This approach was followed by Justice Stinson in *Brown v. First Contact Software Consultants Inc.*, [2009] O.J. No. 3782 (SCJ) ("*Brown*"). Justice Stinson was not faced with a request by a moving party to review the responding party's server, but only with a request for "an order that would require the responding parties to 'image' the hard drives or their computers, in order to preserve an electronic copy of all visible and invisible data contained on them" (*Brown*, at para. 67). The intrusiveness of such a request would be less than the ISS review proposed by Catalyst.

**49** In *Brown*, Justice Stinson refused to order the plaintiffs (responding parties) to image their hard drives or computers. He held (*Brown*, at para. 67):

There is no proof, however, that the responding parties are or have been engaged in conduct designed to hide or delete electronic or other information. There is no proper basis for granting this relief, on the material before the court.

**50** Orders for production of computer hard drives will not be made when a party can explain any delay or errors in producing relevant documents (*Baldwin-Jones Insurance Services (2004) Ltd. (c.o.b. Baldwin Janzen Insurance Brokers) v. Janzen*, [2006] B.C.J. No. 753 (S.C.) at paras. 34, 36). Further, the number of "hits" of a term does not demonstrate that a party has failed to produce relevant documents (*Mathieson v. Scotia Capital Inc.*, [2008] O.J. No. 3500 (Mast.) at par. 9).

**51** As Morgan J. held in *Zenex Enterprises Ltd. v. Pioneer Balloon Canada Ltd.*, [2012] O.J. No. 6082 (SCJ) ("*Zenex*"), "it is not sufficient for a moving party to say 'I believe there are more documents' or 'it appears to me that documents are being hidden'" (*Zenex*, at paras. 13-14).

**52** There is no evidence that West Face has failed to comply with its production obligations, let alone intentionally delete materials to thwart the discovery process or evade its discovery obligations.

**53** The evidence relied upon by Catalyst at the hearing to demonstrate an effort to thwart discovery obligations was not convincing. Evidence with respect to Callidus Capital Corporation ("*Callidus*") was produced by West Face once Catalyst put Callidus in issue by alleging misuse of confidential information. West Face disclosed its investment in Arcan voluntarily.

**54** West Face even offered to turn over its own confidential information created, accessed or modified by Moyse to the ISS, but Catalyst has not accepted this offer.

**55** The error of West Face to recall the March 27, 2014 email arose not in the context of litigation production, but only when West Face received Catalyst's pre-litigation correspondence, and was immediately produced in the July 7, 2014 responding material, six business days after Catalyst brought its motion for interim relief. West Face's failure to recognize prior to litigation that the March 27, 2014 email had been received and forwarded is not evidence of an intention to hide or delete electronic information.

**56** Further, West Face has produced voluminous records relating to the allegations Catalyst has made, even before discovery, and in particular: (i) filed a four-volume responding motion record attaching 163 exhibits regarding WIND, the AWS-3 auction (since abandoned) and Callidus, (ii) produced a copy of the notebook Moyse used during his three and a half weeks at West Face, redacted only for information about West Face's active investment opportunities, (iii) produced all non-privileged, non-confidential emails sent to or from Moyse's West Face email account or known personal email accounts which were on West Face's servers, and (iv) produced 19 additional exhibits in response to undertakings given and questions taken under advisement at the cross-examination of Griffin on May 8, 2015.

**57** For the above reasons, I find that Catalyst has not met its burden to establish that West Face has engaged in any destruction of evidence or in any conduct "designed to hide or delete electronic or other information". Consequently, I dismiss the motion for an Imaging Order.

### **Contempt Order**

**58** For the reasons that follow, I do not find Moyse to be in contempt of the Consent Order.

**59** I summarize the relevant legal principles below:

- (i) The contempt power rests on the power of the court to uphold its dignity and process. It is necessary to maintain the rule of law (*Carey v. Laiken*, 2015 SCC 17 ("*Carey*"), at para. 30);
- (ii) There are three elements which must be established beyond a reasonable doubt before a court may make a finding of civil contempt:
  - (a) The order that was breached must state clearly and unequivocally what should and should not be done;
  - (b) The party alleged to have breached the order must have had actual knowledge of it; and
  - (c) 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 (*Carey*, at paras. 31-35);
- (iii) Any reasonable doubt must be resolved in favour of the person or entity alleged

to have breached the order (*Prescott-Russell Services for Children and Adults v. G. (N.)*, 2006 CanLII 81792 (CA), at para. 270;

- (iv) The contempt power is discretionary and courts should discourage its routine use to obtain compliance with court orders. The contempt power should be used "cautiously and with great restraint" and as "an enforcement power of last rather than first resort" (*Carey*, at para. 36); and
- (v) The court retains a discretion to decline to make a finding of contempt if the alleged contemnor acts in good faith (*Carey*, at para. 37).

**60** I review the relevant evidence against the backdrop of these principles.

**61** The impugned contemptuous acts of Moyse are (i) he deleted his personal browsing history immediately prior to turning his personal computer over to the ISS; and (ii) he allegedly bought and used software to "scrub" files from his personal computer prior to delivering it.

*a) The relevant evidence*

**62** Moyse's evidence was that when he was ordered to deliver his computer, he was concerned and embarrassed by some of the content on his computer related to adult entertainment sites. Moyse's evidence is that he was not concerned that his devices would be reviewed to identify relevant documents that related to Catalyst or to the issues raised in the lawsuit since he had reasonable explanations for every Catalyst-related document that would be found on the computer and intended to disclose all such documents in his affidavit of documents, as required under the Consent Order.

**63** Moyse's evidence is that he understood and respected his obligations under the Consent Order and was careful in how he maintained his computer following the Consent Order. Moyse's evidence that if Catalyst had sought and obtained an order requiring that he maintain the computer "as is", he would not have used it at all prior to the image being taken.

**64** Moyse's evidence was that he did not have advanced knowledge about computers but was aware that the mere act of deleting one's internet browsing history through the browser program itself does not fully erase the record, and that a forensic review of a computer would likely capture some or all recently-deleted material.

**65** Moyse did some internet searches on how to ensure a complete deletion of his internet browsing history. He came to believe that "cleaning" the computer's registry following the deletion of the internet history would ensure the permanent deletion of the history.

**66** Moyse then purchased the "RegCleanPro" product on July 12, 2014 to delete his internet browser history and four days later purchased the "Advanced System Optimizer" ("ASO") program which contains a suite of programs for personal computer tune-up. One product on the ASO suite is a program called "Secure Delete".

**67** Moyse made no efforts to hide the purchase of these products. The payment receipts and license keys for Moyse's purchases of the two Systweak products were found by the ISS in his personal mail box.

**68** On Sunday, July 20, 2014, the day before Moyse was scheduled to deliver his computer and other devices to counsel, he opened the RegClean Pro and ASO software products on his computer. He looked into how each operated. Moyse ran the "RegCleanPro" software to clean up the computer registry after he deleted his internet browser history.

*b) Deleting personal browsing history*

**69** With respect to the first impugned act, there is no evidence to establish, beyond a reasonable doubt, that Moyse deleted relevant information as a result of deleting his personal browsing history and then running a registry cleaner to delete traces of the internet searches.

**70** The Consent Order only requires Moyse to preserve and maintain records "that relate to Catalyst", "relate to their activities since March 27, 2014" or "are relevant to any of the matters raised in this action".

**71** If the words "activities since March 27, 2014" were intended to encompass searching adult entertainment sites or any other non-litigation related activities, then I would agree with Moyse's submissions that the Consent Order would be ambiguous, as reasonable people could have a different understanding of whether non-work-related activities were to be included.

**72** Catalyst does not strenuously submit that "activities" should be read as broadly as including adult entertainment internet searches. I agree with Moyse that deleting adult entertainment files is not caught by the word "activities" in the Consent Order as those activities would still need to be relevant to Moyse's conduct at Catalyst and/or with respect to issues raised in the litigation.

**73** Catalyst's submission as to the purported contempt is that the court should find, on a standard of beyond reasonable doubt, that Moyse's deletion of his personal browsing history resulted in deletion of any references to his searching his "Dropbox" files, and that such searches would have been relevant as evidence that Moyse was taking confidential information with him prior to departing Catalyst.

**74** However, the evidence does not support a finding beyond a reasonable doubt that there were such files. It is not enough for Catalyst to speculate that in the course of deleting his personal browsing history, Moyse may have deleted references to searches of Dropbox files.



**75** The Amended Report of the ISS, dated March 13, 2015, states that Digital Evidence International ("DEI"), the forensic computer expert retained by the ISS, searched Moyse's iPad and found over 1,000 "Catalyst" documents in Moyse's Dropbox, which would demonstrate that, at least with respect to Moyse's iPad, there is a reasonable doubt that he took steps to delete those documents. The ISS stated:

DEI was able to generate a list of documents accessible from this device from the 'Dropbox' iOS application. The iPad contained records for some 1,327 total documents which were recorded by the operating system as accessible to the user at some point in time. Of these documents, a total of 1,017 documents were contained in a folder entitled 'Catalyst'. I have attached as **Appendix 'N'** a copy of the list of files contained within the 'Catalyst' folder, from the data supplied by DEI. The data generated also include [*sic*] a record of the last time that each file was recorded to have been accessed by the user, which is contained within that spreadsheet. I note that there are no records of the documents in the Dropbox being reviewed on any date subsequent to April 16, 2014, and therefore no evidence that the Dropbox files were viewed subsequent to Moyse's departure from Catalyst on the iPad device. [Emphasis in original.]

**76** Catalyst seeks to rely on Moyse's evidence that he accessed Dropbox from time to time, and as such, relevant search history from his computer must have been deleted. However, there was no evidence as to whether Moyse accessed Dropbox through his personal computer or his iPad. Moyse's evidence was that he did not know whether he accessed Dropbox through an "app" (which could have been on his iPad) or by internet (which could also have been through his iPad) (see questions 254-260 of his cross-examination transcript).

**77** Further, Moyse was asked by Catalyst counsel that "if I'm correct that your Dropbox, your history of accessing Dropbox, was retained in your browsing history, you would also have been successful in deleting that, right?" Moyse answered that "I access my Dropbox through a variety of other means" (see questions 294-300 of his cross-examination transcript).

**78** Consequently, there is no evidence, on the standard of beyond reasonable doubt, that Moyse deleted Dropbox information from his personal computer when he deleted his personal browsing history and ran the registry cleaner. Given the over 1000 "Catalyst" files on his iPad Dropbox account, and Moyse's explanation that he may have accessed Dropbox files through an "app", I cannot find (on a standard of beyond reasonable doubt) that Moyse deleted his personal browsing history relevant to Dropbox from his personal computer and as such, I cannot find contempt of court for deleting relevant information from his personal computer.

**79** I note that even if I found that it was beyond reasonable doubt that Moyse deleted relevant Dropbox searches from his personal computer, I would exercise my discretion to decline to making a finding of contempt as such conduct would have occurred as a result of Moyse's "good faith"

efforts to comply with the Consent Order while deleting embarrassing personal files which were not relevant to the litigation.

*c) Use of the Secure Delete program*

**80** Catalyst submits that it is beyond reasonable doubt that Moyse ran the Secure Delete program to delete relevant files from his personal computer. I do not agree that the evidence supports such a conclusion.

**81** First, all of the forensic experts agreed that the presence of a Secure Delete folder on Moyse's system is not evidence that he ran the program.

**82** DEI, on behalf of the ISS, indicated that it could not conclude from the presence of a folder whether the program had been used to delete files. Musters, the forensic expert retained by Catalyst, acknowledged on cross-examination that "the Secure Delete program was launched, but it doesn't yet speak to whether or not files or folders were deleted". Lo, the forensic expert retained by Moyse, gave the same opinion, *i.e.*, that the presence of a Secure Delete folder is not evidence that Moyse ran the program.

**83** Second, Lo's evidence was that he had conducted a complete forensic analysis of Moyse's computer and found no evidence that Secure Delete had been used to delete any files or folders from Moyse's computer. Lo's expert opinion evidence was that if the Secure Delete program had been run on the computer, a log would have been found which maintains records of the files deleted (the "Secure Delete Log"), but no such log exists on Moyse's computer.

**84** Catalyst's expert, Musters, initially gave opinion evidence that it was a "relatively simple" matter to "reset" the Secure Delete Log by using a function called Registry Editor to hide any trace of having run the program. Musters did not append as an exhibit to his affidavit the "publicly available information" on which he relied. Musters maintained his position in cross-examination. However, in an answer to an undertaking, Musters sought to "correct an error in his testimony" in that "the [publicly-available] information includes advice on the removal of the entire ASO program".

**85** Consequently, the evidence is that Moyse could not have easily deleted only the Secure Delete Log with publicly-available information. Instead, the conclusion sought by Catalyst, at a level of beyond reasonable doubt, is that Moyse ran Secure Delete to remove programs and then (i) obtained information which explained how to remove the ASO software from his computer, (ii) chose not to use that information to remove all traces of that ASO software, (iii) instead removed only the Secure Delete Log files of the ASO (though Musters did not provide any publicly-available information which would simply instruct Moyes how to do so), (iv) but still left the ASO software, receipts, and emails in place to be easily found by a forensic investigator.

**86** I cannot find that the above evidence supports a finding, beyond reasonable doubt, that Moyse

breached the Consent Order by scrubbing relevant files with the Secure Delete program. There still remained 833 relevant documents on his computer, as well as the evidence on his computer of the ASO program, the Secure Delete folder, and the purchase receipts. The evidence is at least as consistent with Moyse's evidence that he loaded the ASO software and investigated the products it offered and what the use would entail, but he did not run the Secure Delete program.

**87** For the above reasons, I dismiss the Contempt Motion.

**Order and costs**

**88** Consequently, I dismiss Catalyst's motion in its entirety. If counsel cannot agree on costs, I will consider written costs submissions from each party of no more than three pages (not including a costs outline), to be delivered by West Face and Moyse within 14 days of this order, with Catalyst to respond within 14 days from receipt of the Defendants' submissions. The Defendants may provide a reply of no more than two pages to be delivered within 10 days of receipt of Catalyst's costs submissions.

B.T. GLUSTEIN J.

*Case Name:*

**Cole v. Hamilton (City)**

**Between**

**Mark Cole and Alberton Properties Inc.,  
(appellants/plaintiffs), and**

**The Corporation of the City of Hamilton, Mary Kiss, Marvin  
Caplan, Robert Morrow, Geraldine Copps, Len King and Peter  
Lampman, (respondents/defendants)**

[2002] O.J. No. 4688

60 O.R. (3d) 284

29 C.P.C. (5th) 49

Docket No. M28619 and C38104

Ontario Court of Appeal  
Toronto, Ontario

**Cronk J.A.**

Heard: May 30, 2002.

Judgment: July 3, 2002.

(16 paras.)

**Counsel:**

Barnet H. Kussner, for the respondents/defendants (moving parties).

Leonard F. Marsello, for the appellants/plaintiffs (responding parties).

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**1 CRONK J.A.** (endorsement):-- This motion for directions by the respondents/defendants (the "Moving Parties") concerns the proper appeal route or routes to be followed in connection with an

appeal by the appellants/plaintiffs (the "Responding Parties") from the order of Justice N. Borkovich dated March 22, 2002 by which summary judgment was granted in favour of the Moving Parties and the Responding Parties' cross-motion for summary judgment on part of their claim and their action in its entirety were dismissed.

## I. THE FACTS

**2** The Moving Parties brought a summary judgment motion in the action. The Responding Parties brought a cross-motion for summary judgment on part of their claim. Both summary judgment motions were heard together by the motions judge over nine full days, resulting in the motions judge's order dated March 22, 2002.

**3** The Responding Parties appeal to this court from that part of the motions judge's order granting the Moving Parties' motion for summary judgment and dismissing the action in its entirety. They have also moved before the Superior Court of Justice for an order granting them leave to appeal to the Divisional Court from that portion of the motions judge's order by which their cross-motion for partial summary judgment was dismissed.

**4** On this motion for directions, the Moving Parties seek a determination that this court has jurisdiction to hear and dispose of all matters which were before the motions judge, including all matters at issue on the Responding Parties' motion for summary judgment. If that determination is made, as urged by the Moving Parties, the Responding Parties' motion in the Superior Court of Justice for leave to appeal to the Divisional Court would be misconceived. Further, as alternative relief on this motion, the Moving Parties seek an order directing that the appeal pending before this court be expedited and that it be heard and disposed of prior to the Responding Parties' motion for leave to appeal to the Divisional Court.

**5** There is no dispute that it is in the interests of the parties, and judicial economy, that the Responding Parties' appeal from the order of the motions judge, in its entirety, be heard in one forum. The Responding Parties are content to appeal the order of the motions judge, in its entirety, to this court. However, they are concerned that leave to appeal may be required from a judge of the Superior Court of Justice concerning that part of the motions judge's order whereby their cross-motion for partial summary judgment was dismissed.

**6** The Moving Parties declined, as they are entitled to do, to consent to the Responding Parties' motion for leave to appeal to the Divisional Court. If such consent was forthcoming, and if leave to appeal be granted, the parties would then be in a position to apply under s. 6(2) of the Courts of Justice Act, R.S.O. 1990, c. C.43 for an order that this court also hear and determine the Responding Parties' appeal to the Divisional Court. That option is not available under s. 6(2) absent the prior granting of leave to appeal to the Divisional Court.

**7** As an alternative procedural approach, the Moving Parties proposed that the parties agree that the Responding Parties' motion for leave to appeal to the Divisional Court be held in abeyance

pending determination of their appeal to this court. The reasoning behind that proposal was that if the appeal to this court is dismissed, that outcome effectively would dispose of all matters at issue between the parties subject only to the Responding Parties' right to seek leave to appeal to the Supreme Court of Canada from the decision of this court. Under that scenario, the Responding Parties' motion for leave to appeal to the Divisional Court would be withdrawn or abandoned, as moot. The Responding Parties, however, as is their right, did not agree to that proposal.

**8** The Moving Parties argue that this court has jurisdiction to hear and determine all matters which were before the motions judge, including all matters at issue on the Responding Parties' cross-motion for partial summary judgment, because the order of the motions judge is final in the sense that it is dispositive of all matters at issue in the action. The Moving Parties assert, therefore, that the Responding Parties are improperly pursuing two separate appeal routes by initiating an appeal before this court and by moving before the Superior Court of Justice for leave to appeal to the Divisional Court.

## II. ANALYSIS

**9** It is well established that an order that finally determines the issues in a proceeding is a final order, an appeal from which lies to this court under s. 6(1)(b) of the Courts of Justice Act. In contrast, an interlocutory order is one which does not determine the substantive rights of the parties but leaves them to be resolved by subsequent adjudication. (See *S.(R.) v. H.(R.)* (2000), 52 O.R. (3d) 152 (C.A.)). However, the determination of whether an order is final or interlocutory is sometimes made with great difficulty. Here, the motions judge made one order, dealing with both summary judgment motions. That portion of his order which concerns the Responding Parties' cross-motion for partial summary judgment does not finally dispose of all of the Responding Parties' claims in the action. In contrast, that portion of his order dealing with the Moving Parties' motion for summary judgment concerns all of the issues in the action. His further order that the Responding Parties' action be dismissed in its entirety flowed from his conclusion that summary judgment should be granted to the Moving Parties.

**10** In *Albert v. Spiegel* (1993), 17 C.P.C. (3d) 90 (Ont. C.A.), the plaintiff moved before this court for leave to appeal from an order dismissing his motion for summary judgment. A cross-motion by the defendant for summary judgment was successful, and resulted in a judgment dismissing the plaintiff's action. The plaintiff appealed from the latter judgment, as of right, to this court. At issue was this court's jurisdiction to hear the proposed appeal from the order dismissing the plaintiff's motion for summary judgment, together with the plaintiff's motion for leave to appeal. Morden A.C.J.O. stated (at p. 91):

The order sought to be appealed is interlocutory and, by virtue of s. 19(1)(b) of the Courts of Justice Act, an appeal lies from it to the Divisional Court with leave as provided in the rules of the court. Under r. 62.02(1) leave to appeal this provision must be obtained from a judge of the General Division other than the

judge who made the interlocutory order.

In our view, it cannot be said that an appeal "lies to the Divisional Court", within the meaning of these words in s. 6(2) [of the Courts of Justice Act] applied to the facts of this case, until leave has been granted under s. 19(1)(b).

(See also, *Merling v. Southam Inc.* (2000), 42 C.P.C. (4th) 26 (Ont. C.A.); *Nesbitt Burns Inc. v. Canada Trustco Mortgage* (2000), 131 O.A.C. 85 (C.A.); and *V.K. Mason Construction Ltd. v. Canadian General Insurance Group Ltd.* (1998), 42 O.R. (3d) 618 (C.A.)).

**11** The facts in *Albert v. Spiegel* are clearly analogous to those in this case. Based on *Albert v. Spiegel*, an order dismissing a motion for summary judgment is an interlocutory order from which an appeal to the Divisional Court lies, with leave.

**12** The Moving Parties rely on the subsequent decisions of this court in *Whalen v. Hillier* (2001), 53 O.R. (3d) 550 (C.A.) and *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 195 D.L.R. (4th) 135 (Ont. C.A.) in support of their argument that where there are motions and cross-motions for summary judgment, and one motion is granted with the result that the other motion is dismissed, appeals on both motions properly lie to this court. In my view, for the reasons that follow, neither of those cases displaces the rule established in *Albert v. Spiegel*.

**13** First, *Whalen v. Hillier* did not involve a challenge of a decision not to grant summary judgment. The issue in that case was whether a motions judge had jurisdiction to grant summary judgment in favour of a party responding to a motion for summary judgment brought by the party opposite. No doubt because the issue in *Whalen v. Hillier* was different from the issue in *Albert v. Spiegel*, no mention was made in *Whalen v. Hillier* of the decision in *Albert v. Spiegel*.

**14** Similarly, no mention was made of *Albert v. Spiegel* in *Chippewas of Sarnia Band v. Canada (Attorney General)*, which involved numerous appeals and cross-appeals, including appeals from orders dismissing motions or cross-motions for summary judgment. The action in the *Chippewas* case was complex and multi-faceted. The appellate proceedings were the subject of extensive case management. The jurisdiction of this court to hear all of the appeals together was not challenged. Indeed, all parties agreed, given the nature of the judgment under appeal, that none of the appeals and cross-appeals related to interlocutory orders. Given those facts, the decision in the *Chippewas* case does not assist the Moving Parties.

### III. CONCLUSION

**15** I conclude, therefore, that the decisions in *Whalen v. Hillier* and in the *Chippewas* case cannot be regarded as having overruled the decision in *Albert v. Spiegel*. Until a motion under s. 6(2) of the Courts of Justice Act may properly be brought, this court has no jurisdiction to hear and determine the Responding Parties' appeal from the order of the motions judge dismissing their cross-motion

for partial summary judgment. A motion under s. 6(2) may only be brought after leave to appeal to the Divisional Court has been granted, if leave be granted. The Responding Parties have indicated that if they are successful in obtaining leave to appeal to the Divisional Court, they intend to bring a motion under s. 6(2) for an order directing that both appeals be heard together by this court.

**16** Accordingly, the directions sought by the Moving Parties are denied. I direct that the Responding Parties' appeal to this court from the decision of the motions judge granting summary judgment to the Moving Parties and dismissing the action in its entirety not be heard until final disposition of the Responding Parties' motion for leave to appeal to the Divisional Court, or further order of this court. By order dated June 13, 2002, I directed that the time for perfection of the Responding Parties' pending appeal to this court be extended, on consent, to the date which is four months after the date of release of this decision. Should variation of that four month period be required to ensure that the Responding Parties' motion for leave to appeal to the Divisional Court is determined prior to argument of the appeal pending before this court, either party may seek such variation by further motion to this court. This is not a proper case for an award of costs and I decline to order same.

CRONK J.A.



Pgs. 3, 4 & 6

*Case Name:*

**Concerned Residents Assn. of North Dumfries  
v. Preston Sand and Gravel Co.**

**Between**

**Concerned Residents Association of North  
Dumfries, Applicant (Moving Party),**

**and**

**Preston Sand and Gravel Company Limited  
and The Township of North Dumfries,  
Respondents (Responding Parties)**

[2015] O.J. No. 1574

2015 ONSC 2086

2015 CarswellOnt 4489

251 A.C.W.S. (3d) 374

35 M.P.L.R. (5th) 276

Court File No.: DC14-615ML

Ontario Superior Court of Justice

**D. Parayeski J.**

Heard: December 15, 2014.

Judgment: March 31, 2015.

(27 paras.)

*Administrative law -- Judicial review and statutory appeal -- When available -- Bars -- Delay --  
Leave to appeal -- Motion by applicant for extension of time to file motion for leave to appeal  
Ontario Municipal Board decision dismissed -- Respondents fairly conceded applicant formed  
requisite intent to appeal in timely manner -- Delay not adequately explained by counsel's vacation,  
as counsel knew of filing issue beforehand and could have instructed staff -- Delay of three months,  
22 days was short and respondents knew of intention to appeal so no prejudice -- Applicant failed to*

*establish arguable appeal, as issue with balancing of prejudice in disallowing expert evidence was question of fact, and Board's reasons were detailed and adequate.*

*Municipal law -- Planning and development -- Variances -- Appeals -- Zoning regulations -- Bylaws -- Variances -- What may be varied -- Use -- Motion by applicant for extension of time to file motion for leave to appeal Ontario Municipal Board decision dismissed -- Respondents fairly conceded applicant formed requisite intent to appeal in timely manner -- Delay not adequately explained by counsel's vacation, as counsel knew of filing issue beforehand and could have instructed staff -- Delay of three months, 22 days was short and respondents knew of intention to appeal so no prejudice -- Applicant failed to establish arguable appeal, as issue with balancing of prejudice in disallowing expert evidence was question of fact, and Board's reasons were detailed and adequate.*

Motion by the applicant for an extension of time to file the motion for leave to appeal the decision of the Ontario Municipal Board. The OMB had dismissed the applicant's appeal of zoning by-law amendments passed by the township that would permit the respondent to carry on an aggregate operation on his property.

HELD: Motion dismissed. The respondents fairly conceded that the applicant formed the requisite intent to appeal in a timely manner. The delay was three months, 22 days. The applicant explained the initial filing was refused and then, through inadvertence, counsel failed to re-file on time because of vacation. However, counsel was aware of the filing issue before vacation began and could have easily instructed staff to deal with the matter, so this was not a sufficient explanation for the delay. The delay was short and the respondents knew of the applicant's intention to appeal, so there was no prejudice. The applicant's grounds for appeal were that the OMB erred in refusing to allow certain expert evidence and gave insufficient reasons. The applicant really took issue with the OMB's balancing of prejudice in disallowing certain expert evidence, which was a question of fact, and whether the lateness of filing expert testimony lay with the applicant's counsel or the applicant itself did not change the reality the lateness had contradicted the OMB's procedural order. The OMB's ruling was detailed and more than adequate. It was not appropriate to grant an extension of time.

#### **Statutes, Regulations and Rules Cited:**

Ontario Municipal Board Act, R.S.O. 1990, c. O.28, s. 96(1), s. 96(4)

#### **Counsel:**

E. Gillespie, for Concerned Residents Association of North Dumfries, the Applicant (Moving Party).

D. Germain, for Preston Sand and Gravel Company Limited, the Respondents (Responding Parties)

and P. Kraemer for The Township of North Dumfries, the Respondents (Responding Parties).

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## RULING

**1** D. PARAYESKI J.:-- The moving party applicant seeks an extension to file a motion for leave to appeal a decision of the Ontario Municipal Board to the Divisional Court. The respondents ask that the applicant's motion be dismissed. The respondent Preston Sand and Gravel Company Limited (hereinafter "Preston Sand") asks, in the alternative, that the applicant be ordered to post security for costs.

**2** The Ontario Municipal Board's decision, which the applicant wishes to appeal, is dated April 28, 2014. The hearing, which resulted in that decision, had commenced on January 20, 2014.

**3** In a nutshell, the applicant had appealed to the Ontario Municipal Board zoning by-law amendments passed by the Township, which amendments would permit the respondent Preston Sand to carry on an aggregate operation on land it owns. Preston Sand had started the process to obtain permission to do so in 2008. The decision of the Ontario Municipal Board substantially dismissed the applicant's appeal and granted the approval sought by Preston Sand.

**4** The Ontario Court of Appeal decision in *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131 (Ont. CA), sets out the following tests for an extension to file a motion for leave to appeal. Paragraph 15 of the decision of E.E. Gillese, J.A. (in chambers) reads as follows:

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.

5 I shall address the various elements of the test individually and then collectively.

**A) Whether the moving party formed a bona fide intention to appeal within the relevant time period**

6 The respondents fairly and appropriately concede that the applicant formed the requisite intention on a timely basis, and so this element is not in issue.

**B) The length of, and explanation for, the delay in filing**

7 In this case, the delay was for three months and 22 days. The deadline was May 21, 2014. The applicant served, but did not file its motion for leave by the deadline. On September 12, 2014 it informed counsel for Preston Sand that it intended to bring this motion.

8 The applicant's explanation for this delay is that it had attempted to file its motion for leave within the deadline, but that the filing was refused, and then through inadvertence there was a failure to file subsequently. The only material explanation for the inadvertence is that relevant counsel was beginning a vacation.

9 While inadvertence is a refreshingly honest assertion, it is not a talisman, the mere raising of which constitutes an adequate explanation for delay. Counsel was aware of the filing problem before he left on vacation. Even in this day of easy and virtually instantaneous communications, it appears that he did not instruct his staff to deal with the issue. The explanation is insufficient.

**C) Any prejudice to the responding parties caused, perpetuated or exacerbated by the delay**

10 Preston Sand argues that the prejudice here is significant since it means the delay of a business in which there has already been an investment of capital and for which various regulatory approvals had been sought and obtained.

11 The applicant counters with the fact that the respondents were served, on a timely basis, with the notice of motion for leave, and thus had knowledge of the intention to appeal, and that in any event, the delay here is less than four months in duration.

12 In my view, Preston Sand's argument must fail in that it confuses the delay brought about by the entire Ontario Municipal Board process and any appeal from it with the period of delay before me, which is the delay in filing and bringing the motion for extension.

**D) The merits of the proposed appeal**

13 The underlying right to appeal is set out in s. 96 of the *Ontario Municipal Board Act*, R.S.O.

1990, c.O. 28. In reads, in part, as follows:

### **Appeal**

96. (1) Subject to the provisions of Part IV, an appeal lies from the Board to the Divisional Court, with leave of the Divisional Court, on a question of law.

[...]

### **Decisions of Board to be final**

- (4) Save as provided in this section and in section 43,
- (a) every decision or order of the Board is final; and
  - (b) no order, decision or proceeding of the Board shall be questioned or reviewed, restrained or removed by prohibition, injunction, certiorari or any other process or proceeding in any court.

**14** The court must assess whether the applicant's case raises a question of law, and whether this case is meritorious. This is a low threshold (see *Falus v. Martap Developments 87 Ltd.*, 2012 ONSC 5163 (Div.Ct., Lax J.). Still, courts have denied extensions where there is an arguable, if dubious, appeal: (See *Bratti v. Wabco Standard Trane Inc.*, [1994] O.J. No. 855 (ONCA)(Laskin J.A., in chambers.)

**15** The applicant argues that the Ontario Municipal Board's refusal to allow the testimony of a particular experts amounts to an error in law, and that the Board's reasons were insufficient, thus disclosing a second error in law.

**16** Conversely, the respondents contend that the weighing of probative value against prejudicial effect is a factual question, not a legal one, and therefore does not disclose a question of law. Further, they argue that the reasons that the Board gave were more than sufficient.

**17** Both the British Columbia and Manitoba Courts of Appeal have confirmed that finding that a party was prejudiced is a finding of fact, and the degree of prejudice is also a factual finding. In contrast, the test to determine prejudice and proper weight to be given to each factor in determining prejudice are both questions of law.

**18** Here the applicant's materials focus mainly on allegations that the Board did not appropriately balance the prejudice to the parties in allowing or disallowing the expert to testify. Essentially, the applicant takes issue with the Board's balancing of prejudice, not with the test applied or factors considered.

**19** I am satisfied that the appeal being advanced turns on a question of fact, and not law.

**20** I reject the suggestion that the Board should have considered the fact that the fault for delayed filing of the expert testimony lay with counsel, not with the applicant itself. That does not change the reality that the lateness relating to the expert was in direct contradiction to a procedural order issued by the Board in this specific case.

**21** It is worth noting that the Divisional Court has indicated that it is not prepared to address questions of mixed fact and law or questions regarding the exercise of discretion by the Ontario Municipal Board: (See *Residents for Sustainable Development in Guelph v. 6 & 7 Developments Ltd.*, [2005] O.J. No. 3623 and *Silgold Developments Inc. v. RRL Burloak Inc.*, [2005] O.J. No. 6016.)

**22** Similarly noteworthy is the fact that the Board's ruling is detailed and more than adequately addresses the issues before it.

**23** On the whole, it does not appear that there is a meritorious question of law for the Divisional Court to consider. The Board applied its discretion in weighing the prejudice that would accumulate to each of the parties if the expert testimony was admitted or not admitted, and this exercise is not reviewable.

**24** At paragraph 16 of the *Enbridge Gas* decision referred to earlier, Gillese J.A. states:

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 extension of time to file a notice of appeal.

**25** On balance, I am of the view that this is not an appropriate case to grant the extension sought. The application is dismissed. In light of this ruling, the issue raised by the cross-motion, i.e. security for costs, is moot, and I shall not address it here.

**26** If the parties cannot agree with respect to costs of the motion before me, they may make very brief written submissions to me in that regard. Each set of submissions shall be not more than three typewritten pages in length, not including a costs outline.

**27** The respondents shall have until May 15, 2015 to file their submissions, if any. The applicant shall until May 29, 2015 to respond. All such submissions should be forwarded to my attention at

the John Sopinka Court House at Hamilton.

D. PARAYESKI J.

*Case Name:*

**Diversitel Communications Inc. v. Glacier Bay Inc.**

**Between**

**Diversitel Communications Inc., respondent (plaintiff), and  
Glacier Bay Inc., appellant (defendant)**

[2004] O.J. No. 10

181 O.A.C. 6

128 A.C.W.S. (3d) 23

2004 CanLII 11196

Docket Nos. M30636 (C40887)

Ontario Court of Appeal  
Toronto, Ontario

**Labrosse, Sharpe and Armstrong JJ.A.**

Heard: December 11, 2003.

Judgment: January 7, 2004.

(12 paras.)

*Practice -- Appeals -- Leave to appeal -- Costs -- Security for costs.*

Motion by Diversitel Communications, the plaintiff and the respondent in the appeal for an order quashing the part of the appeal relating to a refusal to order the production of documents and for an order requiring security for costs. The appellant, Glacier Bay, was a California company who contracted with Diversitel to supply panels for electronic equipment. Diversitel made a \$40,000 US advance payment to Glacier. Glacier was given a schedule of delivery. It was unable to meet that schedule due to supplier problems. Accordingly, Diversitel terminated the contract and brought an action for the return of the advance payment. Glacier brought a counterclaim. It then brought a motion for production of documents. Diversitel brought a cross-motion for summary judgment. The motions judge ordered summary judgment, and dismissed the request for the production of



documents and the counterclaim.

HELD: Motion allowed in part. The appeal respecting the refusal to order production of documents was quashed as that decision was interlocutory and leave was required. However, security for costs was not ordered. As Glacier was brought into court by Diversitel in the first place, Diversitel was not entitled to security for costs of the action or appeal from judgment. Security for costs may have been available in relation to Glacier's counterclaim, but Diversitel did not establish that the counterclaim was independent from the main action.

**Statutes, Regulations and Rules Cited:**

Courts of Justice Act, R.S.O. 1990, c. C.43, ss. 6(2), 19(1)(b).

Ontario Rules of Civil Procedure, Rules, 56.01(1)(d), 61.06(1)(b), 76.

**Counsel:**

Richard Marks, for the appellant/defendant.

Paul Lepsoe and Laurie Livingstone, for the respondent/plaintiff.

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The judgment of the Court was delivered by

**1 ARMSTRONG J.A.:**-- This is a motion by the respondent in the appeal for:

- (a) an order quashing that part of the appeal which relates to a refusal to order the production of documents; and
- (b) an order requiring the appellant to post security for costs of the proceedings in the Superior Court and of the appeal.

**Background**

**2** The appellant, Glacier Bay Inc., is a California company which entered into a contract with the respondent, Diversitel Communications Inc., an Ontario company. The contract was to supply panels for electronic equipment to be used in a broadcasting system in the far north of Canada.

**3** Diversitel paid U.S.\$40,000 in advance to Glacier Bay. A schedule called for Glacier Bay to begin delivery in October 2002 and to be completed in February 2003. There is an issue as to whether time was of the essence in the contract.

**4** The appellant was not able to meet the delivery schedule due to problems with its principal supplier. As a result, the respondent terminated the contract on November 1, 2002 and subsequently commenced this action for the return of its U.S.\$40,000.

**5** The appellant brought a motion for production of documents related to the contract which the respondent entered with its replacement supplier. The respondent brought a cross-motion for summary judgment under Rule 76 of the Simplified Rules. The motions judge gave judgment for the respondent and at the same time dismissed the appellant's request for the production of documents and dismissed the counter-claim. According to the motions judge, the appellant defended the action on the basis that the respondent was not justified in terminating the contract. Before us, the appellant submitted that it could have made up the initial delay and completed delivery by February 2003. We are told that the appellant also asserted a counter-claim against the respondent. However, in the record before us, we were not supplied with copies of the pleadings. The appellant has appealed the judgment against it, the dismissal of the counter-claim and the refusal to order the production of documents.

#### The Production of Documents

**6** The decision of the motions judge refusing to order the production of documents is clearly interlocutory and leave to appeal must be obtained from a judge of the Divisional Court pursuant to s. 19(1)(b) of the Courts of Justice Act, R.S.O. 1990, c. C.43 even though the appellant has a right of appeal to this court on the judgment and the dismissal of the counter-claim. If the Divisional Court grants leave then the appellant may bring a motion pursuant to s. 6(2) of the Courts of Justice Act for an order directing that the productions issue be heard with the appeal related to the judgment in the action and the dismissal of the counter-claim. See *Cole v. Hamilton (City)* (2002), 60 O.R. (3d) 284 at 289 (C.A.). I would therefore quash that part of the appeal which relates to the productions issue.

#### Security for Costs

**7** The respondent relies upon rules 61.06(1)(b) and 56.01(1)(d) of the Rules of Civil Procedure in support of its motion for security for costs. The aforesaid rules provide:

61.06(1) In an appeal where it appears that,

(b) an order for security for costs could be made against the appellant under rule 56.01;

a judge of the appellate court, on motion by the respondent, may make such order for security for costs of the proceeding and of the appeal as is just.

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,

- (d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;

**8** The first issue concerns whether the respondent in the appeal, who is the plaintiff in the action is entitled to security of costs of the action and the appeal from the judgment in the action. This court per Laskin J.A. has held in *GEAC Canada Ltd. v. Craig Erickson Systems Inc.* (1994), 26 C.P.C. (3d) 355 (C.A.) that rule 61.06(1)(b) is confined to the making of an order against a plaintiff/appellant: see also *Toronto Dominion Bank v. Szilagyi Farms Ltd.* (1988), 65 O.R. (2d) 433. Grange J.A. also held in *Toys "R" Us (Canada) Ltd. v. Rotisseries St-Hubert Ltee.* (1994), 20 O.R. (3d) 814 (C.A.) that a plaintiff/respondent, who moved for security for costs against a defendant/appellant, pursuant to rule 61.06(1)(b) could not succeed since as the original defendant at trial, it could not have been the object for security of costs at trial and therefore cannot be the subject of such in an order on appeal. The policy rationale is not to impose security for costs upon foreign or impecunious defendants who are forced into court by others.

**9** There is a second issue. The appellant is a plaintiff by counter-claim and arguably could have been subject to security for costs in regard to its counter-claim. However, it is not every counter-claim which will impose upon the defendant/plaintiff by counter-claim the obligation to post security for costs. For example, security for costs will not be ordered where the counter-claim arises out of the same transaction or circumstances as the claim and is in substance a defence to the claim: see *Macpherson v. Masini* (1879), 5 Q.B.D. 144 and *Wilkins v. Towner*, [1936] OWN 137.

**10** I conclude from the above analysis that the respondent is not entitled to move for security for costs of the action and for the appeal from the judgment in the action. The respondent, however, may be entitled to move for security for costs in regard to the dismissal of the counter-claim and the appeal in respect of the counter-claim. However, as indicated above, we have not been provided with the pleadings in the record before us. There is nothing in the record to suggest that the counterclaim does not arise out of the same transaction as the claim advanced by the respondent/plaintiff.

**11** In the result, I would dismiss the motion for security for costs.

**12** While success has been divided, most of the time before us was taken up by the motion for security for costs. I would therefore award the costs of the motion before us to the appellant on a partial indemnity basis fixed in the amount of \$3,500 including Goods and Services Tax and disbursements.

ARMSTRONG J.A.

LABROSSE J.A. -- I agree.

SHARPE J.A. -- I agree.

Pgs. 3-5

*Case Name:*

**Economical Insurance Co. v. Fairview Assessment Centre Inc.**

**Between**

**Economical Insurance Company, Perth Insurance Company and  
Waterloo Insurance Company, Plaintiffs, and  
Fairview Assessment Centre Inc., Pacific Assessment Centre  
Inc., Danny Grossi, Yan Tam, Alexandre Lobatch and Vitali  
Tourkov, Defendants**

[2011] O.J. No. 5863

2011 ONSC 7535

Court File No. 422/11

Ontario Superior Court of Justice  
Divisional Court

**M.A. Penny J.**

Heard: December 15, 2011.

Judgment: December 19, 2011.

(18 paras.)

*Civil litigation -- Civil procedure -- Pleadings -- Striking out pleadings or allegations -- Appeals --  
Leave to appeal -- Interlocutory or final orders -- Motion by defendants for leave to appeal  
interlocutory decision declining to strike portions of statement of claim -- Decision struck portions  
of claim but did not wholly strike pleadings of conspiracy, personal liability and negligence against  
individual defendants -- Claim was for damages for fraudulent billing for insurance-related medical  
assessments -- Decision did not conflict with case law dealing with merger -- Motions judge applied  
principles to case and exercised his discretion to strike only portions of claim -- No reason to doubt  
correctness of order -- Matter not of such importance for leave to appeal to be granted.*

**Statutes, Regulations and Rules Cited:**

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 19(1)(b)

Insurance Act, R.S.O. 1990, c. I.8, s. 438

Rules of Civil Procedure, Rule 21, Rule 62.02, Rule 62.02(4)

**Counsel:**

S. Smith, for the Plaintiffs.

Melvyn L. Solmon and James Mcreynolds, for the Defendants Fairview Assessment Centre Inc., Pacific Assessment Centre Inc., Yan Tam, Alexandre Lobatch and Vitali Tourkov.

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**REASONS FOR JUDGMENT**

**1 M.A. PENNY J.:**-- This is a motion for leave to appeal the interlocutory decision of Hainey J. In that decision, Hainey J granted partial relief on the defendant's motion to strike portions of the statement of claim under rule 21 but declined to strike the pleadings of conspiracy and the pleadings of personal liability and negligence against the individual defendants in their entirety.

**2** This is an action for damages, in essence, for fraudulent billing for insurance-related medical assessments and treatment. The claim alleges (all references to the contents of the claim are to *allegations* in the claim) that the corporate defendants are in the business of providing medical assessments and treatment for insurance purposes. The individual defendants are the owners and or officers, directors and employees of the corporate defendants.

**3** The causes of action sound in conspiracy, negligent misrepresentation, deceit and fraudulent misrepresentation. The claim also seeks to "pierce the corporate veil."

**4** The grounds for the original motion included:

- (a) the conspiracy claim did not allege special damages attributable to each conspiracy;
- (b) the conspiracy claim related to events which it already taken place and was therefore "merged" with the alleged torts of negligence and fraud; and
- (c) the claims against the individuals did not disclose separate or independent causes of action from those claimed against the corporations.

**5** Hainey J. agreed with the defendants that the conspiracy allegations were deficient because they did not allege that the plaintiffs suffered special damage by reason of the alleged conspiracies. Accordingly, Hainey J. held that it was plain and obvious that the conspiracy allegations did not disclose a reasonable cause of action and should be struck with leave to amend.

6 With respect to the issue of merger, Hainey J., relying in part on *Hunt v. Carey*, [1990] 2 S.C.R. 959, found that it was not plain and obvious that the conspiracy allegations merged with the other torts for essentially two related reasons:

- (1) conspiracy is only one of the torts pleaded and the determination of which tort has been established rests with the trial judge. Only then *might* the doctrine of merger apply; and
- (2) the conspiracy claim is founded upon an unlawful act that is itself non-tortious. Breach of section 438 of the Ontario *Insurance Act* is alleged as the unlawful act in the conspiracy; breach of statute is not of itself tortious or actionable. This makes the conspiracy claim different from the allegations of negligence and fraud such that the conspiracy claim is not merged.

7 With respect to the claims against the individual defendants in negligence, Hainey J., having carefully reviewed the allegations against the individual defendants, was satisfied that they allege separate tortious conduct which is independent of the allegations against the corporate defendants.

8 Under Rule 62.02, leave to appeal to the Divisional Court under clause 19(1)(b) of the *Courts of Justice Act* (from the interlocutory order of a Judge of the Superior Court of Justice) 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) be 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.

9 For the purposes of rule 62.02(4) of the *Rules of Civil Procedure*, an exercise of discretion which has led to a different result because of different circumstances does not meet the requirement for a conflicting decision. It is necessary to demonstrate a difference in the principles chosen as a guide to the exercise of such discretion.

### **Merger**

10 There is a considerable body of law on the issue of merger although, in my view, it is reasonably well settled. The principle is well described in the decision of Ground J. in *Graye v. Filliter*,<sup>1</sup> where he said:

The facts pleaded on which the conspiracy is based are the same as those pleaded

with respect to the specific torts and no special injury or special damages arising from the conspiracy are pleaded. Accordingly, it does not appear to me that, in our case, the trial judge could find that the specific torts are not established on the facts pleaded but that the conspiracy or agreement to commit those torts is established and the defendants liable for injury or damage occasioned to the plaintiff as a result of the conspiracy even though, on the same facts the court has found that the defendants are not liable to the plaintiff on the basis of the specific torts pleaded.

Ground J's decision, I note, specifically took account of the decision of the Supreme Court of Canada in *Hunt v. Carey*, referred to by Hainey J. in his endorsement on the present motion.

**11** I do not think Hainey J.'s endorsement could be said to conflict, in the relevant legal sense, with the well established body of law dealing with merger. Rather, Hainey J. simply applied the principles to the particular circumstances of this case and, in the exercise of his discretion, agreed in part with the defendants in striking out portions of the claim and agreed in part with the plaintiffs in declining to strike out portions of the statement of claim. Accordingly, I do not think the defendants have shown that the decision of Hainey J. falls within branch one of the test for leave.

**12** The defendants, however, argue that Hainey J. applied the wrong test and that, as a result, there is good reason to doubt the correctness of his decision. The defendants say the test is whether the allegations relating to the claim of conspiracy and the ensuing damages are *substantially the same as* those of the allegations relating to the causes of action for negligent misstatement, deceit and fraudulent misrepresentation such that the conspiracy and the other causes of action relate to the same underlying factual foundation *and no significant differences between the two causes of action emerge*.

**13** The defendants say that the underlying allegations relating to all the causes of action are substantially the same such that there are no significant differences between them. The defendants argue that the distinction relied on by Hainey J - that the conspiracy claim is founded upon an unlawful act, i.e., breach of section 438 of the *Insurance Act*, which is itself not tortious and not actionable - is a distinction without a difference.

**14** However, even if I were persuaded that there is good reason to doubt the correctness of Hainey J's order, the defendants must still show that the proposed appeal involves matters of such importance that leave to appeal should be granted. For a matter to be of "such importance" under rule 62.02(4)(b), it must transcend the interests of the immediate parties to the litigation and contemplate issues of broad significance or general application that are felt to warrant resolution by a higher level of judicial authority. Where the motions judge was not required or asked to establish or expand any new proposition of law or practice, or modify or overturn an established one, and simply applied existing propositions of law to the circumstances as he analyzed them, the matter would not appear to be of such importance as to satisfy this aspect of the test for leave.<sup>2</sup> I agree in



general with Corbett J. in *Silver v. Imax Corp*<sup>3</sup> that discrete pleadings issues do not transcend the interests of the parties and do not constitute matters of such importance under Rule 62.02 that leave to be should be granted.

**15** The matter in issue here is a discrete pleading issue and does not dispose of anyone's final rights. It does not involve any important issue of principle. A relevant factor in the determination of whether the original motion ought to have been granted on this issue is whether the damages are the same. In this case, portions of the pleading relating to conspiracy were struck out with leave to amend to deal with the issue of special damages attributable to the alleged conspiracy. Those amendments have not yet been made. Finally, while I agree wholeheartedly with the sentiment that a complex allegation of conspiracy might potentially add to the length of pretrial disclosure and, indeed, to the trial, there is nothing about the particular allegations in this case which suggest that might be so. I am not persuaded that the matter in issue is of such importance that leave should be granted. In my view, leave should not be granted.

### **The Negligence Allegations Against The Individuals**

**16** In my view, the defendants' arguments concerning the negligence allegations against the individual defendants fall into exactly the same categories.

**17** I do not think Hailey J.'s decision could be said to conflict with any other decision of the court in the relevant legal sense required by Rule 62.02. And, even if I were convinced that there was good reason to doubt the correctness of Hailey J.'s disposition of the pleadings motion on this issue, for the reasons outlined above, I am not persuaded that the matter is of such importance that leave to appeal should be granted.

### **Costs**

**18** The parties at the end of oral argument agreed that if leave was granted, costs should be left to the panel of the Divisional Court hearing the appeal. However, no submissions were made on the disposition of costs if leave was not granted. Accordingly, I encourage the parties to reach agreement on an appropriate disposition of costs. If they are unable to do so, the plaintiffs may deliver brief written submissions, not to exceed two typed pages together with a bill of costs, within ten days of the release of these Reasons. The defendants shall have seven days thereafter to deliver responding submissions, subject to the same to page limit.

M.A. PENNY J.

1 [1997] O.J. No. 1243, 1997 CarswellOnt 5335

2 *Rankin v. MacLeod, Young Weir Ltd.* (1986), 57 O.R. (2d) 569 (Ont. H.C.J.)

3 [2011] O.J. No. 656 (S.C.J.)

Pgs. 3-4

*Case Name:*

**Enbridge Gas Distribution Inc. v. Froese**

**Between**

**Enbridge Gas Distribution Inc., Plaintiff (Responding Party),**

**and**

**David Froese a.k.a. David Frose, Defendant (Moving Party)**

[2013] O.J. No. 896

2013 ONCA 131

2013 CarswellOnt 2423

114 O.R. (3d) 636

Docket: M42141

Ontario Court of Appeal

Toronto, Ontario

**E.E. Gillese J.A.**

**(In Chambers)**

Heard: By written submissions, February 28, 2013.

Judgment: March 4, 2013.

(26 paras.)

*Civil litigation -- Civil procedure -- Appeals -- Leave to appeal -- Time to appeal -- Extension of time -- Motion by defendant for an extension of time to file a Notice of Motion for leave to appeal a November 2012 order dismissed -- Defendant damaged a gas line when digging out a septic tank -- He did not call for a utility locate before digging -- Trial judge found defendant not negligent and dismissed utility's action for payment of repair costs -- Divisional Court overturned decision in November 2012 -- Proposed appeal was largely fact based and involved no special circumstance or a matter of public importance.*

**Appeal From:**

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.

**Counsel:**

Peter B. Cozzi, for the moving party.

Jennifer Heath, for the responding party.

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**E.E. 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.

E.E. GILLESE J.A.

**Most Negative Treatment:** Recently added (treatment not yet designated)

**Most Recent Recently added (treatment not yet designated):** [Cotter v. Point Grey Golf and Country Club](#) | 2016 BCSC 10, 2016 CarswellBC 19 | (B.C. S.C., Jan 7, 2016)

2014 SCC 7, 2014 CSC 7  
Supreme Court of Canada

Hryniak v. Mauldin

2014 CarswellOnt 640, 2014 CarswellOnt 641, 2014 SCC 7, 2014 CSC 7, [2014] 1 S.C.R. 87, [2014] A.C.S. No. 7, [2014] S.C.J. No. 7, 12 C.C.E.L. (4th) 1, 21 B.L.R. (5th) 248, 239 A.C.W.S. (3d) 896, 27 C.L.R. (4th) 1, 314 O.A.C. 1, 366 D.L.R. (4th) 641, 37 R.P.R. (5th) 1, 453 N.R. 51, 46 C.P.C. (7th) 217, 95 E.T.R. (3d) 1

**Robert Hryniak, Appellant and Fred Mauldin, Dan Myers, Robert Blomberg, Theodore Landkammer, Lloyd Chelli, Stephen Yee, Marvin Cleair, Carolyn Cleair, Richard Hanna, Douglas Laird, Charles Ivans, Lyn White and Athena Smith, Respondents and Ontario Trial Lawyers Association and Canadian Bar Association, Interveners**

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

Heard: March 26, 2013  
Judgment: January 23, 2014  
Docket: 34641

Proceedings: affirming *Combined Air Mechanical Services Inc. v. Flesch* (2011), 13 R.P.R. (5th) 167, 14 C.P.C. (7th) 242, 2011 ONCA 764, 2011 CarswellOnt 13515, 10 C.L.R. (4th) 17, 344 D.L.R. (4th) 193, 108 O.R. (3d) 1, 286 O.A.C. 3, 97 C.C.E.L. (3d) 25, 93 B.L.R. (4th) 1 (Ont. C.A.); affirming *Combined Air Mechanical Services Inc. v. Flesch* (2010), 71 B.L.R. (4th) 27, 2010 CarswellOnt 2026, 2010 ONSC 1729 (Ont. S.C.J.); affirming *Parker v. Casalese* (2010), 99 C.L.R. (3d) 1, 2010 ONSC 5636, 2010 CarswellOnt 7991 (Ont. Div. Ct.); affirming *Parker v. Casalese* (2010), 2010 CarswellOnt 4406, 268 O.A.C. 378 (Ont. S.C.J.); affirming *394 Lakeshore Oakville Holdings Inc. v. Misek* (2010), 98 R.P.R. (4th) 21, 2010 ONSC 6007, 2010 CarswellOnt 8323 (Ont. S.C.J.); reversing in part *Bruno Appliance & Furniture Inc. v. Cassels Brock & Blackwell LLP* (2010), 2010 ONSC 5490, 2010 CarswellOnt 8325 (Ont. S.C.J.)

Counsel: Sarit E. Batner, Brandon Kain, Moya J. Graham, for Appellant  
Javad Heydary, Jeffrey D. Landmann, David K. Alderson, Michelle Jackson, Jonathan A. Odumeru, for Respondents  
Allan Rouben, Ronald P. Bohm, for Intervener, Ontario Trial Lawyers Association  
Paul R. Sweeny, David Sterns, for Intervener, Canadian Bar Association

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Employment; Labour; Property; Public; Torts; Family

#### Headnote

##### Civil practice and procedure --- Summary judgment — General principles

Group of American investors, led by M, provided funds to Canadian "traders" — H was principal of company T that traded in bonds and debt instruments, and P was lawyer who acted for H, T and C who was principal of Panamanian investment company — Money wired by M group to law firm was pooled with other funds and transferred to T — T forwarded pooled funds to offshore bank, and money disappeared — M group joined another plaintiff in action for fraud against H, P and law firm, and motions for summary judgment were heard together — Motion judge used powers under new R. 20.04(2.1) of



Rules of Civil Procedure to weigh evidence, evaluate credibility and draw inferences — Motion judge concluded trial was not required against H, and dismissed remainder of motion for summary judgment — H appealed, and Court of Appeal set out threshold test stating that "interest of justice" required that new powers be exercised only at trial, unless motion judge can achieve "full appreciation" of evidence and issues required to making dispositive findings on motion for summary judgment — Court found that, given factual complexity and voluminous record, action was type that generally required full trial, however, record supported that H had committed tort of civil fraud and dismissed his appeal — H appealed — Appeal dismissed — Summary judgment motion enhances access to justice as cheaper, faster alternative to full trial, and new R. 20 reflects recommendations for improving access to justice — New fact-finding powers in R. 20 can be exercised unless it is in interest of justice for them to be exercised only at trial — When judge is able to make necessary findings of fact, apply law to facts, and achieve just result in proportionate, expeditious and less expensive means, then there will be no genuine issue requiring trial — On summary judgment motion, evidence need not be equivalent to that at trial, but must be such that judge can fairly resolve dispute — While summary judgment must be granted where there is no genuine issue requiring trial, decision to use expanded fact-finding powers or call oral evidence is discretionary — In this case, motion judge made no palpable and overriding error in granting summary judgment as record was sufficient to make fair and just determination.

### **Civil practice and procedure --- Summary judgment — Evidence on application — General principles**

Group of American investors, led by M, provided funds to Canadian "traders" — H was principal of company T that traded in bonds and debt instruments, and P was lawyer who acted for H, T and C who was principal of Panamanian investment company — Money wired by M group to law firm was pooled with other funds and transferred to T — T forwarded pooled funds to offshore bank, and money disappeared — M group joined another plaintiff in action for fraud against H, P and law firm, and motions for summary judgment were heard together — Motion judge used powers under new R. 20.04(2.1) of Rules of Civil Procedure to weigh evidence, evaluate credibility and draw inferences — Motion judge concluded trial was not required against H, and dismissed remainder of motion for summary judgment — H appealed, and Court of Appeal set out threshold test stating that "interest of justice" required that new powers be exercised only at trial, unless motion judge can achieve "full appreciation" of evidence and issues required to making dispositive findings on motion for summary judgment — Court found that, given factual complexity and voluminous record, action was type that generally required full trial, however, record supported that H had committed tort of civil fraud and dismissed appeal — H appealed — Appeal dismissed — Summary judgment motion enhances access to justice as cheaper, faster alternative to full trial, and new R. 20 reflects recommendations for improving access to justice — New fact-finding powers in R. 20 can be exercised unless it is in interest of justice for them to be exercised only at trial — When judge is able to make necessary findings of fact, apply law to facts, and achieve just result in proportionate, expeditious and less expensive means, then there will be no genuine issue requiring trial — On summary judgment motion, evidence need not be equivalent to that at trial, but must be such that judge can fairly resolve dispute — While summary judgment must be granted where there is no genuine issue requiring trial, decision to use expanded fact-finding powers or call oral evidence is discretionary — In this case, motion judge made no palpable and overriding error in granting summary judgment as record was sufficient to make fair and just determination.

### **Procédure civile --- Jugement sommaire — Principes généraux**

Groupe d'investisseurs américains dirigés par M ont confié leur argent à des « courtiers » canadiens — H était le dirigeant de T, une société qui faisait le commerce des obligations et des titres de créance, et P était l'avocat de H, T et C, lequel était le dirigeant d'une société de placement panaméenne — Fonds transférés par le groupe M au cabinet d'avocats ont été mis en commun avec d'autres fonds puis transférés à T — T a viré les fonds à une banque étrangère, et l'argent a disparu — Groupe M s'est joint à un autre demandeur en vue d'intenter une action pour fraude civile contre H, P et le cabinet d'avocats, et des requêtes en jugement sommaire ont été instruites ensemble — Juge saisi de la requête a exercé les pouvoirs prévus en vertu du nouvel art. 20.04(2.1) des Règles de procédure civile pour apprécier la preuve, évaluer la crédibilité et tirer des conclusions — Juge saisi de la requête a estimé qu'il n'était pas nécessaire de tenir un procès contre H et a rejeté les autres points soulevés dans la requête — H a interjeté appel, et la Cour d'appel a énoncé un critère préliminaire affirmant que « l'intérêt de la justice » exigeait que les nouveaux pouvoirs ne soient exercés que lors d'un

procès, sauf si un juge saisi d'une requête peut procéder à la « pleine appréciation » de la preuve et des questions en litige qui s'impose pour tirer des conclusions décisives sur une requête en jugement sommaire — Cour a conclu que l'action était du type de celles qui nécessitent généralement la tenue d'un procès, compte tenu de la complexité des faits en cause et de son dossier volumineux; toutefois, le dossier étayait la conclusion selon laquelle H avait commis le délit de fraude civile, et la Cour a rejeté l'appel de H — Ce dernier a formé un pourvoi — Pourvoi rejeté — Requête en jugement sommaire améliore l'accès à la justice en tant que solution de rechange moins coûteuse et plus rapide à un procès formel, et la nouvelle R. 20 découle de recommandations visant à améliorer l'accès à la justice — Nouveaux pouvoirs en matière de recherche des faits prévus à la R. 20 peuvent être exercés, à moins qu'il ne soit dans l'intérêt de la justice qu'ils ne soient exercés que dans le cadre d'un procès — Lorsque le juge est en mesure de tirer les conclusions de fait nécessaires, d'appliquer les règles de droit aux faits et d'en arriver à un résultat juste en ayant recours à des moyens proportionnés, plus expéditifs et moins coûteux, alors il n'existe pas de véritable question litigieuse nécessitant la tenue d'un procès — Dans le cadre d'une requête en jugement sommaire, il n'est pas nécessaire que la preuve soit la même que celle présentée lors d'un procès, mais elle doit être telle que le juge puisse résoudre équitablement le litige — Bien qu'une requête en jugement sommaire doit être accueillie lorsqu'il n'existe pas de véritable question litigieuse nécessitant la tenue d'un procès, la décision d'exercer le pouvoir élargi en matière de recherche des faits ou le pouvoir d'ordonner la présentation de témoignages oraux est de nature discrétionnaire — En l'espèce, le juge saisi de la requête n'a pas commis d'erreur manifeste et dominante en exerçant les pouvoirs pour accueillir la requête en jugement sommaire, étant donné que le dossier était suffisant pour permettre de rendre une décision juste.

### **Procédure civile --- Jugement sommaire — Preuve en instance — Principes généraux**

Groupe d'investisseurs américains dirigés par M ont confié leur argent à des « courtiers » canadiens — H était le dirigeant de T, une société qui faisait le commerce des obligations et des titres de créance, et P était l'avocat de H, T et C, lequel était le dirigeant d'une société de placement panaméenne — Fonds transférés par le groupe M au cabinet d'avocats ont été mis en commun avec d'autres fonds puis transférés à T — T a viré les fonds à une banque étrangère, et l'argent a disparu — Groupe M s'est joint à un autre demandeur en vue d'intenter une action pour fraude civile contre H, P et le cabinet d'avocats, et des requêtes en jugement sommaire ont été instruites ensemble — Juge saisi de la requête a exercé les pouvoirs prévus en vertu du nouvel art. 20.04(2.1) des Règles de procédure civile pour apprécier la preuve, évaluer la crédibilité et tirer des conclusions — Juge saisi de la requête a estimé qu'il n'était pas nécessaire de tenir un procès contre H et a rejeté les autres points soulevés dans la requête — H a interjeté appel, et la Cour d'appel a énoncé un critère préliminaire affirmant que « l'intérêt de la justice » exigeait que les nouveaux pouvoirs ne soient exercés que lors d'un procès, sauf si un juge saisi d'une requête peut procéder à la « pleine appréciation » de la preuve et des questions en litige qui s'impose pour tirer des conclusions décisives sur une requête en jugement sommaire — Cour a conclu que l'action était du type de celles qui nécessitent généralement la tenue d'un procès, compte tenu de la complexité des faits en cause et de son dossier volumineux; toutefois, le dossier étayait la conclusion selon laquelle H avait commis le délit de fraude civile, et la Cour a rejeté l'appel de H — Ce dernier a formé un pourvoi — Pourvoi rejeté — Requête en jugement sommaire améliore l'accès à la justice en tant que solution de rechange moins coûteuse et plus rapide à un procès formel, et la nouvelle R. 20 découle de recommandations visant à améliorer l'accès à la justice — Nouveaux pouvoirs en matière de recherche des faits prévus à la R. 20 peuvent être exercés, à moins qu'il ne soit dans l'intérêt de la justice qu'ils ne soient exercés que dans le cadre d'un procès — Lorsque le juge est en mesure de tirer les conclusions de fait nécessaires, d'appliquer les règles de droit aux faits et d'en arriver à un résultat juste en ayant recours à des moyens proportionnés, plus expéditifs et moins coûteux, alors il n'existe pas de véritable question litigieuse nécessitant la tenue d'un procès — Dans le cadre d'une requête en jugement sommaire, il n'est pas nécessaire que la preuve soit la même que celle présentée lors d'un procès, mais elle doit être telle que le juge puisse résoudre équitablement le litige — Bien qu'une requête en jugement sommaire doit être accueillie lorsqu'il n'existe pas de véritable question litigieuse nécessitant la tenue d'un procès, la décision d'exercer le pouvoir élargi en matière de recherche des faits ou le pouvoir d'ordonner la présentation de témoignages oraux est de nature discrétionnaire — En l'espèce, le juge saisi de la requête n'a pas commis d'erreur manifeste et dominante en exerçant les pouvoirs pour accueillir la requête en jugement sommaire, étant donné que le dossier était suffisant pour permettre de rendre une décision juste.

In June 2001, members of a group of American investors led by M met with two principals of investments companies and a Canadian lawyer to discuss an investment opportunity. H was the principal of T, a company which traded in bonds and debt instruments. C was the principal of F, a Panamanian investment company. P was the lawyer representing H, T and C. The M group wired US\$1.2 million to the law firm, which was pooled with other funds and transferred to T. T then forwarded the pooled funds to an offshore bank, and the money then disappeared. H claimed that T's funds were stolen.

The M group joined another plaintiff in an action for civil fraud against H, P and the law firm, and brought a motion for summary judgment. The motion judge held that a trial was not required against H. The remainder of the motion was dismissed. H appealed, and this was the first occasion on which the Court of Appeal considered the new R. 20 of the Rules of Civil Procedure regarding summary judgment. The Court of Appeal set out a threshold test for when a judge could employ the new evidentiary powers under R. 20.04(2.1), stating that the "interest of justice" required that the new powers be exercised only at trial unless a motion judge can achieve the "full appreciation" of the evidence and issues required to make dispositive findings. The Court found that, given the factual complexity and voluminous record, the action was the type for which a trial would generally be required, however, the record supported the finding that H had committed the tort of civil fraud and dismissed H's appeal. H appealed.

**Held:** The appeal was dismissed

Per Karakatsanis J. (McLachlin C.J.C., LeBel, Abella, Rothstein, Cromwell, Wagner JJ. concurring): Rule 20 was amended in 2010 following recommendations concerning improving access to justice. The reforms create a legitimate alternative to trials as a means for adjudicating and resolving legal disputes. The amendments changed the test for summary judgment from asking whether a case presents "a genuine issue for trial" to asking whether there is a "genuine issue requiring a trial", demonstrating that a trial is not the default procedure. The new powers in the Rule permit motion judges to weigh evidence, evaluate credibility and draw reasonable inferences, as well as call oral evidence.

The Court of Appeal suggested that summary judgment would be most appropriate when cases were document driven, with few witnesses and limited contentious factual issues, or where the record could be supplemented by oral evidence on discrete points. However, this is not a strict rule. There is no genuine issue requiring a trial when a judge can make necessary findings of fact, apply the law to the facts, and achieve a just result in proportionate, expeditious and less expensive means.

The evidence on a summary judgment motion must be such that the judge can fairly resolve the dispute, and the powers in R. 20.04(2.1) and 20.04(2.2) provide the motion judge with a valid manner of fact finding. The guidelines suggested by the Court of Appeal for calling oral evidence concerning small number of witnesses, the issue having significant impact, and the issue being narrow and discrete are useful, however these are not absolute rules. The power to call oral evidence should be employed when it allows the judge to reach a fair and just adjudication, and it is the proportionate course of action.

The first step on a motion for summary judgment under R. 20.04 is a determination of whether there is a genuine issue requiring trial based on the evidence without using the new fact-finding powers. If there appears to be a genuine issue requiring trial, the judge should then determine if the need for a trial can be avoided by using the new powers under R. 20.04(2.1) and 20.04(2.2). These powers can be used, provided that their use is not against the interest of justice. The powers are presumptively available, and the decision to use the fact-finding powers or to call oral evidence is discretionary.

The action underlying this motion for summary judgment was for civil fraud, which has four elements. First, a false representation. Second, some level of knowledge of the falsehood of the representation, whether through knowledge or recklessness. Third, the false representation caused the plaintiff to act. And finally, the plaintiff's actions resulted in a loss. The Court of Appeal agreed with the motion judge that the M group was induced to invest with H due to what H said at their meeting in 2001. The motion judge also found the requisite knowledge or recklessness as to the falsehood of the representation, and rejected the defence that the funds were stolen. There was also intention that the M group would act

on H's false representations, and clearly there was loss by the M group. The motion judge properly concluded there was no issue requiring a trial, and made no palpable and overriding error in granting summary judgment. The motion judge did not err in exercising his fact-finding powers under R. 20.04(2.1) as the record was sufficient to make a fair and just determination.

En juin 2001, les membres d'un groupe d'investisseurs dirigés par M ont rencontré deux dirigeants de sociétés de placement de même qu'un avocat canadien dans le but de discuter d'une possibilité d'investissement. H était le dirigeant de T, une société qui faisait le commerce des obligations et des titres de créance. C était le dirigeant de F, une société de placement panaméenne. P était l'avocat de H, T et C. Le groupe M a transféré 1,2 million \$US au cabinet d'avocats, où cette somme a été mise en commun avec d'autres fonds puis transférée à T. T a alors viré les fonds à une banque étrangère, et l'argent a disparu. Selon H, les fonds de T ont été dérobés.

Le groupe M s'est joint à un autre demandeur en vue d'intenter une action pour fraude civile contre H, P et le cabinet d'avocats et ils ont présenté des requêtes en jugement sommaire. Le juge saisi de la requête a estimé qu'il n'était pas nécessaire de tenir un procès contre H. Les autres points soulevés dans la requête ont été rejetés. H a interjeté appel, et il s'agissait de la première fois que la Cour d'appel appliquait la nouvelle R. 20 des Règles de procédure civile à un jugement sommaire. La Cour d'appel a énoncé un critère préliminaire pour déterminer dans quelles circonstances un juge peut exercer les nouveaux pouvoirs en matière de preuve prévus à la R. 20.04(2.1) des Règles, affirmant que « l'intérêt de la justice » exigeait que les nouveaux pouvoirs ne soient exercés que lors d'un procès, sauf si un juge saisi d'une requête peut procéder à la « pleine appréciation » de la preuve et des questions en litige qui s'impose pour tirer des conclusions décisives. La Cour a conclu que l'action était du type de celles qui nécessitent généralement la tenue d'un procès, compte tenu de la complexité des faits en cause et de son dossier volumineux. Toutefois, le dossier étayait la conclusion selon laquelle H avait commis le délit de fraude civile, et la Cour a rejeté l'appel de H. Ce dernier a formé un pourvoi.

**Arrêt:** Le pourvoi a été rejeté.

Karakatsanis, J. (McLachlin, J.C.C., LeBel, Abella, Rothstein, Cromwell, Wagner, JJ., souscrivant à son opinion) : La R. 20 a été modifiée en 2010 à la suite de recommandations visant à améliorer l'accès à la justice. Les réformes ont créé une solution de rechange légitime pour trancher et régler les litiges d'ordre juridique. Les modifications ont eu pour effet de modifier le critère applicable aux jugements sommaires en remplaçant la question de savoir si la cause ne « soulève pas de question litigieuse » par celle de savoir si la cause soulève une « véritable question litigieuse nécessitant la tenue d'une instruction », démontrant que la tenue d'un procès ne constitue pas la procédure par défaut. Les nouveaux pouvoirs prévus aux Règles permettent au juge saisi d'une requête d'apprécier la preuve, d'évaluer la crédibilité et de tirer des conclusions raisonnables et d'ordonner la présentation de témoignages oraux.

La Cour d'appel a laissé entendre qu'il est le plus souvent indiqué de rendre un jugement sommaire dans des affaires où les documents occupent une place prépondérante, où il y a peu de témoins et de questions de fait litigieuses, ou encore des affaires dans lesquelles il est possible de compléter le dossier en présentant des témoignages oraux sur des points distincts. Toutefois, il ne s'agit pas d'une règle stricte. Il n'existe pas de véritable question litigieuse nécessitant la tenue d'un procès lorsque le juge est en mesure de tirer les conclusions de fait nécessaires, d'appliquer les règles de droit aux faits et d'arriver à un résultat juste de manière proportionnée, plus expéditive et moins coûteuse.

La preuve dans le cadre d'une requête en jugement sommaire doit être telle que le juge soit confiant de pouvoir résoudre équitablement le litige, et l'exercice des pouvoirs prévus à la R. 20.04(2.1) et 20.04(2.2) des Règles permet au juge saisi de la requête de procéder à une recherche des faits valable. Bien que les indications suggérées par la Cour d'appel lorsqu'il est possible d'entendre les témoignages oraux d'un nombre restreint de témoins, lorsque la question soulevée a une incidence importante et lorsque cette question est précise et distincte soient utiles, ces règles ne sont pas absolues. Le pouvoir d'ordonner des témoignages oraux devrait être exercé lorsqu'il permet au juge de rendre une décision juste et équitable sur le fond et que son exercice constitue la marche à suivre proportionnée.

La première étape à suivre dans le cadre d'une requête en jugement sommaire en vertu de la R. 20.04 est de décider, sans recourir aux nouveaux pouvoirs en matière de recherche des faits, s'il existe une véritable question litigieuse nécessitant la tenue d'un procès. S'il semble y avoir une véritable question nécessitant la tenue d'un procès, le juge devrait alors déterminer si l'exercice des nouveaux pouvoirs prévus à la R. 20.04(2.1) et (2.2) des Règles permettra d'éviter la tenue d'un procès. Le juge peut exercer ces pouvoirs à son gré, pourvu que leur exercice ne soit pas contraire à l'intérêt de la justice. Ces pouvoirs sont présumés être disponibles, et la décision d'exercer les pouvoirs en matière de recherche des faits ou d'ordonner des témoignages oraux est discrétionnaire.

C'était une action pour fraude civile qui était à l'origine de la présente requête en jugement sommaire. La fraude civile comporte quatre éléments : premièrement, une fausse déclaration du défendeur; deuxièmement, une certaine connaissance de la fausseté de la déclaration de la part du défendeur (connaissance ou insouciance); troisièmement, le fait que la fausse déclaration a amené le demandeur à agir; et quatrièmement, le fait que les actes du demandeur ont entraîné une perte. La Cour d'appel partageait l'avis du juge saisi de la requête que le groupe M avait été amené à investir avec H en raison des propos tenus par H lors de la réunion de 2001. Le juge saisi de la requête a également conclu à l'existence de la connaissance ou de l'insouciance requise quant à la fausseté de la déclaration et a rejeté la thèse invoquée en défense selon laquelle les fonds avaient été dérobés. Il y avait également l'intention de H que ses fausses déclarations incitent le groupe M à agir et, manifestement, le groupe M a subi une perte. Le juge saisi de la requête a eu raison de conclure qu'il n'y avait pas de question litigieuse nécessitant la tenue d'un procès et n'a pas commis d'erreur manifeste et dominante en rendant un jugement sommaire. Le juge saisi de la requête n'a pas commis d'erreur en exerçant les pouvoirs en matière de recherche des faits que lui confère la R. 20.04(2.1) des Règles, étant donné que le dossier était suffisant pour permettre de rendre une décision juste et équitable.

APPEAL by defendant from judgment reported at *Combined Air Mechanical Services Inc. v. Flesch* (2011), 13 R.P.R. (5th) 167, 14 C.P.C. (7th) 242, 2011 ONCA 764, 2011 CarswellOnt 13515, 10 C.L.R. (4th) 17, 344 D.L.R. (4th) 193, 108 O.R. (3d) 1, 286 O.A.C. 3, 97 C.C.E.L. (3d) 25, 93 B.L.R. (4th) 1 (Ont. C.A.), affirming motion judge's decision to grant summary judgment in favour of plaintiff.

POURVOI formé par le défendeur à l'encontre d'un jugement publié à *Combined Air Mechanical Services Inc. v. Flesch* (2011), 13 R.P.R. (5th) 167, 14 C.P.C. (7th) 242, 2011 ONCA 764, 2011 CarswellOnt 13515, 10 C.L.R. (4th) 17, 344 D.L.R. (4th) 193, 108 O.R. (3d) 1, 286 O.A.C. 3, 97 C.C.E.L. (3d) 25, 93 B.L.R. (4th) 1 (Ont. C.A.), ayant confirmé la décision du juge des requêtes de rendre un jugement sommaire en faveur du demandeur.

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

1 Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.

2 Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

3 Summary judgment motions provide one such opportunity. Following the *Civil Justice Reform Project: Summary of Findings and Recommendations* (2007) (the Osborne Report), Ontario amended the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (*Ontario Rules* or *Rules*) to increase access to justice. This appeal, and its companion, *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 8 (S.C.C.), address the proper interpretation of the amended Rule 20 (summary judgment motion).



4 In interpreting these provisions, the Ontario Court of Appeal placed too high a premium on the "full appreciation" of evidence that can be gained at a conventional trial, given that such a trial is not a realistic alternative for most litigants. In my view, a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.

5 To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.

6 As the Court of Appeal observed, the inappropriate use of summary judgment motions creates its own costs and delays. However, judges can mitigate such risks by making use of their powers to manage and focus the process and, where possible, remain seized of the proceedings.

7 While I differ in part on the interpretation of Rule 20, I agree with the Court of Appeal's disposition of the matter and would dismiss the appeal.

## **I. Facts**

8 More than a decade ago, a group of American investors, led by Fred Mauldin (the Mauldin Group), placed their money in the hands of Canadian "traders". Robert Hryniak was the principal of the company Tropos Capital, which traded in bonds and debt instruments; Gregory Peebles, is a corporate-commercial lawyer (formerly of Cassels Brock & Blackwell) who acted for Hryniak, Tropos and Robert Cranston, formerly a principal of a Panamanian company, Frontline Investments Inc.

9 In June 2001, two members of the Mauldin Group met with Cranston, Peebles, and Hryniak, to discuss an investment opportunity.

10 At the end of June 2001, the Mauldin Group wired US\$1.2 million to Cassels Brock, which was pooled with other funds and transferred to Tropos. A few months later, Tropos forwarded more than US\$10 million to an offshore bank, and the money disappeared. Hryniak claims that at this point, Tropos's funds, including the funds contributed by the Mauldin Group, were stolen.

11 Beyond a small payment of US\$9,600 in February 2002, the Mauldin Group lost its investment.

## **II. Judicial History**

### ***A. Ontario Superior Court of Justice, 2010 ONSC 5490 (Ont. S.C.J.)***

12 The Mauldin Group joined with Bruno Appliance and Furniture, Inc. (the appellants in the companion appeal) in an action for civil fraud against Hryniak, Peebles and Cassels Brock. They brought motions for summary judgment, which were heard together.

13 In hearing the motions, the judge used his powers under the new Rule 20.04(2.1) to weigh the evidence, evaluate credibility, and draw inferences. He found that the Mauldin Group's money was disbursed by Cassels Brock to Hryniak's company, Tropos, but that there was no evidence to suggest that Tropos had ever set up a trading program. Contrary to the investment strategy that Hryniak had described to the investors, the Mauldin Group's money was placed in an account with the offshore New Savings Bank, and then disappeared. He rejected Hryniak's claim that members of the New Savings Bank had stolen the Mauldin Group's money.

14 The motion judge concluded that a trial was not required against Hryniak. However, he dismissed the Mauldin Group's motion for summary judgment against Peebles, because that claim involved factual issues, particularly with respect to Peebles' credibility and involvement in a key meeting, which required a trial. Consequently, he also dismissed the motion for summary

judgment against Cassels Brock, as those claims were based on the theory that the firm was vicariously liable for Peebles' conduct.

***B. Court of Appeal for Ontario, 2011 ONCA 764, 108 O.R. (3d) 1 (Ont. C.A.)***

15 The Court of Appeal simultaneously heard Hryniak's appeal of this matter, the companion *Bruno Appliance* appeal, and three other matters which are not before this Court. This was the first occasion on which the Court of Appeal considered the new Rule 20.

16 The Court of Appeal set out a threshold test for when a motion judge could employ the new evidentiary powers available under Rule 20.04(2.1) to grant summary judgment under Rule 20.04(2)(a). Under this test, the "interest of justice" requires that the new powers be exercised only at trial, unless a motion judge can achieve the "full appreciation" of the evidence and issues required to make dispositive findings on a motion for summary judgment. The motion judge should assess whether the benefits of the trial process, including the opportunity to hear and observe witnesses, to have the evidence presented by way of a trial narrative, and to experience the fact-finding process first-hand, are necessary to fully appreciate the evidence in the case.

17 The Court of Appeal suggested that cases requiring multiple factual findings, based on conflicting evidence from a number of witnesses, and involving an extensive record, are generally not fit for determination in this manner. Conversely, cases driven by documents, with few witnesses, and limited contentious factual issues are appropriate candidates for summary judgment.

18 The Court of Appeal advised motion judges to make use of the power to hear oral evidence, under Rule 20.04(2.2), to hear only from a limited number of witnesses on discrete issues that are determinative of the case.

19 The Court of Appeal concluded that, given its factual complexity and voluminous record, the Mauldin Group's action was the type of action for which a trial is generally required. There were numerous witnesses, various theories of liability against multiple defendants, serious credibility issues, and an absence of reliable documentary evidence. Moreover, since Hryniak and Peebles had cross-claimed against each other and a trial would nonetheless be required against the other defendants, summary judgment would not serve the values of better access to justice, proportionality, and cost savings.

20 Despite concluding that this case was not an appropriate candidate for summary judgment, the Court of Appeal was satisfied that the record supported the finding that Hryniak had committed the tort of civil fraud against the Mauldin Group, and therefore dismissed Hryniak's appeal.

### **III. Outline**

21 In determining the general principles to be followed with respect to summary judgment, I will begin with the values underlying timely, affordable and fair access to justice. Next, I will turn to the role of summary judgment motions generally and the interpretation of Rule 20 in particular. I will then address specific judicial tools for managing the risks of summary judgment motions.

22 Finally, I will consider the appropriate standard of review and whether summary judgment should have been granted to the respondents.

### **IV. Analysis**

#### ***A. Access to Civil Justice: A Necessary Culture Shift***

23 This appeal concerns the values and choices underlying our civil justice system, and the ability of ordinary Canadians to access that justice. Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised.

24 However, undue process and protracted trials, with unnecessary expense and delay, can *prevent* the fair and just resolution of disputes. The full trial has become largely illusory because, except where government funding is available,<sup>1</sup> ordinary

Canadians cannot afford to access the adjudication of civil disputes.<sup>2</sup> The cost and delay associated with the traditional process means that, as counsel for the intervener the Advocates' Society (in *Bruno Appliance*) stated at the hearing of this appeal, the trial process denies ordinary people the opportunity to have adjudication. And while going to trial has long been seen as a last resort, other dispute resolution mechanisms such as mediation and settlement are more likely to produce fair and just results when adjudication remains a realistic alternative.

25 Prompt judicial resolution of legal disputes allows individuals to get on with their lives. But, when court costs and delays become too great, people look for alternatives or simply give up on justice. Sometimes, they choose to represent themselves, often creating further problems due to their lack of familiarity with the law.

26 In some circles, private arbitration is increasingly seen as an alternative to a slow judicial process. But private arbitration is not the solution since, without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined.

27 There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.

28 This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

29 There is, of course, always some tension between accessibility and the truth-seeking function but, much as one would not expect a jury trial over a contested parking ticket, the procedures used to adjudicate civil disputes must fit the nature of the claim. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.

30 The proportionality principle is now reflected in many of the provinces' rules and can act as a touchstone for access to civil justice.<sup>3</sup> For example, Ontario Rules 1.04(1) and 1.04(1.1) provide:

**1.04** (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

**1.04** (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

31 Even where proportionality is not specifically codified, applying rules of court that involve discretion "includes ... an underlying principle of proportionality which means taking account of the appropriateness of the procedure, its cost and impact on the litigation, and its timeliness, given the nature and complexity of the litigation" (*Szeto v. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311 (N.L. C.A.), at para. 53).

32 This culture shift requires judges to actively manage the legal process in line with the principle of proportionality. While summary judgment motions can save time and resources, like most pre-trial procedures, they can also slow down the proceedings if used inappropriately. While judges can and should play a role in controlling such risks, counsel must, in accordance with the traditions of their profession, act in a way that facilitates rather than frustrates access to justice. Lawyers should consider their client's limited means and the nature of their case and fashion proportionate means to achieve a fair and just result.



33 A complex claim may involve an extensive record and a significant commitment of time and expense. However, proportionality is inevitably comparative; even slow and expensive procedures can be proportionate when they are the fastest and most efficient alternative. The question is whether the added expense and delay of fact finding at trial is necessary to a fair process and just adjudication.

### ***B. Summary Judgment Motions***

34 The summary judgment motion is an important tool for enhancing access to justice because it can provide a cheaper, faster alternative to a full trial. With the exception of Quebec, all provinces feature a summary judgment mechanism in their respective rules of civil procedure.<sup>4</sup> Generally, summary judgment is available where there is no genuine issue for trial.

35 Rule 20 is Ontario's summary judgment procedure, under which a party may move for summary judgment to grant or dismiss all or part of a claim. While, Ontario's Rule 20 in some ways goes further than other rules throughout the country, the values and principles underlying its interpretation are of general application.

36 Rule 20 was amended in 2010, following the recommendations of the Osborne Report, to improve access to justice. These reforms embody the evolution of summary judgment rules from highly restricted tools used to weed out clearly unmeritorious claims or defences to their current status as a legitimate alternative means for adjudicating and resolving legal disputes.

37 Early summary judgment rules were quite limited in scope and were available only to plaintiffs with claims based on debt or liquidated damages, where no real defence existed.<sup>5</sup> Summary judgment existed to avoid the waste of a full trial in a clear case.

38 In 1985, the then new Rule 20 extended the availability of summary judgement to both plaintiffs and defendants and broadened the scope of cases that could be disposed of on such a motion. The rules were initially interpreted expansively, in line with the purposes of the rule changes.<sup>6</sup> However, appellate jurisprudence limited the powers of judges and effectively narrowed the purpose of motions for summary judgment to merely ensuring that: "claims that have no chance of success [are] weeded out at an early stage".<sup>7</sup>

39 The Ontario Government commissioned former Ontario Associate Chief Justice Coulter Osborne Q.C., to consider reforms to make the Ontario civil justice system more accessible and affordable, leading to the report of the Civil Justice Reform Project (the Osborne Report). The Osborne Report concluded that few summary judgment motions were being brought and, if the summary judgment rule was to work as intended, the appellate jurisprudence that had narrowed the scope and utility of the rule had to be reversed (p. 35). Among other things, it recommended that summary judgment be made more widely available, that judges be given the power to weigh evidence on summary judgment motions, and that judges be given discretion to direct that oral evidence be presented (pp. 35-36).

40 The report also recommended the adoption of a summary trial procedure similar to that employed in British Columbia (p. 37). This particular recommendation was not adopted, and the legislature made the choice to maintain summary judgment as the accessible procedure.

41 Many of the Osborne Report's recommendations were taken up and implemented in 2010. As noted above, the amendments codify the proportionality principle and provide for efficient adjudication when a conventional trial is not required. They offer significant new tools to judges, which allow them to adjudicate more cases through summary judgment motions and attenuate the risks when such motions do not resolve the entire case.

42 Rule 20.04 now reads in part:<sup>8</sup>

#### **20.04 . . .**

(2) [General] The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

(2.1) [Powers] In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.

2. Evaluating the credibility of a deponent.

3. Drawing any reasonable inference from the evidence.

(2.2) [Oral Evidence (Mini-Trial)] A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

43 The Ontario amendments changed the test for summary judgment from asking whether the case presents "a genuine issue for trial" to asking whether there is a "genuine issue requiring a trial". The new rule, with its enhanced fact-finding powers, demonstrates that a trial is not the default procedure. Further, it eliminated the presumption of substantial indemnity costs against a party that brought an unsuccessful motion for summary judgment, in order to avoid deterring the use of the procedure.

44 The new powers in Rules 20.04(2.1) and (2.2) expand the number of cases in which there will be no genuine issue requiring a trial by permitting motion judges to weigh evidence, evaluate credibility and draw reasonable inferences.<sup>9</sup>

45 These new fact-finding powers are discretionary and are presumptively available; they may be exercised *unless* it is in the interest of justice for them to be exercised only at a trial; Rule 20.04(2.1). Thus, the amendments are designed to transform Rule 20 from a means to weed out unmeritorious claims to a significant alternative model of adjudication.

46 I will first consider when summary judgment can be granted on the basis that there is "no genuine issue requiring a trial" (Rule 20.04(2)(a)). Second, I will discuss when it is against the "interest of justice" for the new fact-finding powers in Rule 20.04(2.1) to be used on a summary judgment motion. Third, I will consider the power to call oral evidence and, finally, I will lay out the process to be followed on a motion for summary judgment.

#### *(1) When is There no Genuine Issue Requiring a Trial?*

47 Summary judgment motions must be granted whenever there is no genuine issue requiring a trial (Rule 20.04(2)(a)). In outlining how to determine whether there is such an issue, I focus on the goals and principles that underlie whether to grant motions for summary judgment. Such an approach allows the application of the rule to evolve organically, lest categories of cases be taken as rules or preconditions which may hinder the system's transformation by discouraging the use of summary judgment.

48 The Court of Appeal did not explicitly focus upon when there is a genuine issue requiring a trial. However, in considering whether it is against the interest of justice to use the new fact-finding powers, the court suggested that summary judgment would most often be appropriate when cases were document driven, with few witnesses and limited contentious factual issues, or when the record could be supplemented by oral evidence on discrete points. These are helpful observations but, as the court itself recognized, should not be taken as delineating firm categories of cases where summary judgment is and is not appropriate. For example, while this case is complex, with a voluminous record, the Court of Appeal ultimately agreed that there was no genuine issue requiring a trial.

49 There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

50 These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

51 Often, concerns about credibility or clarification of the evidence can be addressed by calling oral evidence on the motion itself. However, there may be cases where, given the nature of the issues and the evidence required, the judge cannot make the necessary findings of fact, or apply the legal principles to reach a just and fair determination.

*(2) The Interest of Justice*

52 The enhanced fact-finding powers granted to motion judges in Rule 20.04(2.1) may be employed on a motion for summary judgment unless it is in the "interest of justice" for them to be exercised only at trial. The "interest of justice" is not defined in the Rules.

53 To determine whether the interest of justice allowed the motion judge to use her new powers, the Court of Appeal required a motion judge to ask herself, "can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?" (para. 50).

54 The Court of Appeal identified the benefits of a trial that contribute to this full appreciation of the evidence: the narrative that counsel can build through trial, the ability of witnesses to speak in their own words, and the assistance of counsel in sifting through the evidence (para. 54).

55 The respondents, as well as the interveners, the Canadian Bar Association, the Attorney General of Ontario and the Advocates' Society, submit that the Court of Appeal's emphasis on the virtues of the traditional trial is misplaced and unduly restrictive. Further, some of these interveners submit that this approach may result in the creation of categories of cases inappropriate for summary judgment, and this will limit the development of the summary judgment vehicle.

56 While I agree that a motion judge must have an appreciation of the evidence necessary to make dispositive findings, such an appreciation is not only available at trial. Focussing on how much and what kind of evidence could be adduced at a trial, as opposed to whether a trial is "requir[ed]" as the Rule directs, is likely to lead to the bar being set too high. The interest of justice cannot be limited to the advantageous features of a conventional trial, and must account for proportionality, timeliness and affordability. Otherwise, the adjudication permitted with the new powers — and the purpose of the amendments — would be frustrated.

57 On a summary judgment motion, the evidence need not be equivalent to that at trial, but must be such that the judge is confident that she can fairly resolve the dispute. A documentary record, particularly when supplemented by the new fact-finding tools, including ordering oral testimony, is often sufficient to resolve material issues fairly and justly. The powers provided in Rules 20.04(2.1) and 20.04(2.2) can provide an equally valid, if less extensive, manner of fact finding.

58 This inquiry into the interest of justice is, by its nature, comparative. Proportionality is assessed in relation to the full trial. It may require the motion judge to assess the relative efficiencies of proceeding by way of summary judgment, as opposed to trial. This would involve a comparison of, among other things, the cost and speed of both procedures. (Although summary judgment may be expensive and time consuming, as in this case, a trial may be even more expensive and slower.) It may also involve a

comparison of the evidence that will be available at trial and on the motion as well as the opportunity to fairly evaluate it. (Even if the evidence available on the motion is limited, there may be no reason to think better evidence would be available at trial.)

59 In practice, whether it is against the "interest of justice" to use the new fact-finding powers will often coincide with whether there is a "genuine issue requiring a trial". It is logical that, when the use of the new powers would enable a judge to fairly and justly adjudicate a claim, it will generally not be against the interest of justice to do so. What is fair and just turns on the nature of the issues, the nature and strength of the evidence and what is the proportional procedure.

60 The "interest of justice" inquiry goes further, and also considers the consequences of the motion in the context of the litigation as a whole. For example, if some of the claims against some of the parties will proceed to trial in any event, it may not be in the interest of justice to use the new fact-finding powers to grant summary judgment against a single defendant. Such partial summary judgment may run the risk of duplicative proceedings or inconsistent findings of fact and therefore the use of the powers may not be in the interest of justice. On the other hand, the resolution of an important claim against a key party could significantly advance access to justice, and be the most proportionate, timely and cost effective approach.

### (3) *The Power to Hear Oral Evidence*

61 Under Rule 20.04(2.2), the motion judge is given the power to hear oral evidence to assist her in making findings under Rule 20.04(2.1). The decision to allow oral evidence rests with the motion judge since, as the Court of Appeal noted, "it is the motion judge, not counsel, who maintains control over the extent of the evidence to be led and the issues to which the evidence is to be directed" (para. 60).

62 The Court of Appeal suggested the motion judge should only exercise this power when

(1) Oral evidence can be obtained from a small number of witnesses and gathered in a manageable period of time; (2) Any issue to be dealt with by presenting oral evidence is likely to have a significant impact on whether the summary judgment motion is granted; and (3) Any such issue is narrow and discrete — *i.e.*, the issue can be separately decided and is not enmeshed with other issues on the motion. [para. 103]

This is useful guidance to ensure that the hearing of oral evidence does not become unmanageable; however, as the Court of Appeal recognized, these are not absolute rules.

63 This power should be employed when it allows the judge to reach a fair and just adjudication on the merits and it is the proportionate course of action. While this is more likely to be the case when the oral evidence required is limited, there will be cases where extensive oral evidence can be heard on the motion for summary judgment, avoiding the need for a longer, more complex trial and without compromising the fairness of the procedure.

64 Where a party seeks to lead oral evidence, it should be prepared to demonstrate why such evidence would assist the motion judge in weighing the evidence, assessing credibility, or drawing inferences and to provide a "will say" statement or other description of the proposed evidence so that the judge will have a basis for setting the scope of the oral evidence.

65 Thus, the power to call oral evidence should be used to promote the fair and just resolution of the dispute in light of principles of proportionality, timeliness and affordability. In tailoring the nature and extent of oral evidence that will be heard, the motion judge should be guided by these principles, and remember that the process is not a full trial on the merits but is designed to determine if there is a genuine issue requiring a trial.

### (4) *The Roadmap/Approach to a Motion for Summary Judgment*

66 On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2).

She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

67 Inquiring first as to whether the use of the powers under Rule 20.04(2.1) will allow the dispute to be resolved by way of summary judgment, before asking whether the interest of justice requires that those powers be exercised only at trial, emphasizes that these powers are presumptively available, rather than exceptional, in line with the goal of proportionate, cost-effective and timely dispute resolution. As well, by first determining the consequences of using the new powers, the benefit of their use is clearer. This will assist in determining whether it is in the interest of justice that they be exercised only at trial.

68 While summary judgment *must* be granted if there is no genuine issue requiring a trial,<sup>10</sup> the decision to use either the expanded fact-finding powers or to call oral evidence is discretionary.<sup>11</sup> The discretionary nature of this power gives the judge some flexibility in deciding the appropriate course of action. This discretion can act as a safety valve in cases where the use of such powers would clearly be inappropriate. There is always the risk that clearly unmeritorious motions for summary judgment could be abused and used tactically to add time and expense. In such cases, the motion judge may choose to decline to exercise her discretion to use those powers and dismiss the motion for summary judgment, without engaging in the full inquiry delineated above.

### ***C. Tools to Maximize the Efficiency of a Summary Judgment Motion***

#### ***(1) Controlling the Scope of a Summary Judgment Motion***

69 The *Ontario Rules* and a superior court's inherent jurisdiction permit a motion judge to be involved early in the life of a motion, in order to control the size of the record, and to remain active in the event the motion does not resolve the entire action.

70 The Rules provide for early judicial involvement, through Rule 1.05, which allows for a motion for directions, to manage the time and cost of the summary judgment motion. This allows a judge to provide directions with regard to the timelines for filing affidavits, the length of cross-examination, and the nature and amount of evidence that will be filed. However, motion judges must also be cautious not to impose administrative measures that add an unnecessary layer of cost.

71 Not all motions for summary judgment will require a motion for directions. However, failure to bring such a motion where it was evident that the record would be complex or voluminous may be considered when dealing with costs consequences under Rule 20.06(a). In line with the principle of proportionality, the judge hearing the motion for directions should generally be seized of the summary judgment motion itself, ensuring the knowledge she has developed about the case does not go to waste.

72 I agree with the Court of Appeal (at paras. 58 and 258) that a motion for directions also provides the responding party with the opportunity to seek an order to stay or dismiss a premature or improper motion for summary judgment. This may be appropriate to challenge lengthy, complex motions, particularly on the basis that they would not sufficiently advance the litigation, or serve the principles of proportionality, timeliness and affordability.

73 A motion for summary judgment will not always be the most proportionate way to dispose of an action. For example, an early date may be available for a short trial, or the parties may be prepared to proceed with a summary trial. Counsel should always be mindful of the most proportionate procedure for their client and the case.

#### ***(2) Salvaging a Failed Summary Judgment Motion***

74 Failed, or even partially successful, summary judgment motions add — sometimes astronomically — to costs and delay. However, this risk can be attenuated by a judge who makes use of the trial management powers provided in Rule 20.05 and the court's inherent jurisdiction.

75 Rule 20.05(1) and (2) provides in part:

**20.05** (1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously.

(2) If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just ...

76 Rules 20.05(2)(a) through (p) outline a number of specific trial management orders that may be appropriate. The court may: set a schedule; provide a restricted discovery plan; set a trial date; require payment into court of the claim; or order security for costs. The court may order that: the parties deliver a concise summary of their opening statement; the parties deliver a written summary of the anticipated evidence of a witness; any oral examination of a witness at trial will be subject to a time limit or; the evidence of a witness be given in whole or in part by affidavit.

77 These powers allow the judge to use the insight she gained from hearing the summary judgment motion to craft a trial procedure that will resolve the dispute in a way that is sensitive to the complexity and importance of the issue, the amount involved in the case, and the effort expended on the failed motion. The motion judge should look to the summary trial as a model, particularly where affidavits filed could serve as the evidence of a witness, subject to time-limited examinations and cross-examinations. Although the Rules did not adopt the Osborne Report's recommendation of a summary trial model, this model already exists under the simplified rules or on consent. In my view, the summary trial model would also be available further to the broad powers granted a judge under Rule 20.05(2).

78 Where a motion judge dismisses a motion for summary judgment, in the absence of compelling reasons to the contrary, she should also seize herself of the matter as the trial judge. I agree with the Osborne Report that the involvement of a single judicial officer throughout

saves judicial time since parties will not have to get a different judge up to speed each time an issue arises in the case. It may also have a calming effect on the conduct of litigious parties and counsel, as they will come to predict how the judicial official assigned to the case might rule on a given issue. [p. 88]

79 While such an approach may complicate scheduling, to the extent that current scheduling practices prevent summary judgment motions being used in an efficient and cost effective manner, the courts should be prepared to change their practices in order to facilitate access to justice.

#### ***D. Standard of Review***

80 The Court of Appeal concluded that determining the appropriate test for summary judgment — whether there is a genuine issue requiring a trial — is a legal question, reviewable on a correctness standard, while any factual determinations made by the motions judge will attract deference.

81 In my view, absent an error of law, the exercise of powers under the new summary judgment rule attracts deference. When the motion judge exercises her new fact-finding powers under Rule 20.04(2.1) and determines whether there is a genuine issue requiring a trial, this is a question of mixed fact and law. Where there is no extricable error in principle, findings of mixed fact and law, should not be overturned, absent palpable and overriding error, *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at para. 36.

82 Similarly, the question of whether it is in the "interest of justice" for the motion judge to exercise the new fact-finding powers provided by Rule 20.04(2.1) depends on the relative evidence available at the summary judgment motion and at trial, the nature, size, complexity and cost of the dispute and other contextual factors. Such a decision is also a question of mixed fact and law which attracts deference.

83 Provided that it is not against the "interest of justice", a motion judge's decision to exercise the new powers is discretionary. Thus, unless the motion judge misdirected herself, or came to a decision that is so clearly wrong that it resulted in an injustice, her decision should not be disturbed.



84 Of course, where the motion judge applies an incorrect principle of law, or errs with regard to a purely legal question, such as the elements that must be proved for the plaintiff to make out her cause of action, the decision will be reviewed on a correctness standard (*Housen v. Nikolaisen*, at para. 8).

***E. Did the Motion Judge Err by Granting Summary Judgment?***

85 The motion judge granted summary judgment in favour of the Mauldin Group. While the Court of Appeal found that the action should not have been decided by summary judgment, it nevertheless dismissed the appeal. Hryniak argues this constituted "prospective overruling" but, in light of my conclusion that the motion judge was entitled to proceed by summary judgment, I need not consider these submissions further. For the reasons that follow, I am satisfied that the motion judge did not err in granting summary judgment.

***(1) The Tort of Civil Fraud***

86 The action underlying this motion for summary judgment was one for civil fraud brought against Hryniak, Peebles, and Cassels Brock.

87 As discussed in the companion *Bruno Appliance* appeal, the tort of civil fraud has four elements, which must be proven on a balance of probabilities: (1) a false representation by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether knowledge or recklessness); (3) the false representation caused the plaintiff to act; (4) the plaintiff's actions resulted in a loss.

***(2) Was There a Genuine Issue Requiring a Trial?***

88 In granting summary judgment to the Mauldin Group against Hryniak, the motion judge did not explicitly address the correct test for civil fraud but, like the Court of Appeal, I am satisfied that his findings support that result.

89 The first element of civil fraud is a false representation by the defendant. The Court of Appeal agreed with the motion judge that "[u]nquestionably, the Mauldin group was induced to invest with Hryniak because of what Hryniak said to Fred Mauldin" at the meeting of June 19, 2001 (at para. 158), and this was not disputed in the appellant's factum.

90 The motion judge found the requisite knowledge or recklessness as to the falsehood of the representation, the second element of civil fraud, based on Hryniak's lack of effort to ensure that the funds would be properly invested and failure to verify that the eventual end-point of the funds, New Savings Bank, was secure. The motion judge also rejected the defence that the funds were stolen, noting Hryniak's feeble efforts to recover the funds, waiting some 15 months to report the apparent theft of US\$10.2 million.

91 The motion judge also found an intention on the part of Hryniak that the Mauldin Group would act on his false representations, the third requirement of civil fraud. Hryniak secured a US\$76,000 loan for Fred Mauldin and conducted a "test trade", actions which, in the motion judge's view, were "undertaken ... for the purpose of dissuading the Mauldin group from demanding the return of its investment" (para. 113). Moreover, the motion judge detailed Hryniak's central role in the web of deception that caused the Mauldin Group to invest its funds and that dissuaded them from seeking their return for some time after they had been stolen.

92 The final requirement of civil fraud, loss, is clearly present. The Mauldin Group invested US\$1.2 million and, but for a small return of US\$9,600 in February 2002, lost its investment.

93 The motion judge found no credible evidence to support Hryniak's claim that he was a legitimate trader, and the outcome was therefore clear, so the motion judge concluded there was no issue requiring a trial. He made no palpable and overriding error in granting summary judgment.

***(3) Did the Interest of Justice Preclude the Motion Judge from Using his Powers Under Rule 20.04?***

94 The motion judge did not err in exercising his fact-finding powers under Rule 20.04(2.1). He was prepared to sift through the detailed record, and was of the view that sufficient evidence had been presented on all relevant points to allow him to draw the inferences necessary to make dispositive findings under Rule 20. Further, while the amount involved is significant, the issues raised by Hryniak's defence were fairly straightforward. As the Court of Appeal noted, at root, the question turned on whether Hryniak had a legitimate trading program that went awry when the funds were stolen, or whether his program was a sham from the outset (para. 159). The plaintiffs are a group of elderly American investors and, at the return date of the motion, had been deprived of their funds for nearly a decade. The record was sufficient to make a fair and just determination and a timely resolution of the matter was called for. While the motion was complex and expensive, going to trial would have cost even more and taken even longer.

95 Despite the fact that the Mauldin group's claims against Peebles and Cassels Brock had to proceed to trial, there is little reason to believe that granting summary judgment against Hryniak would have a prejudicial impact on the trial of the remaining issues. While the extent of the other defendants' involvement in the fraud requires a trial, that matter is not predetermined by the conclusion that Hryniak clearly was a perpetrator of the fraud. The motion judge's findings speak specifically to Hryniak's involvement and neither rely upon, nor are inconsistent with, the liability of others. His findings were clearly supported by the evidence. It was neither against the interest of justice for the motion judge to use his fact-finding powers nor was his discretionary decision to do so tainted with error.

## V. Conclusion

96 Accordingly, I would dismiss the appeal, with costs to the respondents.

*Appeal dismissed.*

*Pourvoi rejeté.*

## Appendix

*Rules of Civil Procedure, R.R.O. 1990, Reg. 194*

### RULE 20 SUMMARY JUDGMENT

**20.01** [Where Available] (1) [To Plaintiff] A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim.

(2) The plaintiff may move, without notice, for leave to serve a notice of motion for summary judgment together with the statement of claim, and leave may be given where special urgency is shown, subject to such directions as are just.

(3) [To Defendant] A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.

**20.02** [Evidence on Motion] (1) An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01 (4), but, on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts.

(2) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest solely on the allegations or denials in the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.

**20.03** [Factums Required] (1) On a motion for summary judgment, 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.



(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing.

(4) Revoked.

**20.04** [Disposition of Motion] (1) [General] Revoked.

(2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

(2.1) [Powers] In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.

2. Evaluating the credibility of a deponent.

3. Drawing any reasonable inference from the evidence.

(2.2) [Oral Evidence (Mini-Trial)] A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

(3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount.

(4) [Only Genuine Issue Is Question Of Law] Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge.

(5) [Only Claim Is For An Accounting] Where the plaintiff is the moving party and claims an accounting and the defendant fails to satisfy the court that there is a preliminary issue to be tried, the court may grant judgment on the claim with a reference to take the accounts.

**20.05** [Where A Trial Is Necessary] (1) [Powers of Court] Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously.

(2) [Directions And Terms] If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just, including an order,

(a) that each party deliver, within a specified time, an affidavit of documents in accordance with the court's directions;

(b) that any motions be brought within a specified time;

(c) that a statement setting out what material facts are not in dispute be filed within a specified time;

(d) that examinations for discovery be conducted in accordance with a discovery plan established by the court, which may set a schedule for examinations and impose such limits on the right of discovery as are just, including a limit on the scope of discovery to matters not covered by the affidavits or any other evidence filed on the motion and any cross-examinations on them;

(e) that a discovery plan agreed to by the parties under Rule 29.1 (discovery plan) be amended;

(f) that the affidavits or any other evidence filed on the motion and any cross-examinations on them may be used at trial in the same manner as an examination for discovery;

(g) that any examination of a person under Rule 36 (taking evidence before trial) be subject to a time limit;

(h) that a party deliver, within a specified time, a written summary of the anticipated evidence of a witness;

(i) that any oral examination of a witness at trial be subject to a time limit;

(j) that the evidence of a witness be given in whole or in part by affidavit;

(k) that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,

(i) there is a reasonable prospect for agreement on some or all of the issues, or

(ii) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court;

(l) that each of the parties deliver a concise summary of his or her opening statement;

(m) that the parties appear before the court by a specified date, at which appearance the court may make any order that may be made under this subrule;

(n) that the action be set down for trial on a particular date or on a particular trial list, subject to the direction of the regional senior judge;

(o) for payment into court of all or part of the claim; and

(p) for security for costs.

(3) [Specified Facts] At the trial, any facts specified under subrule (1) or clause (2) (c) shall be deemed to be established unless the trial judge orders otherwise to prevent injustice.

(4) [Order re Affidavit Evidence] In deciding whether to make an order under clause (2) (j), the fact that an adverse party may reasonably require the attendance of the deponent at trial for cross-examination is a relevant consideration.

(5) [Order re Experts, Costs] If an order is made under clause (2) (k), each party shall bear his or her own costs.

(6) [Failure To Comply With Order] Where a party fails to comply with an order under clause (2) (o) for payment into court or under clause (2) (p) for security for costs, the court on motion of the opposite party may dismiss the action, strike out the statement of defence or make such other order as is just.

(7) Where on a motion under subrule (6) the statement of defence is struck out, the defendant shall be deemed to be noted in default.

**20.06 [Costs Sanctions For Improper Use Of Rule]** The court may fix and order payment of the costs of a motion for summary judgment by a party on a substantial indemnity basis if,

(a) the party acted unreasonably by making or responding to the motion; or

(b) the party acted in bad faith for the purpose of delay.

**20.07 [Effect Of Summary Judgment]** A plaintiff who obtains summary judgment may proceed against the same defendant for any other relief.

**20.08 [Stay Of Execution]** Where it appears that the enforcement of a summary judgment ought to be stayed pending the determination of any other issue in the action or a counterclaim, crossclaim or third party claim, the court may so order on such terms as are just.

**20.09 [Application To Counterclaims, Crossclaims And Third Party Claim]** Rules 20.01 to 20.08 apply, with necessary modifications, to counterclaims, crossclaims and third party claims.

#### Footnotes

- 1 For instance, state funding is available in the child welfare context under *G. (J.)* orders even where legal aid is not available (see *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 (S.C.C.), or for cases involving certain minority rights (see the Language Rights Support Program).
- 2 In M. D. Agrast, J. C. Botero and A. Ponce, the 2011 *Rule of Law Index*, published by the World Justice Project, Canada ranked 9th among 12 European and North American countries in access to justice. Although Canada scored among the top ten countries in the world in four rule of law categories (limited government powers, order and security, open government, and effective criminal justice), its lowest scores were in access to civil justice. This ranking is "partially explained by shortcomings in the affordability of legal advice and representation, and the lengthy duration of civil cases" (p. 23).
- 3 This principle has been expressly codified in British Columbia, Ontario, and Quebec: *Supreme Court Civil Rules*, B.C. Reg. 168/2009, Rule 1-3(2); *Ontario Rules*, Rule 1.04(1.1); and *Code of Civil Procedure*, R.S.Q., c. C-25, art. 4.2. Aspects of Alberta's and Nova Scotia's rules of court have also been interpreted as reflecting proportionality: *Medicine Shoppe Canada Inc. v. Devchand*, 2012 ABQB 375, 541 A.R. 312 (Alta. Q.B.), at para. 11; *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4, 297 N.S.R. (2d) 371 (N.S. S.C.), at para. 12.
- 4 Quebec has a procedural device for disposing of abusive claims summarily: see arts. 54.1 ff of the *Code of Civil Procedure*. While this procedural device is narrower on its face, it has been likened to summary judgment: see *Bal Global Finance Canada Corp. c. Aliments Breton (Canada) inc.*, 2010 QCCS 325 (C.S. Que.). Moreover, s. 165(4) of the Code provides that the defendant may ask for an action to be dismissed if the suit is "unfounded in law".
- 5 For a thorough review of the history of summary judgment in Ontario, see T. Walsh and L. Posloski, "Establishing a Workable Test for Summary Judgment: Are We There Yet?", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation 2013* (2013), 419, at pp. 422-32.
- 6 *Ibid.*, at p. 426; for example, see *Vaughan v. Warner Communications Inc.* (1986), 56 O.R. (2d) 242 (Ont. H.C.).
- 7 *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2008 SCC 14, [2008] 1 S.C.R. 372 (S.C.C.), at para. 10.
- 8 The full text of Rule 20 is attached as an Appendix.

- 9 As fully canvassed by the Court of Appeal, the powers in Rule 20.04(2.1) were designed specifically to overrule a number of long-standing appellate decisions that had dramatically restricted the use of the rule; *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (Ont. C.A.); *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.).
- 10 Rule 20.04(2): "The court shall grant summary judgment if, (a) the court is satisfied that there is no genuine issue requiring a trial ...".
- 11 Rule 20.04(2.1): "In determining ... whether there is a genuine issue requiring a trial ... if the determination is being made by a judge, the judge may exercise any of the following powers ... 1. Weighing the evidence. 2. Evaluating the credibility of a deponent. 3. Drawing any reasonable inference from the evidence." Rule 20.04(2.2): "A judge may ... order that oral evidence be presented ...".

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Pgs. 6-7

*Case Name:*  
**Hunt v. Carr**

**RE: Linda Sue Mary Hunt, Applicant/Appellant, and  
Andrew James Carr, Respondent/Respondent**

[2015] O.J. No. 168

2015 ONSC 326

Belleville Court File No.: FS-14-0276-00

Ontario Superior Court of Justice  
Belleville, Ontario

**S.J. Kershman J.**

Heard: December 12, 2014.  
Judgment: January 15, 2015.

(42 paras.)

**Counsel:**

Mr. Scott McMahon, for the Applicant/Appellant.

Mr. L. Picart, for the Respondent/Respondent.

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**DECISION ON MOTION FOR LEAVE TO APPEAL**

S.J. KERSHMAN J.:--

**Introduction:**

1 This is a Motion for leave to appeal from a decision of Justice R. Scott made on October 10, 2014.

**Factual Background:**

2 The Applicant, Ms. Hunt, brought an application for various relief in a family law matter. The application materials were served on the Respondent, Mr. Carr, on August 27, 2014. Mr. Carr did not respond to the pleadings prior to the time limits as prescribed by the *Family Law Rules* (O. Reg. 439/07, s.1). On October 1, 2014, Mr. Picart, counsel for Mr. Carr, sent a letter to Mr. McMahon, counsel for Ms. Hunt; seeking an extension of time to serve and file his materials. Mr. McMahon responded on October 3, 2014, indicating that late filing would be acceptable, provided that certain conditions were agreed to by Mr. Carr. These conditions included Mr. Carr moving out of the house within 48 hours and paying \$1,500 in costs to Ms. Hunt.

3 These conditions were not agreeable to Mr. Carr.

4 On October 7, 2014, Mr. Picart served a Form 14B Notice of Motion and Affidavit dated October 7, 2014, on Mr. McMahon seeking the following relief:

- a. An Order abridging the time for service and filing of the Respondent, Mr. Carr's, Answer and Financial Statement, pursuant to Rule 3(5) of the *Family Law Rules*;
- b. An Order that the Motion be heard prior to the Case Conference, pursuant to Rule 14(4.2) of the *Family Law Rules*;
- c. An Order that the Motion proceed by way of a Form 14B Motion, as opposed to Form 14A Notice of Motion and Affidavit, pursuant to Rule 14(10) of the *Family Law Rules*;
- d. An Order that Mr. Carr shall have four weeks from the date of the Order to serve and file his responding materials, pursuant to Rule 2 of the *Family Law Rules*; and,
- e. Such further and other Orders as counsel may advise and this Honourable Court deems just.

5 The matter was dealt with by Scott, J. whose endorsement, dated October 10, 2014, reads as follows:

Respondent shall be allowed 28 days from today's date to file necessary documents. *Status Quo* to remain. Given all of the circumstances, the Respondent is entitled to his costs fixed at \$200 payable forth with.

6 The Order was taken out on November 5, 2014. Mr. Carr complied with the timelines for filing his responding materials in accordance with the Order.

7 Ms. Hunt seeks leave to appeal from the aforesaid Order.

8 Mr. McMahon filed an Affidavit from Ms. Hunt on the Motion for Leave. Mr. Picart filed an Affidavit from Mr. Carr in response. Mr. McMahon argues that the Court should not rely on Mr. Carr's Affidavit.

9 The Court finds that since Ms. Hunt filed an Affidavit, it is appropriate for Mr. Carr to file an Affidavit in response. The Court can rely on both Affidavits for the purposes of this Motion.

**Applicable Law:**

10 The following statutes and provisions are relevant in this matter:

- a) Rule 62.02(4) of the *Rules of Civil Procedure*, O. Reg. 575/07, s.6(1), which reads:

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.

- b) Rule 1(8.4) of the *Family Law Rules*, which reads:

If an order is made striking out a party's application, answer, motion to change or response to motion to change in a case, the following consequences apply unless a court orders otherwise:

1. The party is not entitled to any further notice of steps in the case, except as provided by subrule 25 (13) (service of order).
2. The party is not entitled to participate in the case in any way.
3. The court may deal with the case in the party's absence.
4. A date may be set for an uncontested trial of the case.

c) Rule 2(2)(3) of the *Family Law Rules*, which reads:

The primary objective of these rules is to enable the court to deal with cases justly. O. Reg. 114/99, r. 2 (2).

(3) Dealing with a case justly includes,

- (a) ensuring that the procedure is fair to all parties;
- (b) saving expense and time;
- (c) dealing with the case in ways that are appropriate to its importance and complexity; and
- (d) giving appropriate court resources to the case while taking account of the need to give resources to other cases.

d) Rule 3(5) of the *Family Law Rules*, which reads:

The court may make an order to lengthen or shorten any time set out in these rules or an order, except that it may lengthen a time set out in subrule 33 (1) (timetable for child protection cases) only if the best interests of the child require it.



e) Rule 10.5 of the *Family Law Rules*, which reads:

The consequences set out in paragraphs 1 to 4 of subrule 1 (8.4) apply, with necessary changes, if a respondent does not serve and file an answer.

f) Rule 14(4.2) of the *Family Law Rules*, which reads:

Subrule (4) does not apply if the court is of the opinion that there is a situation of urgency or hardship or that a case conference is not required for some other reason in the interest of justice.

g) Rule 14(6)(e.2) of the *Family Law Rules*, which reads:

Subrule (4) does not apply to a motion, made without notice, made on consent, that is unopposed or that is limited to procedural, uncomplicated or unopposed matters (Form 14B);

h) Rule 14(10) of the *Family Law Rules*, which reads:

If a motion is limited to procedural, uncomplicated or unopposed matters, the party making the motion may use a motion form (Form 14B) instead of a notice of motion and affidavit.

i) Rule 14(10.1) of the *Family Law Rules*, which reads:

If a party uses a motion form (Form 14B) and no person served with the motion form serves and files a response within four days after being served, the motion shall be dealt with by the court as an unopposed motion.

j) Rule 14(11) of the *Family Law Rules*, which reads:

A party making a motion with notice shall,

- (a) serve the documents mentioned in subrule (9) or (10) on all other parties, not later than four days before the motion date;
- (b) file the documents as soon as possible after service, but not later than two days before the motion date; and
- (c) file a confirmation (Form 14C) not later than 2 p.m. two days before the motion date.

**Issue:**

1. Should Leave to Appeal from the decision of Scott J. dated October 10, 2014 be granted?

***Conflicting Decisions:***

**Analysis:**

**11** It is the Court's understanding, from a review of the Appellant's Factum and the submissions made, that counsel is not making any submissions with respect to r. 62.02(4)(a).

**12** In the case of *Lee Sand & Gravel v. Lee* [2007] O.J. No. 227 (Ont. Sup. Ct.), Di Tomaso J. set out the test for leave to appeal under r. 62.02(4)(a), at paragraph 26, as follows:

In order to obtain leave under Rule 62.02(4)(a), it is insufficient to show that two courts have exercised their discretion to produce different results. It is necessary to demonstrate a difference in the principles chosen as a guide to the exercise of such discretion.

**13** In the case of *Gill (Litigation Guardian Of) v. Waters*, 2014 ONSC 5364, G.M. Mulligan J. restated the test for granting leave to appeal, at paragraph 17, as follows:

In *Farmers Oil & Gas Inc. v. Ontario (Ministry of Natural Resources)*, 2013 ONSC 1608 (Ont. Div. Ct.), 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.

**14** Based on the test set out in the *Lee Sand & Gravel* and the *Gill* cases, a conflicting case under s. 62.02(4)(a) is one that applies conflicting legal principles. While the conclusion of the Motions Judge in the case at hand does not follow the cases submitted in the Appellant counsel's factum, the Court finds that the decisions in counsel's factum do not conflict, in principle, with the decision of the Motions Judge.

#### **Disposition under Rule 62.02(4)(a)**

**15** Based on the aforesaid analysis, the Court finds that it is not appropriate for leave to appeal to be granted on this ground.

#### ***Good Reason to Doubt the Correctness of the Order:***

#### **Position of the Appellant:**

**16** The Ms. Hunt argues that she had the right to participate at the Motion, but was not afforded the opportunity to do so.

**17** Ms. Hunt argues that the language of Rule 14(11) of the *Family Law Rules* requires the Respondent to provide the Appellant with at least four days' notice before the Motion was dealt with. This was not done.

**18** Finally, Ms. Hunt argues that no Motion confirmation form was filed, as required, pursuant to Rule 14 (11)(c).

**Position of the Respondent:**

**19** Mr. Carr argues that Rule 14(6)(e.2) sets out various exceptions to Rule 14(4). Exceptions are based on urgency, hardship, or whether the matter is of a procedural nature.

**20** Mr. Carr claims that he was seeking to extend the time to file his Answer and Financial Statement in order to avoid a miscarriage of justice; Ms. Hunt was seeking to have him removed from the home, in which he had lived for at least nine years. The situation was more problematic because of Mr. Carr's poor health and financial situation.

**21** Mr. Carr further argues that, on an uncomplicated and procedural matter, the Motion can proceed by way of a Form 14B Motion, in accordance with Rule 14(10).

**Analysis:**

**22** The application materials were served on August 27, 2014. The responding materials were to be filed by September 27, 2014. September 27 and 28 were a Saturday and Sunday, respectively. The first date that the Respondent could have been in default would have been September 29, 2014.

**23** Two days later on October 1, 2014, Mr. Picart sent a letter to Mr. McMahon seeking an extension of time to file materials. He cited the fact that he had been recently retained and that his assistant had just returned from her vacation. Mr. McMahon wrote back on October 3, 2014, agreeing to the extension--provided that certain conditions were complied with by Mr. Carr. As previously mentioned: those conditions included Mr. Carr vacating the home that he had lived in since 2004 and paying \$1,500 in costs to Ms. Hunt.

**24** Having reviewed the conditions, the Court finds that they are very strict and onerous, particularly in light of the fact that Mr. Carr is 74 years of age and is living on a fixed income of \$1,617 per month, consisting of Canada Pension Plan and Old Age Security income. His Affidavit states that he has serious health issues including skin cancer, irritable bowel syndrome, and chronic obstructive pulmonary disorder.

**25** Had Mr. Carr filed his materials on time, the *status quo* would have been maintained (i.e.: the parties would still be living in the same residence). Ms. Hunt would not have been entitled to any of the conditions sought for the extension of time, including the costs and the requirement that Mr. Carr moved out of the home. Ms. Hunt would have been required to wait until a case conference, or, in the alternative, she would have had to bring a Motion with leave of the Court.

**26** The un-contradicted evidence of Mr. Carr is that he met with Mr. Picart on September 8, 2014. He said that Mr. Picart required further evidence from him in order to advise him of his rights. He

met again with Mr. Picart on September 15 and 22, 2014. The evidence is it Mr. Picart's secretary was away on holidays from September 22 to 29, 2014. Mr. Picart said that upon her return, he would write to Mr. McMahon seeking a four week extension, which he did.

**27** As to the argument that the relief with respect to the *status quo* and costs was not relief sought in the Notice of Motion, the Court disagrees. While these items were not specifically requested, the Court finds that they are covered in the wording: "[s]uch further and other Orders as counsel may advise and this Honourable Court deems just."

**28** The Notice of Motion specifically requested an Order that the matter proceed by way of Form 14B Motion, as opposed to Form 14A Notice of Motion and Affidavit, pursuant to Rule 14(10) of the *Family Law Rules*.

**29** In the Court's view, Justice Scott was fully aware that this matter was proceeding by way of a Form 14B Motion, as opposed to a Form 14A Notice of Motion and Affidavit, because part of the relief set out in the Notice of Motion specifically requested proceeding by way of a Form 14B Motion.

**30** The Court is aware that the Form 14B is marked that it is to be served, with notice, on all persons affected. The Motion materials were served on October 7, 2014, at 12:48pm, by fax, on Mr. McMahon. There was no return date on the Notice of Motion. The hearing date on the Motion form was also left blank. That form included a section that indicated that the Motion was made "with notice to all persons affected -opposition expected."

**31** Near the bottom of Page 1 of the Notice of Motion, the form reads: "I want the Court to deal with this Motion: [X] by relying only on the written materials." The boxes, which allowed for personal attendance at Court or attendance by conference call, were not checked off.

**32** The Court finds that the reason why the hearing date was left blank was because the Motion was to be in writing only. Mr. Picart served Mr. McMahon with the Form 14B Motion and Affidavit. There is no evidence that Mr. McMahon responded to being served with a Notice of Motion. He could have called Mr. Picart, sent him an email, or a fax, in relation to these materials. He did not.

**33** Mr. McMahon did send a letter to Mr. Picart on October 10, 2014, dealing with a violation under the *Trespass to Property Act*. At no time does it appear that Mr. McMahon acknowledged being served with the Form 14B Motion and Affidavit.

**34** The opportunity was available for Mr. McMahon to deal with the Form 14B Motion, however, that opportunity was not taken advantage of.

**35** Pursuant to Rule 14(10.1), Ms. Hunt had four days' time to respond to Mr. Carr's Form 14B Motion, after which time it would be dealt with by the Court as an unopposed matter. The Court

finds that Ms. Hunt had no intention of filing an Affidavit in response to the Form 14B Notice of Motion within the four days. If she had, she would have filed an Affidavit by October 12, 2014, which she did not do.

**36** Because the Form 14B Motion and Affidavit were served by Mr. Picart on October 7, 2014, based on Rule 14(10.1), the matter should not have been dealt with until October 12, 2014. It was dealt with on October 10, 2014.

**37** The Scott J. endorsement was served on Mr. McMahon on October 22, 2014. It appears that the Ms. Hunt did not receive the Scott, J. endorsement until that date. This meant that Ms. Hunt was unaware of the Endorsement until ten days after the expiry of time to file an Affidavit in response to the Form 14B Motion.

**Disposition under Rule 62.02(4)(b)**

**38** Based on the aforesaid analysis, the Court finds that it is not appropriate that leave to appeal be granted on this ground.

**39** As to the other relief sought by Ms. Hunt in the Notice of Motion for Leave to Appeal, since the Motion is dismissed, the Court will not consider the additional relief claimed.

**40** In conclusion, the Motion for Leave to Appeal fails.

**Costs:**

**41** The parties will have 10 days to resolve the issue of costs, failing which, the parties can obtain a date from the Trial Coordinator to deal with the matter. Each party will have 10 minutes to argue the issue of costs. Cost outlines and formal Offers to Settle are to be provided.

**42** Order accordingly.

S.J. KERSHMAN J.

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*Case Name:*

**Kempf v. Nguyen**

**Between**

**Rolf Kempf, Angela Kempf, Severin Kempf  
(a minor) and Raphael Kempf (a  
minor) by their Litigation Guardian Angela  
Kempf, Plaintiffs (Respondents),  
and  
Thi Thanh Nguyen, Defendant (Appellant)**

[2015] O.J. No. 750

2015 ONCA 114

2015 CarswellOnt 2231

124 O.R. (3d) 241

249 A.C.W.S. (3d) 557

74 M.V.R. (6th) 173

382 D.L.R. (4th) 105

17 C.C.L.T. (4th) 177

328 O.A.C. 276

Docket: C56989

Ontario Court of Appeal

**J.I. Laskin, P.S. Rouleau and G.J. Epstein JJ.A.**

Heard: June 5, 2014.

Judgment: February 18, 2015.

(150 paras.)

*Civil litigation -- Civil procedure -- Trials -- Jury trials -- Jury notice -- Setting aside or striking out -- Appeal by defendant from trial judgment finding him liable for cycling accident allowed -- New trial ordered -- Trial judge erred in striking out jury notice jury on ground that jury would not be able to understand limited use they could make of waiver signed by plaintiff and on basis that defendant's plea of volenti involved claim for declaratory relief which was precluded from jury determination -- Volenti was not a claim for declaratory relief -- Discharging jury because it would be too difficult to explain the law was reversible error.*

*Tort law -- Defences -- Contributory negligence -- Voluntary assumption of risk (volenti non fit injuria) -- Voluntary acceptance of risk -- Waiving right of action -- Appeal by defendant from trial judgment finding him liable for cycling accident allowed -- New trial ordered -- Trial judge erred in striking out jury notice jury on ground that jury would not be able to understand limited use they could make of waiver signed by plaintiff and on basis that defendant's plea of volenti involved claim for declaratory relief which was precluded from jury determination -- Volenti was not a claim for declaratory relief -- Discharging jury because it would be too difficult to explain the law was reversible error.*

Appeal by the defendant from trial judgment finding him liable for a cycling accident. The plaintiff and defendant took part in a charity bicycle ride. The plaintiff had approached the defendant from the back. As he approached the defendant's left side, the defendant suddenly swerved to the left, clipping the plaintiff's front wheel with his back wheel. The plaintiff fell and suffered serious injuries. The plaintiff sued in negligence. The trial judge had struck the jury notice on the ground that the jury would be confused by the implications of a waiver the plaintiff had signed before entering the ride, particularly in the light of the defendant's plea that the plaintiff voluntarily assumed the risks of the ride. Her primary concern was that, even with proper instructions, the jury would not be able to understand the limited use they could, in law, make of the waiver. She was also concerned that the plea of volenti involved a claim for declaratory relief, a matter precluded from being determined by a jury. The trial judge found the defendant responsible for the plaintiff's injuries. In her reasons, the trial judge did not address Nguyen's plea of contributory negligence and at no point expressly indicated that she found him entirely at fault. The appellant argued that the trial judge erred in failing to apportion any liability against the plaintiff, in finding that the applicable standard of care was negligence as opposed to recklessness and in striking the jury notice.

HELD: Appeal allowed. New trial ordered. The trial judge erred in striking the jury notice as she based her decision to strike the jury upon a wrong or inapplicable principle of law. To the extent that the trial judge's decision to strike the jury was based on the plea of volenti, she erred. Volenti was not a claim for declaratory relief but a full defence to a finding of negligence. It was the trial judge's duty to determine the legal principles to be applied and instruct the jury in accordance with these principles. Discharging the jury on the basis that it would be too difficult to explain the law was reversible error. This particular waiver was not a complicated or lengthy document and did not



contain any terms that released other ride participants from liability for their negligence. A properly instructed jury would have no difficulty understanding that the document was not a bar to the plaintiff's action. Any jury acting reasonably would not inevitably reach the same result as the trial judge. The trial judge should have addressed the issue of contributory negligence. It would be open to a jury to assess credibility differently. In deciding negligence and possibly apportioning it, a jury acting reasonably could take a different approach to the standard of care than the trial judge.

### **Statutes, Regulations and Rules Cited:**

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 108(1), s. 108(2)

### **Appeal From:**

On appeal from the judgment of Justice Darla A. Wilson of the Superior Court of Justice, dated April 5, 2013, with reasons reported at 2013 ONSC 1129 and 2013 ONSC 1977.

### **Counsel:**

Tim Buckley and Douglas Smith, for the appellant.

Patrick J. Monaghan and Christine Matthews, for the respondents.

Reasons for judgment were delivered by G.J. Epstein J.A., concurred in by P.S. Rouleau J.A. Separate dissenting reasons were delivered by J.I. Laskin J.A.

**G.J. EPSTEIN J.A.:--**

### **INTRODUCTION**

**1** On June 1, 2008, over 12,000 cyclists took to the Don Valley Parkway in Toronto for a charity bicycle ride to benefit the Heart and Stroke Foundation. As the ride progressed, two groups of cyclists formed at the front, with the first group slightly ahead of the second. The appellant, Thi Thanh Nguyen, was at the back of the first group. The respondent Rolf Kempf was at the front of the second group.

**2** Wanting to join the first group, Kempf approached Nguyen's left side. Suddenly, Nguyen swerved to the left, clipping Kempf's front wheel with his back wheel. Kempf fell and suffered serious injuries. Nguyen did not stop.

**3** In April 2009, Kempf sued Nguyen in negligence for damages arising from the accident. In his

amended statement of defence, Nguyen pled, among other things, that Kempf had voluntarily assumed the risk of the ride ("*volenti*") and that Kempf had himself been negligent.

4 The trial commenced on February 4, 2013. The parties settled the issue of damages. The issue for trial was, therefore, the extent to which, if at all, Nguyen was liable for Kempf's injuries.

5 At the opening of trial, counsel for Kempf moved to strike the jury notice Nguyen had served in August 2009. The jury had already been selected. The trial judge struck the jury notice and discharged the jury. The trial judge reasoned that the jury would be confused by the implications of a waiver Kempf had signed before entering the ride, particularly in the light of Nguyen's plea that Kempf voluntarily assumed the risks of the ride.

6 After a five-day trial, the trial judge found Nguyen responsible for Kempf's injuries. In her reasons, the trial judge did not address Nguyen's plea of contributory negligence. While she held, at para. 100 of her reasons for judgment, that Nguyen's actions caused Kempf's injuries, the trial judge at no point expressly indicated that she found Nguyen entirely at fault.

7 On appeal, Nguyen does not contest the trial judge's finding that he was negligent. He raises two substantive grounds. He submits that the trial judge erred in failing to apportion any liability against Kempf. Nguyen further submits that the trial judge erred in finding that the applicable standard of care was negligence as opposed to recklessness. Nguyen also raises a procedural ground. He argues that the trial judge erred in striking the jury notice.

8 I would allow the appeal on the third ground. With respect, for the reasons that follow I am of the view that the trial judge based her decision to strike the jury upon a wrong or inapplicable principle of law. On this record and in the light of the issues raised by the parties, I would set aside the judgment and order a new trial on the issue of liability to be heard by a judge and a jury.

## **BACKGROUND FACTS**

### **The Ride**

9 The ride was open to cyclists of all abilities. Participants could choose a 25, 50 or 75 kilometer route. Nguyen and Kempf signed up for the 75 kilometer route. Much of the event took place on the Don Valley Parkway, a major arterial road in Toronto. The road was closed to motor vehicles for the event.

10 The ride was not a competitive event, at least formally. There were no prizes. Nonetheless, many cyclists rode as fast as they could. The entire roadway was open to the cyclists but due to the advantages of "drafting", discussed in more detail below, the lead cyclists generally rode in packs. Inside the packs, riders roughly organized into lines, with one cyclist following immediately behind another. The front wheel of a cyclist would often be within a foot or less of the back wheel of the cyclist ahead. The packs were also tight lateral to the direction of travel such that a cyclist would be

able to reach out and touch the rider on each side.

**11** Nguyen and Kempf were fairly experienced cyclists. Each belonged to a cycling club and took part in cycling outings several times a week. Both were familiar with the "rules" pertaining to cycling safely in a group, as communicated informally within their cycling groups. They did not know each other.

**12** To participate in the ride, cyclists had to sign a document described as a waiver. Kempf and Nguyen signed the waiver. Because the waiver is central to this appeal, I set it out here in some detail:

**THE BECEL HEART&STROKE RIDE FOR HEART WAIVER  
AGREEMENT, EVENT DAY JUNE 1, 2008**

Please Read Carefully Release Waiver and Indemnity: The Becel Ride for Heart  
I Agree:

- 1) That all times during the Becel Heart&Stroke Ride for Heart my safety remains my sole responsibility and that I will observe all rules of the road; and

...

- 4) That I am aware of the risks inherent in participating in the Becel Heart&Stroke Ride for Heart and assume all such risks.

...

IN CONSIDERATION of the acceptance of my application and permission to participate as an entrant in the Becel Heart&Stroke Ride for Heart and post-event activities, I, for myself, my heirs, executors, administrators, successors and assigns, HEREBY RELEASE, WAIVE AND FOREVER DISCHARGE the Heart and Stroke Foundation of Ontario, Unilever Canada, PLH & Associates, The City of Toronto, The Toronto Police Services Board, The Toronto Police Service, The Members of the Toronto Police Service Auxiliary Program, the Chief of Police, the Toronto Transit Commission, Board of Governors of Exhibition Place, the Canadian National Exhibition Association, and all other associations, sanctioning bodies and sponsoring companies, and all their respective agents, officials, servants, claims, demands, damages, costs, expenses, actions and causes of action, whether in law or equity, in respect to death, injury, loss or damage to my person or property HOWSOEVER CAUSED, arising or to arise by reason of my participation in the said event, whether a spectator,

participant, competitor or otherwise, whether prior to, during or subsequent to the event, AND NOTWITHSTANDING that any of the foregoing may have contributed to, or the injury or damage may have been occasioned by, the negligence of any the foresaid. I FURTHER HEREBY UNDERTAKE or HOLD AND SAVE HARMLESS and AGREE TO INDEMNIFY all of the aforesaid from and against any and all liability incurred by any or all of them as a result of, or in any way connected with, my participation in the said event.

BY SUBMITTING THIS ENTRY, I ACKNOWLEDGE HAVING READ, UNDERSTOOD AND AGREED TO THE ABOVE WAIVER, RELEASE AND INDEMNITY. I WARRANT that I am physically fit to participate in this event, and that my equipment is mechanically fit and suitable for its intended use in the Becel Heart&Stroke Ride for Heart.

Print Full Name of Participant:... [Emphasis in original.]

**13** The facts recited thus far are not in dispute. But there were conflicting accounts about how the riders were organized, how fast they were travelling, and, most significantly, Nguyen's and Kempf's actions immediately before the accident and what motivated those actions. To determine liability, the trier of fact had to resolve these factual differences, consider the standard of care called for by the circumstances, and decide whether Nguyen, Kempf, or both, were negligent and to what extent.

## **The Accident**

### **Kempf's Evidence**

**14** Just before the accident, Kempf was leading a group of about ten cyclists. He decided to join the group in front of him in order to take advantage of the draft provided by the lead cyclists. His plan was to move into a position to the left of a cyclist ahead of him. This cyclist was Nguyen. Kempf accelerated to close the gap between him and Nguyen. He got to a position where his front wheel was approximately 50 to 70 centimeters (about two feet) to the left of Nguyen's rear wheel and overlapped Nguyen's rear wheel. He was travelling approximately 20 to 25 kilometers per hour ("kph").

**15** There was no evidence that Kempf shouted out to Nguyen of his intention to move in beside him or that Kempf indicated to Nguyen that he had moved into position beside him.

**16** Nguyen suddenly moved roughly two feet to the left. Nguyen's rear wheel struck Kempf's front wheel. Kempf tried but was unable to avoid the contact: it happened in a "split second".

**17** As a result of the collision, Kempf was thrown into the air and landed on the ground. Other cyclists rode over him and crashed as well.

**18** Nguyen did not stop after the impact of the two bicycles. Kempf later identified Nguyen as the rider who collided with him by looking through pictures of the ride posted online.

### **Nguyen's Evidence**

**19** Just prior to the accident, Nguyen was travelling in the lead group of the ride at about 30 to 35 kph. He was drafting off of a line of four to five cyclists directly ahead. Nguyen's front wheel was about one foot behind the back wheel of the cyclist in front of him. There was another cyclist to his left riding parallel with him; their shoulders were roughly one foot apart.

**20** The rider two ahead of Nguyen suddenly slowed down. This caused the rider directly ahead of Nguyen to take the evasive measure of decelerating and swerving to the right. Nguyen was not forewarned of these actions and had no time to consider alternative courses of action. To avoid impact with the riders ahead he moved approximately half a foot, possibly two feet, to his left. Nguyen acknowledged that he could have veered to the right. He had no time to shout out a warning.

**21** He was not aware there was someone moving up behind him on his left. He did not recall standing up in his pedals: he said it was unlikely that he did.

**22** In cross-examination, Nguyen admitted that his sudden movement to the left was not one he would ordinarily make in a group ride.

**23** Immediately after swerving to the left, Nguyen heard a crash behind him. Nguyen did not look back as he was concentrating on the rider in front of him. Unaware of his involvement in what had just happened, Nguyen carried on with the ride.

### **Eyewitness Evidence**

**24** Jason Walter was a friend of Kempf and belonged to the same cycling club as Nguyen. Just before the accident, Walter was behind and to the right of Kempf, approximately six to ten feet away, on a diagonal. During cross-examination, however, Walter admitted that he may have been as many as three bicycles back from Kempf. He saw the accident take place and recognized that both Kempf and Nguyen were involved.

**25** Walter testified that just before the accident Nguyen was directly ahead of Kempf. Walter saw Nguyen stand up on his pedals. Nguyen's bicycle slowed when he stood up, Kempf's front wheel came up to overlap with Nguyen's back wheel and then Nguyen's bike swung out to the left. The rear wheel of Nguyen's bicycle clipped the front wheel of Kempf's bicycle. Walter agreed that the wheel contact was so slight that Nguyen might not have noticed it. Kempf went down. Walter had to take evasive action to avoid the pile-up of riders that resulted from the collision between Kempf and Nguyen. Walter stopped and saw Kempf was injured. Everything happened in a matter of seconds. Walter did not see what, if anything, had happened in front of Nguyen.

**26** Craig Tyndall belonged to the same cycling club as Kempf. Just prior to the accident, Tyndall was riding immediately behind Kempf -- travelling at approximately 38 kph. Nguyen was ahead of Kempf and to the right. Tyndall saw Nguyen swerve. Tyndall did not see anyone ahead of Nguyen swerve. Kempf tried to avoid Nguyen but went down. Tyndall crashed as he was directly behind Kempf.

### **Evidence of other Ride Participants**

**27** A number of other participants in the ride gave evidence relating to what, if anything, they witnessed in relation to the collision.

**28** Gilles Uguen belonged to the same cycling club as Kempf. He was riding close to the front of the lead group of riders. The group was in a pack with several lines of riders drafting off of one another. In the moments before the accident, Uguen did not notice anything unusual in the pack. The pack was travelling at least 40 kph. Uguen heard a crash and turned to look behind him. He saw Kempf lying on the ground and stopped to check on him.

**29** Herschel Fogelman also belonged to the same cycling club as Kempf. He was in the middle of the lead group and was travelling about 35 to 40 kph. He described the group as "[m]ore pack than pace-line". Just prior to the accident, Fogelman did not observe any riders in the lead group slow down or bunch up. He did not see the accident, but heard the crash behind him. He did not stop. He said to the cyclist beside him that he hoped that he had not caused the crash, although he had no reason to think that he did.

### **Expert Evidence**

**30** Andrew Randell testified on behalf of Nguyen as an expert in the area of cycling and the proper conduct of cyclists participating in a group ride.

**31** Randell defined the terms half-wheeling, drafting, and pace-line. Half-wheeling occurs when the front wheel of a cyclist overlaps with the back wheel of the cyclist in front of him. Drafting, integral to group riding, involves the front rider's blocking the wind for the riders directly behind him so they can keep pace while saving energy. By sharing the time spent at the front, a line of cyclists can go faster than a single cyclist. A pace-line is a highly organized group of cyclists in which two lines of cyclists rotate to maximize their speed and to shelter one another from the wind.

**32** While Randell's evidence was somewhat unclear as to whether overlapping wheels for a short period of time amounted to half-wheeling or whether the term applies only to overlapping for a more extended period of time, he did testify that overlapping wheels for any period of time is "bad" because of the increased risk that the wheels of the two bicycles will touch -- a major cause of crashes in cycling events.

**33** Randell testified that riders must keep a safe distance between themselves and all other riders:

a safe distance is one foot behind the cyclist to the front and one foot and a half to two feet, as measured from the shoulders, from the cyclist to the side. There should be no sudden movements. Signalling potholes and turns is a normal part of group rides and is usually done vocally. A rider has a responsibility to the group to conduct himself or herself in a safe manner.

**34** Randell expressed the view that if a rider were confronted with a situation where the cyclist directly in front swerved to the right in response to riders' further ahead suddenly slowing down, it would not be improper for the rider to try to avoid a collision by turning to the left, without signaling. This would be true even if there were cyclists to the rider's left. In such a case the rider would have to act very quickly, almost without thinking.

**35** Randell was asked about Kempf's testimony that just prior to the accident his front wheel was approximately two feet to the left of Nguyen's back wheel. Randell responded by saying:

Looking at the scenario, I think perhaps "error" is a better word than "unreasonable". Mr. Kempf is looking to come in -- to move in beside Mr. Nguyen to take up his position in the group. It's perfectly reasonable. He comes in very tightly. That distance at which he's coming in next to Mr. Nguyen is very tight... [T]he bicycles aren't on rails at a consistent distance from one another, there's movement constantly in the group. So that's a very tight movement to be making next to Mr. Nguyen at speed as you're coming up fast next to him. So that's where I see, you know, an unreasonable closeness that -- I don't see as being particularly necessary.

**36** In cross-examination, Randell agreed that it would be normal for Nguyen to anticipate that a rider might come in and fill the position to his left and that there would be some overlapping of wheels as a result. Randell also agreed that if Nguyen was travelling 30 to 35 kph and suddenly, without warning, and for no apparent reason, moved over two feet and collided with Kempf's bicycle, such an action on Nguyen's part would constitute a breach of the rules governing group rides, would be careless and would jeopardize the group's safety.

## **THE MOTION TO STRIKE THE JURY NOTICE**

**37** On consent, Nguyen amended his statement of defence prior to the opening of trial. Kempf then moved to strike the jury notice on the basis that these amendments - namely, pleading the defence of *volenti* - changed the nature of the case to one in which Nguyen was seeking a declaration, disqualifying the action from being tried by a jury under the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 108(2). Kempf also argued that even if *volenti* was reserved to the trial judge, he would nonetheless be prejudiced if the jury was not struck as the jury would be unable to understand the limited use they could make of the waiver.

**38** Nguyen argued that raising the defence of *volenti* did not amount to a claim for declaratory relief. He also argued that the waiver was relevant to the inherent risks of the ride and whether there

was contributory negligence. An appropriate charge could provide the jury with the necessary tools to understand the manner in which the waiver could be used in their determination of liability. Nguyen also took the position that the motion to strike was premature and could be renewed if problems arose during the trial.

### **The Trial Judge's Reasons for Striking the Jury Notice**

**39** The trial judge's analysis in support of her decision to strike the jury notice and discharge the jury are set out in paras. 18-23 of the motion reasons:

[18] The jury will be asked to determine fault for the accident. The waiver will be an exhibit and witnesses will necessarily be questioned and cross examined on the document. In my view, there is a real danger that the jury, in answering the liability questions, will be confused by the contents of the waiver or perhaps use it inappropriately in their deliberations. For example, after reading the waiver, the jury could erroneously conclude that because it states that [Kempf] releases others from any liability associated with the Ride, that he has no right to bring this lawsuit. To put it another way, because the waiver states that [Kempf] will release all others from "all liability" arising from his participation in the Ride, there is a concern that the jury will misinterpret that document and conclude on the basis of the wording of the release that there could be no liability imposed on anyone, regardless of the findings of fact.

[19] There is an additional concern. [Nguyen] has pleaded the *volenti* defence, which, if successful, precludes any recovery by [Kempf]. As Justice Wilson stated in *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 SCR 1186, "Since the *volenti* defence is a complete bar to recovery and therefore anomalous in an age of apportionment, the courts have tightly circumscribed its scope. It only applies in situations where the Plaintiff has assumed both the physical and the legal risk involved in the activity."

[20] To be successful, [Nguyen] must demonstrate that [Kempf] willingly assumed a risk that was fully understood and agreed to give up any cause of action. Thus, counsel must of necessity ask [Kempf] questions about what his understanding was when he signed the waiver and what he was agreeing to, what rights he was giving up. [Kempf] and other witnesses will be asked about the waiver, which will be an exhibit at the trial.

[21] While I agree the determination of the application of *volenti* is a function for the Court, in my opinion, the evidence necessary to put that defence forward will



be confusing to the jury whose duty it is to determine the question of liability. There must be evidence about the signing of the waiver and I agree with the submissions of the solicitor for [Kempf] that the jury will have to consider the effect of the waiver and this is an issue of law. In addition, it will be difficult, if not impossible, for the jury to only use the waiver for a narrow purpose, as suggested by the solicitor for [Nguyen].

[22] The case before me can be distinguished from *Harrison v. Antonopoulos*, [2002] O.J. No. 4890 [(S.C.)] relied on by the solicitor for [Nguyen]. In that case, the jury was being asked to find as a fact whether the Plaintiff was continuously disabled within the meaning of an insurance policy. While the Plaintiff sought a declaration from the Court about entitlement to future benefits, I agree with the reasoning of Lang J. that the jury was not being asked to make a finding of declaratory relief in the sense that the term is used in section 108(2) of the *Courts of Justice Act*. Rather, they were being asked to make a finding of fact concerning disability based on the evidence.

[23] In the case before me, the issue of the waiver must be thoroughly canvassed at trial in order to enable the defence of *volenti* to be argued. The waiver is inextricably bound up in the liability issue and the jury would not be able to ignore it and the evidence surrounding it during their deliberations and this would be inappropriate, given the jury's function. They are to determine the issue of liability, not to interpret the waiver and its effect. While I appreciate counsel would be careful in questions about the waiver, that does not change the fact that in my view, this case involves "in pith and substance" to borrow a phrase from Justice Howden in *MacNeil (Litigation Guardian of) v. Bryan*, [2009] O.J. No. 2344 [(S.C.)] declaratory relief which is not to be determined by a jury.

**40** In addition, at para. 24 of the motion reasons, the trial judge rejected Nguyen's suggestion that she adopt a wait-and-see approach.<sup>1</sup> She accepted that if complexity was the problem, it may make sense to hear at least some of the evidence before deciding whether to strike the jury notice. However, the trial judge identified the basis of the motion as being "the concern that in order to determine the issue of liability, given the pleading of *volenti*, the jury will necessarily hear the evidence about the waiver." She went on to find that "[e]ven with a strong charge that instructs the jury on the proper use to make of the waiver evidence", it would be "impossible" for the jury to use it for the narrow purposes relevant to determining liability. She concluded, in the same paragraph, as follows:

I do not need to hear evidence to make the determination as to whether or not it is proper for the case to be heard by the jury given that the *volenti* defence is being

put forward. I am satisfied that in all of the circumstances, justice is better served by dismissing the jury at this juncture.

### **Applicable Legal Principles**

**41** The right to a trial by jury in civil actions is set out in s. 108(1) of the *Courts of Justice Act*:

In an action in the Superior Court of Justice that is not in the Small Claims Court, a party may require that the issues of fact be tried or the damages assessed, or both, by a jury, unless otherwise provided.

**42** Section 108(2) contains a list of claims for relief that cannot be tried by a jury. Declaratory relief is one such claim.

**43** In the majority reasons in *Cowles v. Balac* (2006), 83 O.R. (3d) 660 (C.A.), leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 496, O'Connor A.C.J.O. set out a comprehensive list of principles governing striking out a jury notice and appellate review of such a decision, as paraphrased here:

1. The right to a trial by jury in a civil case is a substantive right and should not be interfered with without just cause or cogent reasons (at para. 36). See also *King v. Colonial Homes Ltd.*, [1956] S.C.R. 528, at p. 533: "the right to trial by jury is a substantive right of great importance of which a party ought not to be deprived except for cogent reasons".
2. A party moving to strike the jury bears the onus of showing that there are features in the legal or factual issues to be resolved, in the evidence or in the conduct of the trial, that merit the discharge of the jury. The overriding test is whether the moving party has shown that justice to the parties will be better served by the discharge of the jury (at para. 37).
3. Appellate review of a trial court's exercise of its discretion to dispense with a jury is limited. The reviewing court can only intervene if the appellant can show that the discretion was exercised arbitrarily or capriciously or was based on a wrong or inapplicable principle of law (at para. 40). See also *Kostopoulos v. Jesshope* (1985), 50 O.R. (2d) 54 (C.A.), at p. 69, leave to appeal to S.C.C. refused, [1985] S.C.C.A. No. 93. Put another way, the appellate court should inquire into whether there was a reasonable basis for the trial judge's exercise of discretion. If not, the trial judge will have made a reversible error (at para. 52).

4. The reviewing court should not interfere with the trial judge's exercise of discretion simply because it disagrees with the conclusion reached. Put another way, an appeal court should not merely pay lip service to the concept of deference and then proceed to substitute its own view as to what the proper result should be (at para. 42). In many situations, the trial judge's discretion may, with equal propriety, be exercised for or against discharging the jury (at para. 91). See also *Graham v. Rourke* (1990), 75 O.R. (2d) 622 (C.A.), at p. 625.
5. The complexity of a case is a proper consideration in determining whether a jury notice should be struck. Complexity relates not only to the facts and the evidence, but also to the legal principles that apply to the case. Where one draws the line as to when a particular case would be better heard by a judge sitting alone is far from an exact science (at paras. 48-49).
6. While it is true that juries decide very long and complex criminal matters, the comparison is not particularly helpful. Accused persons in criminal trials have an absolute right to be tried by a jury when charged with specified offences, even if a judge is of the view that a jury trial is not the best way to achieve justice. The same is not true for civil cases (at para. 58).
7. It is reversible error for a trial judge to strike a jury notice on the basis that it would be difficult for her to explain the law to the jury. Trial judges are presumed to know the law and to be able to explain it to a jury (at para. 63). See also *Hunt (Litigation Guardian of) v. Sutton Group Incentive Realty Inc.* (2002), 60 O.R. (3d) 665 (C.A.), at para. 70.
8. In some cases, it is preferable to take a "wait and see" approach before deciding whether to discharge the jury. Experience has shown that in many instances the anticipated complexities of a case or other concerns do not materialize or at least not to the extent originally asserted. By "waiting and seeing", courts are better able to protect the substantive right of the party who wants a jury trial and to only dismiss the jury when it becomes necessary (at para. 70).
9. While in many cases the "wait and see" approach is the most prudent

course to follow, it is not a rule of law. The *Courts of Justice Act* and the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, contemplate that a judge may strike a jury notice even before a trial has begun (at paras. 71-72).

10. If the reviewing court concludes that the trial judge erred in striking the jury notice, the merits of the action must be considered (at para. 92). As stated in *King*, at p. 533, a new trial is not warranted "if the court were also satisfied that any jury acting reasonably must inevitably have reached the same result as did the trial judge."

**44** While several of these principles speak to the considerable discretion that is vested in the trial judge when deciding whether to strike a jury notice and the limited appellate review of the exercise of that discretion, cases such as *Hunt* and *Brady v. Lamb* (2005), 78 O.R. (3d) 680 (C.A.), illustrate that this court will order a new trial when it has found that a trial judge has exercised that discretion arbitrarily or based on improper principles so as to enforce the statutory right to a jury trial.

## ANALYSIS

**45** The record indicates that Kempf advanced two independent arguments in support of his motion to strike the jury -- one relating to the declaratory nature of *volenti* and the second relating to the complexity introduced by the waiver.

**46** While I find the trial judge's reasons for striking the jury somewhat unclear, my interpretation of them is that her primary concern was that, even with proper instructions, the jury would not be able to understand the limited use they could, in law, make of the waiver. She was also concerned that the plea of *volenti* involved a claim for declaratory relief, a matter precluded from being determined by a jury. She viewed the relevance of the waiver and the plea of *volenti* as being inextricably linked.

**47** The trial judge's motion reasons do not reflect an arbitrary or capricious exercise of judicial discretion. The issue is whether she erred by basing her decision to strike the jury notice upon wrong or inapplicable principles of law. For the following reasons, I am of the view that the trial judge did so err.

### The *Volenti* Issue

**48** The trial judge's concern about Nguyen's plea of *volenti* is apparent in statements she made in her reasons when considering the *volenti* issue. At paras. 23-24, she commented, in reference to that issue, that "this case involves 'in pith and substance' ... declaratory relief" and "I do not need to hear evidence to make the determination as to whether or not it is proper for the case to be heard by the jury given that the *volenti* defence is being put forward."

**49** *Volenti*, however, is not a claim for declaratory relief: it is a full defence to a finding of negligence. In *Dube v. Labar*, [1986] 1 S.C.R. 649, at p. 658, writing for the majority, Estey J. endorsed the following description of the *volenti* defence from the court's earlier decision in *Stein v. Lehnert*, [1963] S.C.R. 38:

[W]here a driver of a motor vehicle invokes the maxim *volenti non fit injuria* as a defence to an action for damages for injuries caused by his negligence to a passenger, the burden lies upon the defendant of proving that the plaintiff, expressly or by necessary implication, agreed to exempt the defendant from liability for any damage suffered by the plaintiff occasioned by that negligence...

**50** In Allen M. Linden and Bruce Feldthusen, *Canadian Tort Law*, 9th ed. (Markham, Ontario: LexisNexis Canada, 2011), the authors state, at p. 520, "[V]olenti is a question of fact normally decided by the jury".

**51** On the basis of this analysis, to the extent that the trial judge's decision to strike the jury was based on the plea of *volenti*, I am of the view that she erred.

### **The Waiver Issue**

**52** It was the trial judge's duty to determine the applicable legal principles, including the ways in which the waiver might be relevant to liability, and instruct the jury with respect to these principles: *Hunt*, at paras. 70-72.

**53** According to Nguyen's counsel, the waiver was relevant to the assumption of risk and contributory negligence.

**54** As previously indicated, the trial judge struck the jury primarily on the basis of her apprehension that the jury would not be able to understand the limited use they could make of the waiver. The trial judge expressed her view that it would be "difficult, if not impossible, for the jury to only use the waiver for a narrow purpose, as suggested by the solicitor for [Nguyen]." She was concerned that the jury would misinterpret the document and conclude that it released everyone involved in the ride, including other cyclists, of any liability. Significantly, in para. 24, the trial judge said that "[e]ven with a strong charge that instructs the jury on the proper use to make of the waiver evidence ... it would be impossible for the jury to use the evidence ... in only a very narrow fashion and to ignore the rest of the evidence about it."

**55** In *R. v. Corbett*, [1988] 1 S.C.R. 670, at p. 692, Dickson C.J. cautioned: "In my view, it would be quite wrong to make too much of the risk that the jury might use the evidence for an improper purpose" (emphasis in original). This principle extends to civil juries: *Hamstra (Guardian ad litem of) v. British Columbia Rugby Union*, [1997] 1 S.C.R. 1092, at para. 15. This court has made it clear that discharging the jury on the basis that it would be too difficult to explain the law is reversible error: *Hunt*, at paras. 70-72; *Cowles*, at para. 63.

**56** In my view, the trial judge erred in taking this position. With respect, as discussed, it was the trial judge's duty to determine the legal principles to be applied and instruct the jury in accordance with these principles.

**57** While perhaps awkwardly worded, this particular contract is not a complicated or lengthy document. By signing the waiver, the participants agreed that they would follow the rules of the road, they were responsible for their own safety, they were riding at their own risk, they were physically fit and their bicycles were mechanically fit. By signing the waiver, the participants also agreed to absolve the ride organizers and related organizations of liability for any injuries or damages suffered. I note that in interpreting the waiver, at para. 108 of her reasons for judgment, the trial judge did not find it necessary to resort to any principles of contractual interpretation or otherwise labour over its meaning. She did not identify any ambiguity. In one short paragraph of her judgment, the trial judge analyzes the waiver and finds that it "does not release other participants ... including damages occasioned by the negligence of a participant or other competitor" (para. 108). I view this interpretation, as the trial judge apparently did, as clear.

**58** The limited application of the waiver is hardly beyond the ken of members of a jury. I cannot see how a properly instructed jury would have difficulty understanding that the document was not a bar to Kempf's action. The waiver is a contract between the participants and the ride organizers. It is not a contract between Kempf and Nguyen, nor does it contain any terms that release other ride participants from liability for their negligence. In any event, civil juries in Ontario are able to decide issues involving contracts: see *e.g.*, *Wadhwani v. State Farm Mutual Automobile Insurance Co.*, 2013 ONCA 662, 2013 CarswellOnt 15078, at para. 2; *Barlow v. Citadel General Assurance Co.*, 2009 ONCA 106, 94 O.R. (3d) 399, at para. 1.

**59** This is, as counsel for Kempf described it in oral argument, a rather simple personal injury action. There was a collision between two cyclists. Sadly, one was seriously injured. To determine liability the jury would have to sift through the often conflicting evidence, make findings of fact and apply the law as explained to them by the trial judge. This is what juries do every day.

**60** In addition to the wisdom of their collective life experience, a jury would bring to this action, as juries always do, a reflection of societal values. As Binnie J. wrote for the majority in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at para. 136, "One of the strengths of the jury system is that it keeps the law in touch with evolving realities, including financial realities." In my view, this is an appropriate proceeding for a jury to apply "a healthy measure of common sense", as prescribed by Dickson C.J. in *Corbett*, at p. 692, in order to make findings of fact and determine liability for the accident.

**61** In summary, this is not a case where the trial judge, in the exercise of her discretion, strikes the jury on the ground that the evidence was too technical or complex for the jury to make a proper assessment of liability. It was decided primarily on the basis that the jury members would be incapable of understanding the legal effect of the waiver, even after careful instruction.

62 In my opinion, she erred in this regard.

### **The Wait and See Issue**

63 The trial judge reasoned that a "wait and see" approach might have been appropriate if the problem was one of complexity. Here, however, because the issue was not complexity, but rather the waiver and *volenti*, the trial judge's concerns would not be attenuated if a wait and see approach were taken.

64 I disagree. In my view, it would have been preferable for the trial judge to have reserved her decision on the motion until after the evidence had been completed, as Nguyen's counsel urged her to do, or, perhaps, until a discrete problem arose. As the cases emphasize, the "wait and see" approach is generally preferred. I say so for two reasons. From a practical perspective, often the anticipated complexities of a case or other concerns giving rise to the motion to dismiss a jury do not materialize.<sup>2</sup> From a principled perspective, the right to a jury trial is a fundamental, substantive right that should not be interfered with except for very cogent reasons: *Cowles*, at para. 70.

65 In my view, the "wait and see" approach would have been preferable, but taking such an approach is not a rule of law. For this reason, I would not deal further with this issue.

### **The Conclusion**

66 I do not doubt that the trial judge's decision to strike the jury notice and discharge the jury was motivated by her interest in ensuring the parties received a fair trial. However, I see nothing in this case -- the issues, evidence or applicable law -- that supports the conclusion that a jury, properly instructed, could not do justice to the parties. I am satisfied that the trial judge's ruling reveals errors that require this court's intervention.

### **The Remedy**

67 My conclusion that the trial judge erred in striking the jury notice and discharging the jury begs the question of whether a new trial should be ordered. The question calls for the application of the test articulated by the Supreme Court in *King*, at p. 533:

This Court has more than once affirmed that the right to trial by jury is a substantive right of great importance of which a party ought not to be deprived except for cogent reasons; but I cannot think that a new trial should be directed by reason of a trial judge deciding to discharge the jury and complete the trial himself, even if the appellate court was satisfied that the course followed by the trial judge was wrong in law, if the court were also satisfied that any jury acting reasonably must inevitably have reached the same result as did the trial judge.

[Emphasis added.]

**68** I am not satisfied that, in this action, any jury acting reasonably would inevitably reach the same result as the trial judge. In my view, there are at least three ways in which a jury acting reasonably could part ways with the trial judge.

**69** First, the trial judge, in her reasons for judgment, makes no reference to contributory negligence -- a defence that Nguyen pleaded and that was argued by both counsel in their closing submissions.

**70** The trial judge should have addressed this issue. There was evidence capable of supporting a finding of contributory negligence, including Kempf's evidence that he failed to warn Nguyen that he was approaching from behind; Randell's evidence that Kempf came unnecessarily close to Nguyen; and the evidence that, at the time of the collision, Kempf was half-wheeling. The last point is of particular significance given the undisputed evidence concerning the inherent danger associated with half-wheeling, even if just briefly.

**71** Second, despite the trial judge's reasons for preferring Kempf's evidence over Nguyen's, it would be open to a jury to assess credibility differently. Nguyen, Kempf and Walter, gave differing versions of what took place at the time of the accident. This is understandable in the light of the circumstances; namely, cyclists, in a pack, travelling at high speeds, focusing on the rapidly changing dynamics around them.

**72** Third, in deciding negligence and possibly apportioning it, a jury acting reasonably could take a different approach to the standard of care than the trial judge. The trial judgment focuses on whether Nguyen broke the "rules" of a group ride, but it would be open to a jury acting reasonably to reject the "rules" as a *de facto* standard of care. The evidence was that the ride was a charity event open to all participants. It was not a professional cycling event or one restricted to members of a cycling club. It would not necessarily be reasonable for Kempf or Nguyen to expect that the "rules" would be known to other participants and to rely on their adherence by other riders. In addition, Kempf and Nguyen were part of a group of predominantly recreational cyclists, separated by inches, hurtling along a public roadway at speeds of up to 40 kph. Whether either party's acts or omissions breached the standard of care in these circumstances was an open question.

**73** I am satisfied that there is evidence upon which a jury properly instructed and acting reasonably could come to a different conclusion than that reached by the trial judge. While ordering a new trial is to be avoided where possible, I am of the view that, in these circumstances, a new trial is necessary.

## **OTHER ISSUES RAISED IN THIS APPEAL**

**74** Nguyen raises the following additional issues on appeal:



- (1) Did the trial judge err in failing to consider contributory negligence?
- (2) Did the trial judge err in finding that the applicable standard of care is simple negligence, rather than recklessness?

**75** In my view, it is not appropriate to deal with these issues.

**76** First, a new trial is a complete response to the argument that the trial judge erred by failing to address contributory negligence in her reasons.

**77** Second, the applicable standard of care issue is best left to be considered in the context of the new trial, informed, as it should be, by the particular facts of the case.

## **DISPOSITION**

**78** Given I have concluded that the trial judge's decision to strike the jury notice was based on errors in principle and that a jury would not necessarily have arrived at the same result as the trial judge, I would allow the appeal, set aside the decision below and direct a new trial, limited to the issue of liability, before a judge and jury.

**79** Pursuant to the agreement of counsel, I would award costs of the appeal in favour of Nguyen fixed in the amount of \$17,500, all inclusive. I would also abide by the position taken by counsel that they will attempt to agree upon the trial costs, failing which they will return to the trial judge for resolution of that issue.

G.J. EPSTEIN J.A.

P.S. ROULEAU J.A.:-- I agree.

**80** J.I. LASKIN J.A. (dissenting):-- I have read the reasons of my colleague Epstein J.A. I do not agree with her conclusion that the trial judge erred by striking the jury notice and discharging the jury, and I do not agree with her proposed order of a new trial.

**81** In my opinion, the trial judge did not err in exercising her discretion to discharge the jury. And even if she did, a new trial is not called for because any jury acting reasonably would have reached the same result as she did: they would have found Nguyen liable for Kempf's injuries. Also, I do not agree with Nguyen's other two grounds of appeal, on the standard of care and contributory negligence. I would therefore dismiss his appeal.

## **A. OVERVIEW**

### **(a) What this case is about**

**82** Epstein J.A. has reviewed the evidence in detail. Here, I summarize the important facts.

**83** Both Kempf and Nguyen were experienced cyclists. Each was a member of a cycling club and each had participated in many group rides. On June 1, 2008, Kempf and Nguyen participated in a 75 km charity bike ride to raise money for the Heart and Stroke Foundation. The ride took place mostly on Toronto's Don Valley Parkway, which was closed to vehicular traffic for the event.

**84** There are three basic rules of the road for cyclists on a group ride: keep your line; keep your pace; do not make an unannounced sudden movement. All cyclists understand these rules. Indeed, they are a matter of common sense.<sup>3</sup> Nguyen broke all three rules, and his doing so caused the collision that resulted in Kempf's injuries.

**85** Just before the collision, Nguyen was the last cyclist in a group of cyclists slightly ahead of another group led by Kempf. Kempf decided to join Nguyen's group to gain the benefit of the "draft" -- a well-known and well-accepted practice in which the lead cyclist in a group breaks the wind so that the cyclists close behind do not have to expend as much energy.

**86** Kempf moved up to the left of Nguyen, their bikes about 50 to 70 cm (or about two feet) apart. As Kempf's front wheel pulled even with Nguyen's rear wheel, Nguyen slowed slightly, stood up on his pedals and suddenly, without giving any signal and for no discernible reason, swung his bike sharply to the left, striking the front wheel of Kempf's bike. Kempf was thrown to the ground, and other cyclists ran over him. Nguyen never bothered to stop. Though he had caused the collision, he just kept riding.

#### **(b) The litigation**

**87** Kempf sued Nguyen for damages for negligence. In his pleading, Nguyen alleged Kempf had voluntarily assumed the risk of injury, relying on the defence of *volenti non fit injuria* -- literally, "to one who is willing, no harm is done". Nguyen also relied on a "waiver agreement", which each cyclist on the ride had been obliged to sign. And he also alleged that an emergency situation, created when several riders in front of him had slowed down, had forced him to veer sharply to his left. Finally, Nguyen claimed that Kempf was contributorily negligent for his injuries.

**88** Nguyen served a jury notice. At the beginning of the trial, Kempf brought a motion to strike the jury notice. After lengthy argument, the trial judge granted the motion. In a written ruling, she concluded "somewhat reluctantly" that justice to the parties would be better served by discharging the jury.

**89** The trial lasted six days. The trial judge heard evidence from Kempf, Nguyen, five other cyclists on the ride and an expert cyclist called by the defence. She delivered lengthy and thoughtful reasons in which she found Nguyen liable. The parties had agreed on damages.

#### **(c) The grounds of appeal**

**90** Nguyen raises three issues on appeal:

1. The trial judge erred in finding that the standard of care was ordinary negligence. To impose liability on a participant in a sporting event, the appropriate standard of care is intentional or reckless conduct.
2. The trial judge erred by failing to consider whether Kempf was contributorily negligent.
3. The trial judge erred by striking the jury notice and discharging the jury.

My colleague addresses only the third ground of appeal.

**(d) My position, summarized**

**91** 1. The trial judge was correct in holding that the appropriate standard of care was ordinary negligence. Neither logic, nor policy, nor case law supports a recklessness standard.

**92** 2. Although Nguyen had pleaded contributory negligence, he did not press the issue strongly at trial. Still, the trial judge considered the reasonableness of Kempf's conduct. If she erred in failing to make a specific finding on contributory negligence, her error was harmless. It is evident from her reasons and the record that Kempf was not negligent and that Nguyen was entirely at fault for Kempf's injuries.

**93** 3.(i) An appeal court's right to interfere with a trial judge's discretionary decision to discharge a jury is very limited. An appellant must show the trial judge exercised this discretion arbitrarily or capriciously, or based on a wrong principle of law. Nguyen has not met this burden.

**94** As Epstein J.A. acknowledges, the trial judge did not act arbitrarily or capriciously. Quite the opposite. She heard submissions on the motion to discharge the jury for almost three hours; she actively questioned counsel on their positions; and she gave a four-and-a-half page, single-spaced ruling in which she expressly considered the parties' submissions for and against retaining the jury and the applicable case law, and explained why she somewhat reluctantly discharged the jury.

**95** The trial judge also set out the correct test: will justice to the parties be better served by dismissing or retaining the jury? Thus, Nguyen and my colleague are left with the argument that though the trial judge stated the test correctly, she applied it unreasonably. Respectfully, I do not find this argument at all persuasive.

**96** A trial judge is always in the best position to decide whether to retain a jury, a decision our court has acknowledged may often "with equal propriety, be exercised for or against discharging the jury."<sup>4</sup> And this trial judge is one of our province's most experienced judges in personal injuries litigation, having tried many cases both with and without a jury. For reasons I will expand on, she

was concerned that, in combination with the *volenti* defence, the waiver agreement -- which was poorly drafted and hard to read, yet on which defence counsel intended to question the witnesses -- would confuse the jury and would be used by them improperly despite a strong charge. This was a reasonable exercise of her discretion. This court has no right to intervene.

**97** (ii) Even if the trial judge should have retained the jury, a new trial is not called for because any jury acting reasonably would have reached the same result. Kempf's account of the collision was credible and was supported by the evidence of other cyclists, who had observed what had happened. Nguyen, on the other hand, gave an explanation for his cycling that defied common sense and that was not supported by a single other witness. Even his own expert acknowledged Nguyen had breached the rules of the road and had cycled carelessly, even recklessly. On this record, no jury acting reasonably could have reached a decision different from that of the trial judge.

**98** This collision occurred on June 1, 2008. The new trial proposed by my colleague would take place, if at all, at the earliest in mid-2015. Holding a new trial seven years after this accident happened does not serve the administration of justice well. This appeal should be dismissed.

## **A. THE ISSUES ON APPEAL**

### **(1) Standard of care**

**99** The trial judge found the following:

- \* Nguyen owed Kempf a duty of care.
- \* The standard of care was the ordinary negligence standard.
- \* Nguyen had breached the standard of care, and was therefore negligent.
- \* Nguyen's negligence had caused Kempf's injuries.
- \* The waiver agreement did not release one cyclist's negligence claim against another.

**100** The trial judge set out her finding of negligence at para. 98 of her reasons:

[98] I find that Nguyen was negligent, that his negligence consisted of making a sudden movement while riding in a group, failing to maintain a straight line, failing to signal his intention to move and moving directly into the path of the Plaintiff when he could have moved out to the right. Given that I reject Nguyen's

evidence about the existence of a situation of emergency, there is no need for me to consider the doctrine of agony of collision as submitted by the solicitor for the Defendant.

**101** Nguyen accepts the trial judge's findings that he owed Kempf a duty of care and that the waiver did not release Kempf's claim against him. He challenges the trial judge's finding that the appropriate standard of care was ordinary negligence. He contends the appropriate standard of care to impose liability on a participant in a sporting event is intention to cause harm, or, at the very least, recklessness. Nguyen maintains that though he may have been negligent, he did not intend to harm Kempf and he was not reckless.

**102** I see no justification for departing from the ordinary negligence standard, which has served the common law so well, in so many different contexts and activities, for so many years.

**103** Negligence law uses the fictional reasonable person. The standard of care in negligence is that of the reasonable person in similar circumstances: see *Hill v. Hamilton Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at para. 69. A defendant's conduct is negligent or breaches the standard of care if it creates an unreasonable risk of harm: see *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 7.

**104** As is evident from these formulations, the negligence standard is flexible. Its application depends on who the actors are and what activities they are engaged in. Unreasonableness means different things for children, for professionals, for persons with mental disabilities, for motorists and so on.

**105** The risks parties assume depend on the nature of the activity in which they participate. The risks one assumes playing a sport differ from the risks one assumes when going for a morning run or walking to work. In sports, the risks one assumes vary depending on the sport. The risks assumed in a sport where physical contact is part of the game, such as hockey or basketball, differ from the risks assumed in a sport where there is no physical contact, such as tennis or road cycling.

**106** In hockey or basketball, for example, players have to assume some risk of injury from bodily contact, even contact intentionally inflicted or in breach of the rules of the game. A body check -- even one that calls for a penalty -- or contact fighting for a rebound in which the opposing player is called for a foul is part of the ordinary risk of each game. Conduct in these contact sports becomes unacceptable only when it is malicious, out of the ordinary or beyond the bounds of fair play. See e.g. John Barnes, *Sports and the Law in Canada*, 3d ed. (Toronto: Butterworths, 1996), at p. 279.

**107** In other words, the ordinary negligence standard is sufficiently flexible to accommodate the different risks inherent in different sports and sporting activities. There is no need to exempt sports participants from the application of ordinary negligence law. This was the conclusion the trial judge reached after a thorough analysis of the standard of care in sporting activities and the risks inherent in cycling on a group ride. I agree with her analysis. The most important passages are at paras. 86

and 90 of her reasons:

[86] It seems to me that by engaging in a particular sport, the player understands that there are certain risks that are part of a sport. I agree that the standard of care that is owed to other participants in a sport is different than that which is owed to a person in the activities of normal life. Further, what constitutes conduct of a reasonable person will vary from sport to sport. I concur with the comments of my colleague Justice Milanetti in *Nichols v. Sibbick*, [2005] O.J. No. 2873 where she stated, "The principal questions to be determined by the judge are the nature of the risks assumed and what a reasonable competitor would do in the circumstances of each case..."

...

[90] The case before me involves injuries occasioned not in the usual activities of daily life, but rather in the context of an organized cycling event for charity. I agree that when the Plaintiff decided to participate in this ride, he assumed the usual risks associated with the sport. He agreed with the risks including the actions of reasonable cyclists who he could expect to follow the known rules governing group rides. He did not, however, agree to accept the risks associated with conduct that did not accord with the usual rules. In my opinion, the correct standard of care that must be met in this case is that of negligence. It is sufficient if the Plaintiff proves that the conduct of the Defendant fell short of what a reasonable cyclist participating in a group ride for charity would do or refrain from doing. While I agree that what constitutes reasonable care depends on what the participant agreed to reasonably expect given the nature of the sporting event, in a case involving cycling, there is no reason to impose a higher onus on the Plaintiff, to prove that the Defendant conducted himself in a reckless fashion. By its nature cycling is not a contact sport or one that involves physical encounters with opponents such as football or rugby. [Citations omitted.]

**108** As the trial judge recognized, a couple of trial judgments in Ontario have used the word "reckless" when imposing liability on a defendant's conduct in a sporting event. See *Fink v. Greeniaus* (1973), 2 O.R. (2d) 541 (H. Ct. J.), at pp. 549 and 551; and *Gilsenan v. Gunning* (1982), 137 D.L.R. (3d) 252 (Ont. H. Ct. J.), at p. 259. The use of that word is unfortunate. In both cases, the trial judge applied an ordinary negligence standard in finding the defendant liable. That standard, not a recklessness standard, is the correct standard of care. I would not give effect to this ground of appeal.

## **(2) No contributory negligence**

**109** In his pleading, Nguyen alleged that Kempf was contributorily negligent because Kempf did not take reasonable care for his own safety. In her reasons, the trial judge did not expressly deal

with contributory negligence. Nguyen submits that her failure to do so was a reversible error, warranting a new trial. I do not agree with this submission. If the trial judge erred by failing to expressly address the contributory negligence claim, her error was harmless because Nguyen's allegation of contributory negligence had no air of reality.

**110** Although Nguyen pleaded contributory negligence and raised it briefly in closing argument, he did not press the issue during the evidence. He did not cross-examine either Kempf or Kempf's witnesses on whether Kempf failed to take reasonable care for his own safety. Nguyen's defence essentially rested on the waiver agreement and his allegedly justifiable reaction to an emergency situation he claimed had occurred.<sup>5</sup>

**111** In this court, Nguyen suggests two ways in which Kempf may have been contributorily negligent: Kempf was "half-wheeling" and he brought his bicycle up too close to Nguyen's bicycle. In her reasons for ordering a new trial, my colleague also suggests there was evidence Kempf was half-wheeling and was cycling too close to Nguyen. I disagree with both Nguyen and Epstein J.A. On my review of the record, neither suggestion is supportable.

**112** Half-wheeling is a manoeuvre frowned on in cycling. Andrew Randell, the expert called by the defendant, gave evidence about what it means. Randell was a member of Canada's national cycling team for five years and in 2002 was the Canadian national road race champion. He said:

Q. So let's start with the term half-wheel; what does that mean?

A. Half-wheeling is an overlapping between two riders of their wheels. So the front rider and the back rider -- the back rider's wheel, front wheel, will be overlapped with the back rider's [sic] rear wheel, *but it is a consistent overlapping all the time, it's not a momentary overlap*, although even that is bad, but it's more of a consistent doing it over and over again over consistent periods of time. [Emphasis added.]

And:

Q. Okay. And you said that half-wheeling is a condition where you overlap wheels, I guess, persistently

A. Yes.

**113** The trial judge addressed Kempf's cycling and found he had not been half-wheeling. Kempf had brought his front wheel alongside Nguyen's rear wheel only temporarily to take advantage of the draft. As important, Randell was of the same view. He said: "I wouldn't classify what he [Kempf] was doing as half-wheeling." Rather, Randell agreed with plaintiff's counsel during

cross-examination that what Kempf did -- a momentary overlapping of wheels to take advantage of the draft -- is "perfectly acceptable in group riding" and "perfectly normal and ordinary in this situation". He also agreed that "inevitably, there's going to be at least some overlapping of the front wheel to the back wheel."

**114** The evidence on distance was that when Kempf brought his bicycle alongside Nguyen's bicycle, the two bikes were about 50 to 70 cm, or two feet, apart. Again, Nguyen's expert, Randell, acknowledged that this was a reasonable distance apart -- "[t]hat's acceptable riding". It was especially so on the Don Valley Parkway -- "about as good as a paved surface can get in terms of smoothness of surface". Finally, but importantly, Nguyen led no evidence to show the collision would have been avoided if the bicycles had been farther apart.

**115** The trial judge concluded that Nguyen was entirely at fault for Kempf's injuries. The trial record supported her conclusion. Her failure to advert expressly to the defendant's claim of contributory negligence does not justify this court's intervention.

**116** In *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 39, the Supreme Court emphasized that an omission in trial reasons justifies an appellate court's intervention only if the omission is a material error or taints the trial judge's conclusion.

As a starting point to the discussion of the ordinary or reasonable motorist, we emphasize that the failure to discuss a relevant factor in depth, or even at all, is not itself a sufficient basis for an appellate court to reconsider the evidence. This was made clear by the recent decision of *Van de Perre*, [2001] 2 S.C.R. 1014 *supra*, where Bastarache J. says, at para. 15:

...omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial. As stated in *Van Mol (Guardian ad litem of) v. Ashmore* (1999), 168 D.L.R. (4th) 637 (B.C.C.A.), leave to appeal ref'd [2000] 1 S.C.R. vi, an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence.

**117** Here, if the trial judge erred in failing to advert expressly to Nguyen's defence of contributory negligence, the error was hardly material. She considered Kempf's cycling. He testified that at all times he followed the rules of a group ride, and she accepted his evidence. I would not give effect to this ground of appeal.

### **(3) Discharge of the jury**



**(i) A reasonable exercise of the trial judge's discretion**

**118** Significant deference is owed to a trial judge's discretionary decision to retain or discharge a jury. This deferential standard of appellate review is well established. An appeal court may intervene only if "the discretion was exercised arbitrarily or capriciously or was based upon a wrong or inapplicable principle of law": *Kostopoulos v. Jesshope* (1985), 50 O.R. (2d) 54 (C.A.), leave to appeal to S.C.C. refused, [1985] S.C.C.A. No. 93, at p. 69. See also *Cowles v. Balac* (2006), 83 O.R. (3d) 660 (C.A.), leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 496, at para. 40. Put simply, and in keeping with the usual standard of review of discretionary decisions, appellate intervention is justified only if the trial judge exercised this discretion unreasonably or erred in principle. See *Cowles*, at para. 52.

**119** In assessing the reasonableness standard of review, context matters. Although the right to a trial by jury in a civil case is an important right, it is far from absolute. The trial judge's discretion to retain or dismiss a jury is very broad: *Cowles*, at para. 38. Under Rule 47.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 -- the rule invoked in this case -- a trial judge may strike out a jury notice where a jury trial is inappropriate. The question for the trial judge is simply this: will justice to the parties be better served by dismissing or retaining the jury? See *Cowles*, at para. 37. And, as this court and the Supreme Court of Canada have emphasized, the person in the best position to decide this question is the trial judge. See *Hunt (Litigation guardian of) v. Sutton Group Incentive Realty Inc.* (2002), 60 O.R. (3d) 665 (C.A.), at para. 52; and *Hamstra (Guardian ad litem of) v. British Columbia Rugby Union*, [1997] 1 S.C.R. 1092, at para. 26.

**120** Where a trial judge draws the line between discharging or retaining a jury is not an exact science. There is no bright-line test for the exercise of the trial judge's discretion. And so, in *Graham v. Rourke* (1990), 75 O.R. (2d) 622 (C.A.), at p. 625, Doherty J.A. noted, "In many situations that discretion may, with equal propriety, be exercised for or against discharging the jury."

**121** It is against this wide leeway given to a trial judge that we must assess the decision in this case to discharge the jury. Some judges faced with Kempf's motion may have retained the jury. But unless the trial judge had no reasonable basis for discharging the jury, we have no right to intervene. As I said in my overview, in my opinion, the trial judge exercised her discretion reasonably.

**122** Epstein J.A. accepts that the trial judge did not act arbitrarily or capriciously. Indeed she did not, for the reasons set out in my overview. And she did not act on a wrong principle. The trial judge correctly stated the test she had to apply. At para. 12 of her reasons for striking the jury notice, she said:

[12] It is trite law to state that the right to a jury trial is an important one which should not be taken away lightly: *Hunt v. Sutton Group Incentive Realty Inc.* (2002), 60 O.R. (3d) 665 (C.A.). When entertaining a motion to dismiss the jury, the presiding judge must decide whether on the particular facts of the case,

justice to the parties will be better served by dismissing or retaining the jury. The decision to discharge a jury is a matter of judicial discretion which must be reasonable in the circumstances.

And then, at para. 15, she repeated the correct test:

[15] However, I am required to consider the case as framed by the pleadings and the anticipated evidence and decide whether justice is best served by retaining the jury or discharging it. I have come to the conclusion, somewhat reluctantly, that this action cannot proceed with a jury.

**123** Nonetheless, Epstein J.A. says that in applying the test, the trial judge erred by relying on the plea of *volenti* and the waiver as bases to discharge the jury. And my colleague says that, though not an error, it would have been preferable had the trial judge adopted a "wait and see" approach to the decision to discharge the jury. I disagree with my colleague on each of her three points. I will list her points (in italics) and my response to each one.

*(1) The trial judge erred in law by relying on Nguyen's volenti defence as a basis to discharge the jury.*

**124** Epstein J.A. says the trial judge should not have relied on Nguyen's plea of *volenti* to strike the jury because *volenti* is a defence to a finding of negligence, not a claim for declaratory relief. I agree that if the trial judge had characterized Nguyen's plea of *volenti* as a claim for declaratory relief, she would have erred. But she did not do so.

**125** As the trial judge wrote at para. 13 of her reasons, had she characterized the defence as a claim for declaratory relief, she would have been required to discharge the jury because under s. 108(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, a claim for declaratory relief cannot be tried with a jury:

[13] While section 108(2) ... makes it clear that a claim for declaratory relief cannot be tried with a jury and [plaintiff's counsel] argues that the case being presented by the Defendant is akin to a request for declaratory relief, in my view, I do not need to make that finding to deal with this motion.

**126** Instead, the trial judge carefully analyzed the competing positions of the parties and exercised her discretion "somewhat reluctantly" to strike the jury notice. Her analysis would have been unnecessary had she accepted Kempf's argument that Nguyen was asking for declaratory relief.

**127** Although, at para. 23 of her reasons, the trial judge states that "the case involves 'in pith and substance' ... declaratory relief which is not to be determined by a jury" (citation omitted), she nonetheless determined the case was not one in which she was required by statute to discharge the

jury.

*(2) The trial judge erred by holding that the "jury would be incapable of understanding the legal effect of the waiver even after careful instruction."*

**128** This appears to be the main reason why my colleague would allow the appeal. She says that the case was a simple personal injury action and that the waiver was not a complicated document -- its limited application was "hardly beyond the ken of members of a jury."

**129** I do not agree with my colleague. The trial judge's concern was not the waiver alone, but the waiver in combination with the *volenti* defence. Because of that combination, this case was not a simple personal injury action. The trial judge was concerned that the jury would have been confused by the waiver and, because of its connection to the *volenti* defence, would have used it inappropriately in their deliberations despite a correct and strong charge. That was a reasonable concern.

**130** After the argument on the motion to strike the jury notice, three things were evident. First, for Nguyen, the *volenti* defence and the waiver were inextricably connected. He intended to argue that by signing the waiver, Kempf had assumed all risks of injury to himself. Second, although Nguyen conceded that the trial judge should decide the *volenti* defence after the jury had deliberated on liability, he refused to make the same concession for the waiver. That document, he contended, could be properly considered by the jury. Third, Nguyen's counsel intended to question Kempf and the other witnesses on what they understood by signing the waiver, what risks they understood they were agreeing to and what rights they understood they were giving up. In short, he wanted to use the waiver to support Nguyen's defences of *volenti* -- that Kempf had voluntarily assumed the risks of participating in the charity bike ride -- and on the appropriate standard of care.

**131** And the waiver itself was not a straightforward document. It was hard to read and understand. The trial judge found it "confusing" and so it was. The full waiver is attached as Appendix A. The pertinent portions provided:

THE BECEL HEART&STROKE RIDE FOR HEART WAIVER  
AGREEMENT, EVENT DAY JUNE 1, 2008

Please Read Carefully Release Waiver and Indemnity: The Becel Ride for Heart  
I Agree:

- 1) That all times during the Becel Heart&Stroke Ride for Heart my safety remains my sole responsibility and that I will observe all rules of the road; and

...

- 4) That I am aware of the risks inherent in participating in the Becel Heart&Stroke Ride for Heart and assume all such risks.

...

IN CONSIDERATION of the acceptance of my application and permission to participate as an entrant in the Becel Heart&Stroke Ride for Heart and post-event activities, I, for myself, my heirs, executors, administrators, successors and assigns, HEREBY RELEASE, WAIVE AND FOREVER DISCHARGE the Heart and Stroke Foundation of Ontario, Unilever Canada, PLH & Associates, the City of Toronto, The Toronto Police Services Board, The Toronto Police Service, The Members of the Toronto Police Service Auxiliary Program, the Chief of Police, the Toronto Transit Commission, Board of Governors of Exhibition Place, the Canadian National Exhibition Association, and all other associations, sanctioning bodies and sponsoring companies, and all their respective agents, officials, servants, claims, demands, damages, costs, expenses, actions and causes of action, whether in law or equity, in respect to death, injury, loss or damage to my person or property HOWSOEVER CAUSED, arising or to arise by reason of my participation in the said event, whether a spectator, participant, competitor or otherwise, whether prior to, during or subsequent to the event, AND NOTWITHSTANDING that any of the foregoing may have contributed to, or the injury or damage may have been occasioned by, the negligence of any the foresaid. I FURTHER HEREBY UNDERTAKE or HOLD AND SAVE HARMLESS and AGREE TO INDEMNIFY all of the aforesaid from and against any and all liability incurred by any or all of them as a result of, or in any way connected with, my participation in the said event.

BY SUBMITTING THIS ENTRY, I ACKNOWLEDGE HAVING READ, UNDERSTOOD AND AGREED TO THE ABOVE WAIVER, RELEASE AND INDEMNITY. I WARRANT that I am physically fit to participate in this event, and that my equipment is mechanically fit and suitable for its intended use in the Becel Heart&Stroke Ride for Heart.

...

**132** By signing the waiver, each cyclist releases the ride sponsor, Becel, and the charity, the Heart and Stroke Foundation. But some of the language in the waiver might suggest that each cyclist also releases other cyclists from liability. For example, each cyclist agrees that "my safety remains my sole responsibility" and "that I am aware of the risks inherent in participating in the

Becel Heart&Stroke Ride for Heart and assume all such risks." And the consideration clause is similarly open to being interpreted as a broad release of liability.

**133** Thus, in discharging the jury, the trial judge wrote, at paras. 18, 21 and 24:

[18] The jury will be asked to determine fault for the accident. The waiver will be an exhibit and witnesses will necessarily be questioned and cross examined on the document. In my view, there is a real danger that the jury, in answering the liability questions, will be confused by the contents of the waiver or perhaps use it inappropriately in their deliberations. For example, ... because the waiver states that the Plaintiff will release all others from "all liability" arising from his participation in the Ride, there is a concern that the jury will misinterpret that document and conclude on the basis of the wording of the release that there could be no liability imposed on anyone, regardless of the findings of fact.

...

[21] While I agree the determination of the application of *volenti* is a function for the Court, in my opinion, the evidence necessary to put that defence forward will be confusing to the jury whose duty it is to determine the question of liability.

...

[24] [I]n order to determine the issue of liability, given the pleading of *volenti*, the jury will necessarily hear the evidence about the waiver. In my opinion, the inescapable reality of this is that the jury will be considering issues of contract which they cannot do. Even with a strong charge that instructs the jury on the proper use to make of the waiver evidence, in my mind, it would be impossible for the jury to use the evidence concerning the waiver in only a very narrow fashion and to ignore the rest of the evidence about it.

**134** The trial judge's reasoning is similar to that of the experienced trial judge in *Cowles*. In that case too, the trial judge had exercised her discretion to discharge the jury, in part because of the legal complexity of the case. She had concluded that the jury would find it difficult to keep separate various legal concepts, including strict liability, negligence and any applicable defences. On appeal, the defence argued she had erred in discharging the jury. One of the defence's arguments parallels my colleague's argument: any difficulty the jury would have had in applying the relevant legal concepts was not a proper basis to strike the jury notice. This court did not accept that argument. O'Connor A.C.J.O. wrote, at paras. 61 and 67:

[61] ... While the trial judge expressed a concern about the complexity of the legal issues in her reasons, I read her comments in this regard as suggesting that the jury may have difficulty in applying the legal concepts as instructed by her,

not in deciding what those concepts were. This, it seems to me, is apparent from her last comment -- "It may be difficult for a lay jury to keep the concepts separate."

...

[67] In exercising her discretion to strike the jury notice in these cases, the trial judge considered the legal complexity of the cases as one of those complexities that would affect the task of the jury. She was entitled to do so.

**135** I accept that other trial judges may have taken a different view of the complexity in this case, as they may have of the complexity in *Cowles*. But as O'Connor A.C.J.O. said, at para. 42:

[42] An appeal court should not interfere with the exercise of a trial court's discretion simply because it disagrees with the conclusion reached. That means an appeal court should not merely pay lip service to the concept of deference and then proceed to substitute its own view as to what the proper result should be for that of the lower court.

**136** Thus in *Cowles*, this court upheld the trial judge's discretion to discharge the jury, even though it determined, at para. 57, that the case fell "at the low end of the complexity scale that would permit a judge to dispense with a jury" and that it was "likely that some judges confronted with the same factors would exercise their discretion differently." I would do the same here.

(3) *The trial judge should have adopted a "wait and see" approach.*

**137** My colleague says that it would have been preferable had the trial judge reserved her decision on the motion to strike the jury notice until the evidence had been completed. Perhaps, perhaps not. The trial judge considered whether she should "wait and see" and recognized that doing so is preferable in some cases, particularly those in which the evidence is expected to be complex. She decided not to do so in this case.

**138** "Wait and see" is not a rule of law; it is very much a matter of discretion. See *Cowles*, at para. 72. Were it a rule of law, trial judges would never discharge a jury before the evidence was completed. But as O'Connor A.C.J.O. said in *Cowles*, at para. 76, trial judges have the authority by statute, the rules and case law to dispense with a jury before a trial begins. Here, the trial judge determined not to "wait and see". That was her call to make. And it was a reasonable call. At least Epstein J.A. accepts that the trial judge's decision not to "wait and see" does not justify appellate intervention.

**139** The trial judge had a reasonable basis to discharge the jury. This court therefore has no basis to interfere with her decision. I would not give effect to this ground of appeal.

(ii) **No new trial**

**140** Epstein J.A. would order a new trial, which would take place, if at all, at least seven years after the accident. I do not think an order for a new trial is appropriate. Under s. 134(6) of the *Courts of Justice Act*, this court "shall not direct a new trial unless some substantial wrong or miscarriage of justice has occurred." One application of this statutory direction is the principle my colleague refers to, at para. 70 of her reasons, and which comes from the judgment of Cartwright J. in *King v. Colonial Homes Ltd.*, [1956] S.C.R. 528, at p. 533: a new trial should not be ordered in a case where the trial judge erred in discharging the jury "if the court were ... satisfied that any jury acting reasonably must inevitably have reached the same result as did the trial judge." See also *Khan v. College of Physicians and Surgeons of Ontario* (1992), 9 O.R. (3d) 641, at pp. 675-76.

**141** I would apply that principle here. Although I do not think the trial judge erred in discharging the jury, even if she did, a jury properly instructed and acting reasonably would also inevitably have found Nguyen liable for Kempf's injuries. Epstein J.A., however, says that such a jury could differ from the trial judge's assessment in three ways. I do not agree with any of her three points.

**142** First, my colleague says there was evidence supporting a finding of contributory negligence. She points in particular to what she says is evidence Kempf came unnecessarily close to Nguyen and evidence Kempf was half-wheeling when the collision occurred. I have dealt with the issue of contributory negligence earlier in these reasons. On my review of the record, there was simply no evidence to support a finding that Kempf was contributorily negligent. To repeat what I said earlier, the defence's own expert admitted Kempf was an acceptable distance apart from Nguyen and was not half-wheeling.

**143** Second, Epstein J.A. says a jury could assess the credibility of Kempf and Nguyen differently. Of course, in theory that is true. But even on a printed record, which is all an appellate court has, it is difficult to conceive that a reasonable jury could have reached a different result. In this court, Nguyen admitted the evidence supported a finding that he was negligent. The evidence at trial showed that he broke the rules of a group ride, made a manoeuvre at the critical time that defied common sense and, in the words of his own expert, was "reckless". By contrast, nothing in Kempf's evidence suggested he cycled carelessly, and his account was supported by the evidence of the other cyclists who testified.

**144** Third, Epstein J.A. says a jury could take a different approach to the standard of care. I do not see how they could if one accepts, as I do and as the trial judge did, that the ordinary negligence standard applies. Nguyen was an experienced cyclist. He broke rules of a group ride so basic and so grounded in common sense that even inexperienced cyclists would know them. He had to be aware that by breaking the basic rules of a group ride, he created an unreasonable risk of harm. That is what the trial judge found, and that is what Randell accepted. No reasonable jury could have concluded otherwise.

**145** Indeed, my view is that no reasonable jury could have reached a result different from the one

the trial judge reached. In addition to what I have already said in response to my colleague, I rely on the following three points.

**146** First, the evidence of Kempf, whom the trial judge found to be a credible witness, was supported by the evidence of several other cyclists, who had seen the accident or its aftermath. In contrast, the evidence of Nguyen, whom the trial judge found to be an unimpressive witness, was not supported by a single other witness, and was contradicted by several of the witnesses.

**147** Second, Nguyen's explanation for his cycling defied common sense. He claimed that several riders ahead of him had slowed down, which had caused him to veer sharply to his left to avoid them. No witness had seen any cyclist ahead of Nguyen slowing down. And as the trial judge noted, veering to the left into a group of riders, including Kempf, instead of to the right, where there was plenty of open space, made no sense. The trial judge put it this way, at para. 67 of her reasons:

[67] The other perplexing element of the actions of the Defendant relates to the evasive action that he described as being necessary due to the alleged slowing down of riders directly in front of him. According to his version of events, as a result of the slowing of at least a couple of riders, the large fellow right in front of Nguyen moved off to the right, presumably to avoid striking the rider in front of him. One wonders why the Defendant did not make the same maneuver. He stated he knew there were riders to his left, yet he decided to move in that direction instead of off to the right as the rider in front of him did, apparently without incident. Again, this action does not make sense, given the situation as described by the Defendant.

**148** Third, Nguyen's own expert, Randell, acknowledged that Nguyen's cycling, as described by the other witnesses, including Kempf, had been "careless", "dangerous", and "reckless". Nguyen called Randell to testify about the conduct of cyclists on a group ride. On cross-examination by Kempf's counsel, Randell admitted that Nguyen had breached the rules of the road and had cycled recklessly:

Q. And at the moment in time when his front wheel is about even with the axle of the Nguyen vehicle -- for clarity in the record, when the Kempf front wheel is about even with the axle of the rear wheel of the Nguyen vehicle -- suddenly Mr. Nguyen, for no reason, no apparent reason, moves over two feet striking the Kempf vehicle. Can you make those assumptions?

A. Yes.

Q. He moves over two feet striking the Kempf vehicle.



Now, would it be fair to say that in this situation that the rider in the position of Mr. Nguyen, in this hypothetical, has breached the rule to maintain his line?

A. Yes, yeah.

Q. Inevitably, though, it breached the rule to maintain his pace?

A. Yeah, it probably would have slowed it, yeah.

Q. And he has failed to ride a smooth, predictable path, correct?

A. Yes, mm-hmm.

Q. And in terms of riding in a pack, the conduct I described, if you saw it, you'd agree with me, that was a major foul?

A. Yeah, I would say so, yes.

Q. And that kind of riding would put the safety, not only of the individuals involved, but of the whole rear part of the group in peril, correct?

A. Yeah.

Q. To make a sideways sudden movement of two feet without a very good reason would be a careless act, you'd agree?

A. Yeah.

Q. And if made without concern for those who might be approaching, it's fair to say that a movement of two feet or thereabouts to the left by a cyclist on the right edge of a pack would be an act that goes against all the rules we've spoken about governing good riding, correct?

A. Yes, yeah.

Q. It would go against the obligation to promote safety, to act responsibly, correct?

A. Yeah.

Q. And you mentioned it would be a careless act. Do you agree with me that it would also be an act that would be dangerous, correct?

A. It would be dangerous, yeah.

Q. An act that would be reckless?

A. Reckless, sure. I don't understand the definition, but... Can you define "reckless"?

Q. An act taken without due regard for the danger that it might expose others to.

A. Yeah.

Q. So it would be reckless?

A. Yeah.

**149** In the light of these considerations, it is hard to conceive that a reasonable jury could have come to a different result. It is thus not in the interests of justice to order a new trial.

### **C. CONCLUSION**

**150** I would dismiss this appeal with costs fixed in the agreed-on amount of \$17,500, inclusive of disbursements and applicable taxes.

J.I. LASKIN J.A.

\* \* \* \* \*

### **Appendix A: Waiver Agreement**

#### **THE BECEL HEART&STROKE RIDE FOR HEART WAIVER AGREEMENT, EVENT DAY JUNE 1, 2008**

Please Read Carefully Release Waiver and Indemnity: The Becel Ride for Heart  
I Agree:

- 1) That all times during the Becel Heart&Stroke Ride for Heart my safety remains my sole responsibility and that I will observe all rules of the road; and
- 2) That I will make best efforts to wear an approved helmet while riding in the Becel Heart&Stroke Ride for Heart; and if I am under the age of 18 I must wear an approved helmet; and
- 3) That I will discontinue riding in the Becel Heart& Stroke Ride for Heart if it is determined by medical personnel at any time that I am physically unfit to continue; and
- 4) That I am aware of the risks inherent in participating in the Becel Heart&Stroke Ride for Heart and assume all such risks.
- 5) By participating in the Becel Heart&Stroke Ride for Heart, I consent the use of my photograph, without compensation, in any future publicity carried out by the Heart and Stroke Foundation.

IN CONSIDERATION of the acceptance of my application and permission to participate as an entrant in the Becel Heart&Stroke Ride for Heart and post-event activities, I, for myself, my heirs, executors, administrators, successors and assigns, HEREBY RELEASE, WAIVE AND FOREVER DISCHARGE the Heart and Stroke Foundation of Ontario, Unilever Canada, PLH & Associates, the City of Toronto, The Toronto Police Services Board, The Toronto Police Service, The Members of the Toronto Police Service Auxiliary Program, the Chief of Police, the Toronto Transit Commission, Board of Governors of

Exhibition Place, the Canadian National Exhibition Association, and all other associations, sanctioning bodies and sponsoring companies, and all their respective agents, officials, servants, claims, demands, damages, costs, expenses, actions and causes of action, whether in law or equity, in respect to death, injury, loss or damage to my person or property HOWSOEVER CAUSED, arising or to arise by reason of my participation in the said event, whether a spectator, participant, competitor or otherwise, whether prior to, during or subsequent to the event, AND NOTWITHSTANDING that any of the foregoing may have contributed to, or the injury or damage may have been occasioned by, the negligence of any the foresaid. I FURTHER HEREBY UNDERTAKE or HOLD AND SAVE HARMLESS and AGREE TO INDEMNIFY all of the aforesaid from and against any and all liability incurred by any or all of them as a result of, or in any way connected with, my participation in the said event.

BY SUBMITTING THIS ENTRY, I ACKNOWLEDGE HAVING READ, UNDERSTOOD AND AGREED TO THE ABOVE WAIVER, RELEASE AND INDEMNITY. I WARRANT that I am physically fit to participate in this event, and that my equipment is mechanically fit and suitable for its intended use in the Becel Heart&Stroke Ride for Heart.

Print Full Name of Participant:

Date:

(Parent/Guardian Name required if participant is under 18 years)

1 Nguyen abandoned the *volenti* plea, and further amended his statement of defence, at the opening of the case for the defence. In fairness to the trial judge, as the *volenti* plea was not abandoned until after Kempf was cross-examined on the waiver, adopting a wait-and-see approach would not have eliminated all of her concerns about whether trial by jury was appropriate.

2 Here, arguably, it did not materialize given the withdrawal of the *volenti* defence.

3 The defendant's expert, Andrew Randell, acknowledged that these rules are "pretty standard", "derived from common sense" and have "evolved over a long period of time."

4 *Graham v. Rourke* (1990), 75 O.R. (2d) 622, at p. 625.

5 Although Nguyen had pleaded *volenti*, he abandoned it at the opening of the defence's case.

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*Case Name:*  
**Mask v. Silvercorp Metals Inc.**

**Between**  
**John Mask, Plaintiff, and**  
**Silvercorp Metals, Inc., Rui Feng, and**  
**Meng Tang, Defendants**

[2014] O.J. No. 3708

2014 ONSC 4647

Divisional Court File No. 325-14

Court File No. 13-CV-00480848-00CP

Ontario Superior Court of Justice  
Divisional Court

**P.M. Perell J.**

Heard: August 6, 2014.  
Judgment: August 11, 2014.

(31 paras.)

*Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Procedure -- Discovery -- Production and inspection of documents -- Relevancy -- Appeals -- Leave to appeal -- Interlocutory or final orders -- Motion by plaintiff for leave to appeal decision dismissing motion for Rule 30.04(1) production order dismissed -- Motion arose in context of proposed class action alleging negligent misrepresentation and statutory claim under Part XXIII.1 Securities Act, in which certification motion and motion for leave under Act were pending -- Judge did not order divided discovery under Rule 30.04(8) as plaintiff argued -- This was discretionary decision of interest to immediate parties, entitled to significant deference -- There were no conflicting decisions and no reason to doubt correctness of decision that stopped plaintiff from obtaining pre-emptive production in claim requiring leave.*

*Securities regulation -- Civil liability -- Secondary market disclosure -- Motion by plaintiff for leave to appeal decision dismissing motion for Rule 30.04(1) production order dismissed -- Motion*

*arose in context of proposed class action alleging negligent misrepresentation and statutory claim under Part XXIII.1 Securities Act, in which certification motion and motion for leave under Act were pending -- Judge did not order divided discovery under Rule 30.04(8) as plaintiff argued -- This was discretionary decision of interest to immediate parties, entitled to significant deference -- There were no conflicting decisions and no reason to doubt correctness of decision that stopped plaintiff from obtaining pre-emptive production in claim requiring leave.*

Motion by the plaintiff for leave to appeal the decision dismissing his motion for a Rule 30.04(1) production and inspection order. The plaintiff was an investor and the representative plaintiff in a proposed class action that sought to advance claims of negligent misrepresentation and a statutory claim under Part XXIII.1 of the Securities Act. The motions for certification and leave to commence the Securities Act claim were pending. The plaintiff served a request to inspect documents and demanded production by the defendant of hundreds of documents. When the defendants refused such a broad request, the plaintiff moved for a production order, and the case management judge dismissed the motion and made rulings about relevance, proportionality and privilege. The plaintiff argued the judge erred in his interpretation and application of Rule 30.04.

HELD: Motion dismissed. This was an interlocutory decision, so leave could only be granted if there were conflicting decisions and it was desirable to grant leave. The plaintiff created his own issue by choosing not to proceed to cross-examinations in accordance with the agreed-upon schedule, but rather to bring an overreaching motion in the context of a claim for which leave was still required. The judge dismissed the motion and did not order divided discovery pursuant to Rule 30.04(8), as suggested by the plaintiff. The order did not transcend to something important to the public. It was an exercise of the judge's discretion, of interest to the immediate parties, and was entitled to significant deference. The decision in the context of s. 138.8 of the Securities Act was one of first instance so there were no conflicting decisions. The judge found the request to inspect under Rule 30.04(2) was not mandatory and could not be used for a fishing expedition. There was no reason to doubt the correctness of a decision employed to stop the plaintiff from obtaining a pre-emptive production and examination order in a claim requiring leave.

### **Statutes, Regulations and Rules Cited:**

Class Proceedings Act, 1992, S.O. 1992, c. 6,

Rules of Civil Procedure, Rule 30.04(1), Rule 30.04(2), Rule 30.04(5), Rule 30.04(6), Rule 30.04(8), Rule 62.02(4)(a), Rule 62.02(4)(b)

Securities Act, R.S.O. 1990, c. S.5, Part XXIII.1, s. 138.8(1), s. 138.8(2), s. 138.8(3)

### **Counsel:**

*Matthew M.A. Stroh and Kevin Richard, for the Plaintiff.*

Dana M. Peebles, for the Defendants.

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## **REASONS FOR DECISION**

P.M. PERELL J.:--

### **A. INTRODUCTION**

**1** John Mask, who was an investor in the shares of Silvercorp Metals, Inc., is the Plaintiff in a proposed class action under the *Class Proceedings Act, 1992*, S.O. 1992, c.6. He seeks to advance: (1) a common law negligent misrepresentation claim; and (2) a statutory claim under Part XXIII.1 of the Ontario *Securities Act*, R.S.O. 1990, c. S. 5, for which leave to commence the action is required. The certification motion and the motion for leave are scheduled to be heard October next.

**2** The Defendants are Silvercorp, and Dr. Rui Feng, and Meng Tang, who are respectively the CEO and CFO of the corporation.

**3** After the Defendants delivered affidavits to respond to the motion for leave under the *Securities Act* and for certification of the action as a class proceeding under the *Class Proceedings Act, 1992*, Mr. Mask served Requests to Inspect Documents under rule 30.04(2) of the *Rules of Civil Procedure*. He demanded that hundreds of documents be produced for inspection before the cross-examinations. When the Defendants declined to do so but said that they would answer reasonable requests for production at the cross-examinations, Mr. Mask moved for an order that the documents be produced for inspection.

**4** Justice Belobaba, who is case managing the proposed class action, dismissed the production motion and made rulings about the relevance, proportionality, or privilege of some of the requests for production. See *Mask v. Silvercorp Metals Inc.*, 2014 ONSC 4161.

**5** Mr. Mask now seeks leave to appeal Justice Belobaba's Order.

**6** For the reasons that follow, Mr. Mask's motion is dismissed.

### **B. ANALYSIS AND DISCUSSION**

#### **1. The Test for Leave**

**7** The test for leave to appeal from an interlocutory order of a motions judge to the Divisional Court is set out in rule 62.02(4) of the *Rules of Civil Procedure*, which reads:



62.02(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.

**8** In order for leave to be granted under rule 62.02(4)(a), the moving party must show both: (a) a conflicting decision; and also (b) the desirability of leave to appeal being granted. A conflicting decision is one in which different legal principles are chosen to decide a comparable legal problem or to guide the exercise of the court's discretion: *Benincasa v. Agostino*, [2008] O.J. No. 4172 (S.C.J.) at para. 12; *Comtrade Petroleum Inc. v. 490300 Ontario Ltd.* (1992), 7 O.R. (3d) 542 (Div. Ct.).

**9** If leave to appeal is to be granted on the grounds of conflicting decisions, the court must be satisfied not only that there is a conflicting decision, but also that it is desirable that leave to appeal be granted having regard to such factors as what is at stake in the order being challenged, the likelihood of the appeal being successful, the sufficiency of the record for the purposes of deciding the issues on the appeal, and the problems of expense and delay: *Minnema v. Archer Daniels Midland Co.*, [2000] O.J. No. 1685 (S.C.J.) at paras. 34-42.

**10** In order for leave to be granted under rule 62.02(4)(b), the moving party must show both: (a) good reason to doubt the correctness of the order; and also (b) a matter of general importance.

**11** In order to show that there is good reason to doubt the correctness of the order, the moving party need not show that the order is wrong or probably wrong, but rather, that the soundness of the order is open to very serious debate: *Ash v. Lloyd's Corp.* (1992), 8 O.R. (3d) 282 (Gen. Div.) at pp. 284-5; *Oberlander v. Canada (Attorney General)*, [2004] O.J. No. 1574 (S.C.J.) at paras. 8-9; *Brownhall v. Canada (Ministry of Defence)* (2006), 80 O.R. (3d) 91 (S.C.J.) at para. 30; *Walker v. Woodstock District Chamber of Commerce*, [2000] O.J. No. 1994 (S.C.J.); *Judson v. Mitchele*, 2011 ONSC 6004.

**12** In order to show that a matter is of general importance, the moving party must show that the matter is of importance to the public or to the development of the law or to the administration of justice and that the importance of the order transcends the importance of the matter to the particular parties: *Greslik v. Ontario Legal Aid Plan* (1988), 65 O.R. (2d) 110 (Div. Ct.) at p. 112; *Rankin v. McLeod, Young, Weir Ltd. et al.* (1986), 57 O.R. (2d) 569 (H.C.J.) at p. 575; *Brownhall v. Canada (Ministry of Defence)* (2006), 80 O.R. (3d) 91 (S.C.J.) at para. 29.

## 2. **The Proposed Issues for which Leave to Appeal is Sought**

**13** In the case at bar, Mr. Mask raises several purported grounds of appeal, and he argues that there are conflicting decisions and that there is good reason to doubt the correctness of Justice Belobaba's order.

**14** As I shall explain below, these arguments about the grounds of appeal are incorrect, and, therefore, leave to appeal should not be granted.

**15** Moreover, as I shall explain below, even if the arguments were correct, it is not desirable that leave to appeal be granted and despite Mr. Mask's arguments that the matter is important to the development of the law, this is also not true. The order does not transcend the importance of the matter to the parties to a matter of general importance to the development of the law.

**16** The truth of the matter is that Mr. Mask has been hoisted on his own procedural petard. He had the choice of proceeding to cross-examinations in accordance with the agreed schedule, but he chose instead to serve Requests to Inspect Documents with 28 separate requests, demanding thousands of pages of otherwise confidential corporate documents, and he did not file any evidence to explain the relevance of, or the necessity of, reviewing all those documents before the cross-examinations.

**17** Mr. Mask was making a tactical maneuver to obtain an examination for discovery and advance rulings on the production of documents in a case for which leave to proceed had not been granted. It was a trip to the tackle and bait store before a fishing expedition and Justice Belobaba, for a variety of reasons, put a stop to it.

**18** Mr. Mask submits that Justice Belobaba erred in his interpretation and application of rule 30.04, which states:

### *INSPECTION OF DOCUMENTS*

#### *Request to Inspect*

30.04 (1) A party who serves on another party a request to inspect documents (Form 30C) is entitled to inspect any document that is not privileged and that is referred to in the other party's affidavit of documents as being in that party's possession, control or power.

....

*Court may Order Production*

- (5) The court may at any time order production for inspection of documents that are not privileged and that are in the possession, control or power of a party.

*Court may Inspect to Determine Claim of Privilege*

- (6) Where privilege is claimed for a document, the court may inspect the document to determine the validity of the claim.

....

*Divided Disclosure or Production*

- (8) Where a document may become relevant only after the determination of an issue in the action and disclosure or production for inspection of the document before the issue is determined would seriously prejudice a party, the court on the party's motion may grant leave to withhold disclosure or production until after the issue has been determined.

**19** Mr. Mask submits that Justice Belobaba erred and it is a matter of importance to the public that he misinterpreted rule 30.04(8): (1) by applying it in the absence of the Defendants first moving for leave to withhold production of the documents referred to in their affidavits; (2) by reversing the onus on the Defendants to establish that the test under that rule had been met; and (3) by finding that the Defendants would be prejudiced if production of documents was ordered when the Defendants tendered no evidence of prejudice at all.

**20** Mr. Mask's submission ignores that it was his motion pursuant to rule 30.04 that brought the matter to the court and that his overreaching motion was made in the context of a claim for which leave was required under s. 138.8 of the Ontario *Securities Act*, which states:

*Leave to proceed*

138.8(1) No action may be commenced under section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that,

- (a) the action is being brought in good faith; and
- (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

*Same*

- (2) Upon an application under this section, the plaintiff and each defendant shall serve and file one or more affidavits setting forth the material facts upon which each intends to rely.

*Same*

- (3) The maker of such an affidavit may be examined on it in accordance with the rules of court.

....

**21** Mr. Mask's submission also mischaracterizes what Justice Belobaba did, which with some exceptions - where he ruled on the production of certain documents - was to dismiss the motion for production.

**22** Justice Belobaba did not order divided discovery under rule 30.04(8), but rather he used the analogy of that rule to delay production until the cross-examinations, and, in any event, Mr. Mask's submission does not elevate the production orders beyond a discretionary decision for the parties. The order for which leave to appeal is sought does not transcend to something important to the public.

**23** The use of rule 30.04(8) came as a very fair suggestion from the Defendants, who were successful in resisting a preemptive, overbroad, almost indeterminate request for the production of documents. This all becomes clear from paragraphs 46 and 47 of Justice Belobaba's judgment, where he states:

- 46. The request to inspect documents under Rule 30.04(2) is an important remedy when used fairly and appropriately. But it was never designed nor has it been judicially interpreted to allow counsel for Mr. Mask to request (with a straight face) all of the local exploration, production and financial records from every one

of Silvercorp's offices in China over the 18 months of the class period just because Ms. Tang, the company CFO, mentioned in her affidavit that "*E&Y attended at Silvercorp's offices in China where we retain local exploration, production and financial records.*" Rule 30.04(2) was never designed nor has it been judicially interpreted to allow counsel for Mr. Mask to request all of Silvercorp's quarterly and annual financial records without any further specification and without regard to any notions of relevance or proportionality just because they were generally mentioned in an affidavit narrative.

47. And if it was so designed, then class action judges have wisely restricted the Rule's scope and content to a manageable dimension that accords not only with the first principles of documentary production but also with the statutory language and underlying policy of the OSA leave provisions. Rule 30.04(2) cannot be used as a fishing rod whether in regular litigation or especially before cross-examinations have been conducted in an OSA leave motion.

**24** Justice Belobaba's decision was an exercise of discretion of interest to the immediate parties, and his decision is entitled to significant deference. It may be the case, and I do not decide the point, that some issue estoppels have been established about the production of some documents for the purpose of the leave and certification motions, and perhaps, but less likely about the production of the documents should the action proceed to examinations for discovery, but if that is true, Mr. Mask has only himself to blame for jumping the procedural queue.

**25** Mr. Mask submits that there are conflicting decisions about the application of rule 30.04, but this submission is not correct. The signal feature of Mr. Mask's motion under rule 30.04 was that it was made in the context of a claim governed by s. 138.8 of the Ontario *Securities Act*.

**26** What Justice Belobaba decided was a matter of first instance, and thus almost by definition, there cannot be a conflicting decision to a matter of first instance. What Justice Belobaba decided was how rule 34.04 operates when the plaintiff is advancing a claim under Part XXIII.1 of the *Securities Act*. While there are some decisions that have considered the policy issues associated with the procedure for advancing a claim under Part XXIII.1 of the *Securities Act*, these decisions do not conflict with Justice Belobaba's exploration of what is largely unmapped legal territory. The related decisions, discussed in Justice Belobaba's judgment, compliment but do not conflict with his decision.

**27** In determining what Justice Belobaba decided, it is necessary to recall what Mr. Mask asked him to decide. It was Mr. Mask's argument that compliance with a request to inspect under rule 30.04(2) was "mandatory and immediate." Justice Belobaba decided that this was not generally true but, more importantly, it was not true in the circumstances in which a claim under Part XXIII.1 of the Ontario *Securities Act* was being initiated. At paragraphs 15 and 16 of his judgment, Justice Belobaba stated:

15. The defendants take issue with the plaintiff on every level. But their core submission is more encompassing. The defendants say that Mr. Mask is scrambling to find evidence in the responding affidavits that he does not yet have for his OSA leave motion. Rather than proceeding with cross-examinations in accordance with the agreed-upon schedule, leading to the September leave and certification motions, the plaintiff is misusing rule 30.04(2) to try to obtain production of literally hundreds of confidential corporate documents before cross-examinations, and before his OSA leave motion is decided. This is a fishing expedition that is not only proscribed by the Rule 30.04(2) case law but is also precluded by the statutory language and policy behind the OSA leave motion provisions.
16. For the reasons that follow, I agree with the defendants. The plaintiff's rule 30.04(2) motion must be dismissed. I say this for two reasons: one, on the basis of the case law as it applies to rule 30.04(2) requests and two, on the basis of a broader policy concern about leave motions under s.138.8 of the OSA.

**28** Justice Belobaba did not decide that rule 30.04 was never available in the context of a claim being made under Part XXIII.1 of the Ontario *Securities Act*. He decided that a request to inspect under rule 30.04(2) was not mandatory and immediate and that the rule could not be used for a fishing expedition that is not only proscribed by the rule 30.04(2) case law but is also precluded by the statutory language and policy behind the Ontario *Securities Act*.

**29** To the extent that Justice Belobaba's decision was based on the normative case law about the production of documents it was not a matter of general importance and to the extent that his decision was based on the intersection of rule 30.04 and s. 138.8 of the Ontario *Securities Act*, there is no good reason to doubt the correctness of Justice Belobaba's order, which was properly employed to stop Mr. Mask from obtaining a preemptive production of documents and a preemptive and premature examination for discovery for a claim that requires leave to even be commenced.

### **C. CONCLUSION**

**30** For the above reasons, I dismiss the motion for leave.

**31** If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the Defendants' submissions within 20 days of the release of these Reasons for Decision, followed by Mr. Mask's submissions within a further 20 days.

P.M. PERELL J.

*Indexed as:*  
**Merling v. Southam Inc.**

**Between**  
**Henry Merling, (appellant), and**  
**Southam Inc., Paul Benedetti, Wade Hemsworth, Patrick J.**  
**Collins, Kirk Lapointe, John Gibson, Dana Robbins, Howard**  
**Elliott, Terry Cooke, Shaun N. Herron, Jack MacDonald, Jim**  
**Poling, Dave Wilson, Chester Waxman, Lea Prokaska, Wayne**  
**Marston and Admiral Distribution Inc., (respondent)**

[2000] O.J. No. 123

183 D.L.R. (4th) 748

128 O.A.C. 261

49 C.C.L.T. (2d) 247

42 C.P.C. (4th) 26

94 A.C.W.S. (3d) 368

No. C32116

Ontario Court of Appeal  
Toronto, Ontario

**McMurtry C.J.O., Catzman and Charron JJ.A.**

Heard: November 10, 1999.

Judgment: January 24, 2000.

(37 paras.)

*Libel and slander -- Publication -- Practice -- Notice of intention to bring action -- Pleadings --  
Striking out pleadings -- Grounds, action prescribed or barred by limitation period.*

Appeal by the plaintiff Merling from an order striking out certain paragraphs of the statement of

claim. Merling's claim alleged that 23 defamatory articles had been published in one of the defendant Southam's newspapers, the Hamilton Spectator. The Libel and Slander Act required that written notice of libel be given to a defendant newspaper within six weeks of the alleged libel coming to the attention of a plaintiff. Merling had knowledge of the alleged libels on the dates the articles were published, and had delivered three libel notices to the defendant complaining about the 23 articles. Thirteen of the 23 articles had been published more than six weeks prior to notice being given. The motions judge struck out all of the paragraphs in the statement of claim where notices had not been served within six weeks after the alleged libel had come to Merling's attention. Merling argued on appeal that it was open to a trial judge to find that the series of 23 articles could be treated as a single libel for purposes of the notice requirements in the Act. Merling also claimed to be exempted from the notice requirements of the Act because he had been a political candidate running for public office.

HELD: Appeal dismissed. Separate instances of alleged defamatory publications could not be combined for notice purposes unless they depended on other publications for their defamatory meaning. The 23 articles complained of could not be treated as a single libel for notice purposes. While there was no question that Merling was a candidate for public office, the notice exemption for political candidates only operated in cases having to do with retractions by the defendant newspaper and did not apply to Merling.

**Statutes, Regulations and Rules Cited:**

Courts of Justice Act, ss. 6(2), 19(1)(b).

Libel and Slander Act, R.S.O. 1990, c. L.12, ss. 5, 5(1), 5(2)(a), 5(2)(b), 5(2)(c), 5(2)(d)(i), 5(2)(d)(ii), 5(3), 6.

**Counsel:**

Joyce Harris, for the appellant.

Brian MacLeod Rogers, for the respondents, Paul Benedetti, Wade Hemsworth, Patrick J. Collins, Kirk LaPointe, John Gibson, Dana Robins, Howard Elliott, Shaun N. Herron, Jack MacDonald, Jim Poling and Lee Prokaska.

Gary J. Kuzyk, for the respondents Terry Cooke and Dave Wilson.

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The judgment of the Court was delivered by



**McMURTRY C.J.O.:--****NATURE OF THE APPEAL**

**1** The plaintiff appeals from an Order of Mr. Justice Crane dated May 4, 1999 striking out certain paragraphs of the statement of claim for failure to comply with the notice provisions of the Libel and Slander Act, R.S.O. 1990, c. L.12.

**2** The plaintiff also purports to appeal to this court from the order of Crane J. granting leave to amend various paragraphs of the statement of claim, failing which they would be struck out. That order was clearly interlocutory, and could only be appealed to the Divisional Court with leave of a judge of the Superior Court of Justice: sec. 19(1)(b) of the Courts of Justice Act. No leave having been sought and obtained, this court does not acquire jurisdiction to entertain that appeal under the provisions of sec. 6(2) of the Act: *Albert v. Spiegel* (1993), 17 C.P.C. (3d) 90; *Chitel v. Bank of Montreal*, [1999] O.J. No. 3988; *Manos Foods International Inc. v. Coca-Cola Ltd.*, [1999] O.J. No. 3623.

**3** I would therefore make no disposition of that portion of the appeal, without prejudice to any motion the plaintiff might make, if so advised, to a judge of the Superior Court of Justice for leave to appeal to the Divisional Court.

**THE FACTS**

**4** The statement of claim alleged some twenty-three separate defamatory articles published in the *Hamilton Spectator* by the defendant Southam Inc. The alleged defamatory words are particularized in the statement of claim in relation to each article as well as the identity of the specific defendants that are alleged to be responsible for each article.

**5** The *Hamilton Spectator*, a daily newspaper, published the articles between October 1997 and April 1998. The articles referred to the plaintiff who had been a long-standing alderman on city council until he lost the November 10, 1997 election.

**6** The Libel and Slander Act requires that written notice of libel in a newspaper be given to a defendant within six weeks of the alleged libel coming to the notice of a plaintiff. The Libel and Slander Act further provides that an action for libel in a newspaper must be commenced within three months of the alleged libel coming to a plaintiff's knowledge.

**7** It is agreed that the appellant had knowledge of the alleged libels on the dates that the articles were published. The appellant delivered three libel notices to the respondents on December 23, 1997, March 26 and May 29, 1998, complaining about the twenty-three articles. Three of these articles were published during the election campaign but seven weeks or more before the first libel notice. Nine of the articles complained of in the second libel notice were published more than six weeks before that notice was received. The only article complained of in the third libel notice was

published more than six weeks before that notice was received.

**8** The motions judge struck out all of the paragraphs of the statement of claim whose notices had not been served within six weeks after the alleged libel had come to the appellant's attention.

**9** The issues in relation to the appeal are as follows:

1. Would it be open to a trial judge to find that the series of 23 articles complained of could be treated as a "single libel" for purposes of the notice requirements of section 5(1) of the Libel and Slander Act?
2. Does section 5(3) of the Libel and Slander Act exempt the appellant from any requirement to provide a libel notice under section 5(1) of the Act because the appellant was a candidate in the November 10, 1997 municipal elections and therefore exempted from the notice requirements of s. 5(1) of the Act?

**10** The relevant sections of the Libel and Slander Act are as follows:

5(1) No action for libel in a newspaper or in a broadcast lies unless the plaintiff has, within six weeks after the alleged libel has come to the plaintiff's knowledge, given to the defendant notice in writing, specifying the matter complained of, which shall be served in the same manner as a statement of claim or by delivering it to a grown-up person at the chief office of the defendant.

(2) The plaintiff shall recover only actual damages if it appears on the trial,

- (a) that the alleged libel was published in good faith;
- (b) that the alleged libel did not involve a criminal charge;
- (c) that the publication of the alleged libel took place in mistake or misapprehension of the facts; and
- (d) that a full and fair retraction of any matter therein alleged to be erroneous,
  - (i) was published either in the next regular issue of the newspaper or in any regular issue thereof published within three days after the receipt of the notice mentioned in subsection (1) and was so published in as conspicuous a place and type as was the alleged libel, or
  - (ii) was broadcast either within a reasonable time or within three days after the receipt of the notice mentioned in subsection (1) and was so broadcast as conspicuously as was the alleged libel.

(3) This section does not apply to the case of a libel against any candidate for

- public office unless the retraction of the charge is made in a conspicuous manner at least five days before the election. R.S.O. 1980, c. 237, s. 5.
6. An action for a libel in a newspaper or in a broadcast shall be commenced within three months after the libel has come to the knowledge of the person defamed, but, where such an action is brought within that period, the action may include a claim for any other libel against the plaintiff by the defendant in the same newspaper or the same broadcasting station within a period of one year before the commencement of the action. R.S.O. 1980, c. 237, s. 6.

Issue Number 1: Could the 23 articles be treated as a "single libel"?

**11** In support of the appellant's submission that the twenty-three separate publications could be considered as a single libel by the trial judge we were referred to *Botiuk v. Toronto Free Press*, [1995] 3 S.C.R. 3. In *Botiuk* the Supreme Court of Canada held that in the special circumstances of that case several defendants could be held jointly and severally liable for the defamatory publications.

**12** Cory J. noted at p. 17 that "[t]he trial judge observed that counsel for all parties proceeded on the basis that although the contents of each document could be taken individually as to its defamatory nature, all three were to be considered together as creating a single act of libel. He proceeded on this basis."

**13** Furthermore, in relation to the issue of joint liability, Cory J., at pp. 27-28, referred to Fleming's *The Law of Torts*, 8th ed. 1992, and the author's comments at p. 225:

A tort is imputed to several persons as joint tortfeasors in three instances: agency, vicarious liability, and concerted action ... The critical element of the third is that those participating in the commission of the tort must have acted in furtherance of a common design ... Broadly speaking, this means a conspiracy with all participants acting in furtherance of the wrong, though it is probably not necessary that they should realize they are committing a tort.

**14** It should also be noted that Major J. in concurrent reasons made some observations with respect to defamatory publications where more than one defendant is involved. I infer from the comments of Major J. that he was somewhat sceptical about treating separate defamatory publications as one libel. In any event, he made the following observation at p. 41:

It is not clear how the trial judge concluded that he would treat all the defamatory publications as one libel. It was open to him to consider each act of publication as a separate cause of action. However, the trial judge had a discretion to combine the several closely related publications and to make a single award of damages in relation to those publications.

**15** Major J. went on to state (p. 42) that the trial judge "must have concluded that all the appellants acted in concert with one another and that the defamatory statements were published in furtherance of a common design."

**16** In this case, it is pleaded in the appellant's statement of claim that the "defendants embarked upon a deliberate campaign to defame, damage and discredit" the appellant "with a view to securing his defeat as a candidate for alderman." It should be noted, however, that the election was held on November 10, 1997 after only three of twenty-three articles complained of had been published.

**17** With respect to the defamatory statements in Botiuk, there was no requirement under the Libel and Slander Act to deliver a notice within six weeks after learning of the alleged libel. The important policy consideration in relation to correcting the public record as soon as possible in so far as a newspaper or broadcaster is concerned, therefore, had no application.

**18** The appellant also relies on a decision of this court, *Misir v. Toronto Star Newspapers Ltd.*, [1997] O.J. No. 4960. In that action the plaintiffs claimed that they were defamed in a series of twelve articles with respect to abuses in Ontario's car insurance system which were published in the *Toronto Star* in May and September, 1995. Only the last article, published on September 30, 1995, actually named the plaintiffs.

**19** The defendants brought a motion to dismiss all claims other than the libel alleged in the September 30th article on several grounds, the first being that the libels alleged in the May articles were statute barred because the required notice was not given.

**20** Laskin J.A. describes the purpose of section 5(1) of the Libel and Slander Act as follows at para. 13:

Section 5(1) is a condition precedent to the bringing of an action for libel. Lack of notice bars the action. The court has no power to relieve against or excuse non-compliance with the notice requirement. Notice enables the newspaper to publish a retraction, correcting, withdrawing or apologizing for statements alleged to be erroneous and to mitigate damages if the statements are found to be defamatory.

**21** Laskin J.A. goes on to state, in part, that "section 5(1), however, includes the element of discoverability. ... [and] the material before the motion judge does not disclose when [the plaintiffs] became aware of the publication of the May articles. On that ground alone, the alleged libels in the May article cannot now be held to be barred by s. 5(1) of the Act."

**22** Laskin J.A. also states that he would not give effect to the limitation period defence even if the plaintiffs had knowledge of the May articles when they were published. While the May articles may have been defamatory, they were not reasonably capable of defaming the plaintiff until they were raised in the September 30 article. Laskin J.A. also stated that even "had the plaintiffs given notice

within six weeks of the publication of the May articles and issued their statement of claim before September 30, 1995, the defendants undoubtedly would have moved to dismiss the action because the articles did not refer to the plaintiffs."

**23** In *Misir*, Laskin J.A. also referred to *Botiuk* and the comments of Major J. (at para. 20) where he stated that the "various defamatory publications in these appeals were closely intertwined and no basis has been shown that would warrant interfering with [the trial judge's] discretion."

**24** In conclusion, Laskin J.A. states at para. 18:

Applying these principles, the trier of fact will be entitled to find that the May articles were defamatory of the plaintiffs because of the publication of the September 30th article. Alternatively, the trier of fact may be entitled to treat the separate publications - the May and the September articles - as a single libel.

**25** In the appeal before us, the appellant alleged a separate libel in relation to each of the articles. While it could be argued that the Southam defendants "may have acted in furtherance of a common design" adopting the words of Fleming in *The Law of Torts*, quoted earlier, I am of the view that it would be incorrect to treat the articles as a single libel. The circumstances were quite different in *Botiuk* where counsel for all parties proceeded on the basis that the three documents were to be considered as capable of creating a single act of libel. Furthermore, the *Botiuk* case did not raise any issue with respect to section 5(1) of the Libel and Slander Act. In the special circumstances in *Misir*, Laskin J.A. held that the earlier articles were not reasonably capable of defaming the plaintiffs until the publication of the last article. Therefore, the notice provisions of the Libel and Slander Act did not apply before that time. In that case, the important policy reasons behind s. 5(1) of the Libel and Slander Act were not frustrated by such an interpretation. However, the policy reasons would be frustrated if the trier of fact was permitted to treat the twenty-three articles in the case before us as a single libel.

**26** In *Misir*, the court held that all of the articles together could be viewed as having a combined effect that was defamatory. There is no similar allegation by the appellant in this case, as he is clearly identifiable in each of the twenty-three articles. It is also acknowledged that the appellant had knowledge of the alleged libel on the various dates they were published.

**27** I am of the view that separate instances of alleged defamatory publications cannot be combined for notice purposes unless they depend on other publications for their defamatory meaning. The trier of fact may well be able to combine the defamations so found in an assessment of damages.

**28** I conclude that the twenty-three articles complained of cannot be treated as a "single libel" for the purposes of the notice requirements of s. 5(1) of the Libel and Slander Act.

Issue No. 2 - Was the appellant, as a candidate for public office, excepted from giving notice by

virtue of subsection 5(3) of the Libel and Slander Act?

**29** The appellant submits that the notice provision of section 5(1) does not apply to him by reason of section 5(3) which states that "this section", meaning s. 5 in its entirety, does not apply to the case of a libel against any candidate for public office.

**30** There is no question that the appellant was a candidate for public office up to the election of November 10, 1997. The appellant argues, however, that it should be left to the trial judge to determine whether the appellant was still a candidate after that date, perhaps for the next election. In my view, the submission has no merit as there was nothing in the material before us that would indicate that the appellant was still a candidate for some public office after the November 10th election.

**31** The interpretation of section 5(3) is a more difficult issue. Sub-section (3) states as follows:

(3) This section does not apply to the case of a libel against any candidate for public office unless the retraction of the charge is made in a conspicuous manner at least five days before the election.

**32** In my view, sub-section (3) is clearly ambiguous and the objective of the legislation must be considered in order to resolve the ambiguity, if possible.

**33** If a candidate for public office was excepted from giving notice under sub-section (1) of the Libel and Slander Act then the publisher of the libel could not reasonably have knowledge of any need to publish a retraction. This interpretation defeats the intention of the legislature which was to inform the publisher of any alleged libellous matter so as to afford the publisher an opportunity to retract the material in a timely manner. As stated earlier, there is clearly a strong public interest component in providing the opportunity for a retraction during an election campaign.

**34** Sub-section (3) of the Libel and Slander Act clearly contemplates a retraction. A purposive interpretation of section 5 strongly suggests that such a retraction contemplates the retraction referred to in sub-section (2). The phrase "the retraction" in sub-section (3) must refer to the retraction in sub-section (2) or one would expect that the Legislature would have used the phrase "a retraction" instead.

**35** In *Frisina v. Southam Press Ltd. et al.* (1980), 30 O.R. (2d) 65 at 68, Robins J. made this observation in relation to section 5:

It should be borne in mind that notice under s. 5 is intended to enable a newspaper to publish a full and fair retraction correcting, withdrawing or apologizing for statements alleged to be erroneous and to mitigate damages if the statements should be held to be defamatory. Clearly, it is prejudicial to a defendant to deprive it of the benefits of this section and in the absence of

express language doing so, a construction importing this result should not, in my opinion, be given the statute.

**36** I am in agreement with the statement of Robins J. in *Frisina* and, therefore, I interpret sub-section (3) of section 5 to be applicable only to sub-section (2) and not sub-section (1). The appellant was required to give proper notice pursuant to section 5(1) of the Libel and Slander Act.

**37** For these reasons, it is my view that the motions judge was correct in striking out certain paragraphs of the statement of claim. I would dismiss the appeal with costs.

McMURTRY C.J.O.

CATZMAN J.A. -- I agree.

CHARRON J.A. -- I agree.

Pg. 9

*Case Name:*  
**Nicolardi v. Daley**

**Between**  
**Joseph Nicolardi, and**  
**Bruce J. Daley, Noel Daley, Kenneth R. Byers and William C.**  
**Fanjoy**

[2002] O.J. No. 595

[2002] O.T.C. 129

112 A.C.W.S. (3d) 25

Court File No. 97-CV-126314CM

Ontario Superior Court of Justice

**Master Dash**

Heard: January 31, 2002.  
Judgment: February 15, 2002.

(48 paras.)

*Practice -- Discovery -- What documents must be produced -- Privileged documents, solicitor's files, notes, etc. -- Affidavit or list of documents -- Computer tapes, production of -- Inspection of property -- Costs -- Solicitor and client costs -- Entitlement to solicitor and client costs -- Thrown away costs -- Interlocutory proceedings.*

Motion by the plaintiff client for production of documents. The client also sought production of the computer hardware of the defendant solicitors for inspection. The client brought an action against the solicitors arising out of their representation of him in a personal injury action. He claimed in negligence and for breach of fiduciary and contractual duties. He also pleaded that the solicitors had failed to produce all relevant documents from the personal injury file. Access to the solicitors' computer was refused at the examination for discovery in January 2001. The client then brought a motion to compel inspection of the computer. In July 2001, the solicitors advised that all relevant documents had been purged from the computer and the motion was dismissed for lack of expert



evidence respecting the ability to recover purged data. In early November 2001, the client retained an expert and brought a second motion. On November 15, 2001, the client was advised that the computer might in fact have been discarded. This was confirmed by the solicitors on December 18, 2001. The client withdrew his motion for inspection, but sought his costs, including costs thrown away. The solicitors argued that the motion was doomed to failure on the grounds of relevance.

**HELD:** Motion withdrawn. Costs thrown away, including the costs of the return of the motion, were awarded against the solicitors on a substantial indemnity basis. The motion to compel inspection of the computer would not have failed even if there had been no error. Almost every document in the solicitors' file would have had a semblance of relevance to the action and would therefore have been producible. Relevant documents which had been purged from the computer were required to be included in Schedule C of the solicitors' affidavit of documents. There was specific evidence of the non-disclosure of relevant documents, such as memos and letters, which could have supported the client's allegations. The solicitors were aware, even before the computer was discarded, of the client's allegations that specific documents had not been produced. Although the solicitors had not deliberately attempted to mislead the client, they failed to take proper care to ensure the accuracy of the information they had conveyed as to the existence or state of the computer documents. This information was solely within their knowledge. The client had argued the initial motion for inspection and subsequently retained an expert as a direct result of the solicitors' erroneous reporting on the status of the computer. He was therefore entitled to reimbursement for the needless costs incurred as a result of the solicitors' negligent actions.

**Statutes, Regulations and Rules Cited:**

Courts of Justice Act, s. 131(1).

Ontario Rules of Civil Procedure, Rules 1.03, 30, 30.01(1)(a), 30.02(1), 30.02(2), 30.03(1), 30.03(2)(c), 30.06, 32.01(1), 57.01(1)(f)(ii), 57.01(4).

**Counsel:**

Neil C. Searles, for the plaintiff.

K.G. Triantafillopoulos, for the defendants.

**MASTER DASH** (endorsement):--

The Issue

**1** This motion concerns the obligation of a party to make production of documents stored

electronically on a computer, the right of a party to access the opposing party's computer hardware for the purpose of determining whether relevant documents stored electronically have been omitted from production, and the consequences that flow from a party providing inaccurate information about the status of its computers and stored data. In this action it is the computers of a law firm that the firm's former client seeks to access.

**2** The action is for solicitor's negligence and breach of fiduciary and contractual duties which allegedly occurred during the representation by the defendant Fanjoy of the plaintiff herein in an earlier personal injury action, referred to as Nicolardi v. Dhillon. In the course of that earlier proceeding, solicitor Fanjoy got off the record prior to trial. The plaintiff picked up his file from Fanjoy, but had reason to believe that certain documents were missing.

**3** In this action the plaintiff claims that Fanjoy has failed to produce all relevant documents from the Nicolardi v. Dhillon file and brought a motion to compel an inspection of Fanjoy's computer. When the motion was first heard the defendants advised that all documents from the relevant period had been "purged" from Fanjoy's computer. The motion was dismissed for lack of expert evidence respecting the ability to recover "purged" data. The plaintiff then retained an expert who opined as to the possibility of recovering "purged" data and brought the motion back on. The defendants then stated that in fact the computer had been discarded and no back up of the data was made. The plaintiff therefore withdrew the motion, but sought their costs of the motion, including the costs thrown away between the date that the erroneous information was given that the data was merely "purged" and the date that the new information was given that the computer was discarded.

**4** The defendant takes the position that the motion was doomed to failure in any event on the grounds of relevance. The defendant argues that even if the initial statement was correct that the computers were still in existence, but that the computer data had been purged, the plaintiff had failed to establish by proper evidence that the defendants had not produced any relevant documents that would have been recoverable from Fanjoy's computer. In essence the defendants assert that the plaintiff is engaged on a "fishing expedition."

#### The Chronology

**5** In May 1993 the plaintiff retained the defendant solicitor William Fanjoy of the law firm now known as Daley, Byers (the "firm") to represent him in an action arising out of an Oct. 2, 1989 motor vehicle accident, referred to as the Nicolardi v. Dhillon action. Such retainer continued until Jan. 25, 1996 when Fanjoy obtained an order removing the firm as solicitors of record for the plaintiff. In this action the plaintiff claims that the trial in Nicolardi v. Dhillon was adjourned on a number of occasions without his consent, and that prior to being removed from the record, Fanjoy indicated he wished to adjourn the latest trial date scheduled for Feb. 19, 1996 because he was not prepared and would be on vacation the week before trial.

**6** The plaintiff then paid his lawyer's account and picked up his file. The plaintiff reviewed the file contents and immediately came to the conclusion that documents were missing. The plaintiff

wrote Fanjoy on Feb. 1, 1996 indicating that a number of items were missing including an OHIP summary, expert and medical reports, a police report, correspondence and Fanjoy's list of questions to witnesses for the trial scheduled for later that month. This was followed up with two further letters in February respecting missing documents. The plaintiff now states that these letters constituted notice to Fanjoy that the contents of his file were in question, and that Fanjoy had an obligation to preserve and reconstruct his file. The Nicolardi v. Dhillon trial was adjourned because the plaintiff had no solicitor, and he alleged that he did not have the full contents of his file.

**7** The plaintiff suggests that the firm was further put on notice in the summer of 1996 when he obtained and served an appointment to assess the firm's accounts. (The assessment was ultimately held in abeyance once this action was instituted.) In September 1996 the plaintiff retained Alan Davis, the plaintiff's current solicitor in this action, to obtain the complete file from Fanjoy. In September a substantial portion of the "missing" correspondence was delivered to the plaintiff. Davis reviewed Fanjoy's entire physical file and at the plaintiff's discovery in this action admitted that there were no further documents in the file that would have advanced the Nicolardi v. Dhillon trial. Davis was, however, not retained to represent the plaintiff as counsel in the Nicolardi v. Dhillon trial.

**8** The Nicolardi v. Dhillon trial was conducted before a judge and jury in February 1997. The plaintiff represented himself and obtained judgement for \$111,019 plus costs.

**9** In April 1997 Davis was again retained by the plaintiff, this time to represent him in an action against Fanjoy and on April 2, 1997 Davis put Fanjoy and the firm on notice of the claim.

**10** This action was commenced against Fanjoy and the partners of the firm on June 17, 1997 alleging negligence, and breach of contract, retainer and fiduciary duties. The plaintiff pleads numerous alleged breaches, but for purposes of this motion includes an allegation in the statement of claim that the defendants "failed to deliver up to the Plaintiff the complete contents of their file documents relating to the subject motor vehicle claim". The plaintiff claims that when the statement of claim was served in July 1997 this was further notice that these defendants should have preserved their file contents.

**11** On Jan. 5, 1998 Fanjoy delivered an affidavit of documents, which did not include documents stored on the firm's computers. At the plaintiff's examination for discovery in this action on Aug. 13, 1999, the plaintiff gave details about his own computer, and indicated on the record that he wanted to look at Fanjoy's hard drive.

**12** On Jan. 16, 2001, on the third day of the examination for discovery of Fanjoy, Davis asked that "all of the records" on the firm's computers as they relate to the Nicolardi v. Dhillon matter be made available should he determine at a later date that he wished to inspect information stored on the computers. Thomas Wright, solicitor for the defendants refused that request, but indicated he would be prepared to discuss it with Davis later if a specific reason were given. That refusal forms the genesis of the motions that have come before me for access to the firm's computers.

**13** On May 25, 2001 the firm produced a letter confirming that Fanjoy continued to have access to any of the firm's computer records respecting the Nicolardi v. Dhillon matter, although Fanjoy left the firm on Dec. 31, 1999.

**14** On June 25, 2001 Davis wrote to Wright directly requesting disclosure of all documents stored on the firm's computer and an opportunity to view and have complete access to the computer. On July 10, 2001 Wright wrote back to Davis and asked if Davis believed that there were some memoranda or correspondence on the firm's computers, which had not been produced. Wright stated that Ms. Breda, the firm's office manager, confirmed that all accounting information on the firm's computer had been produced, and that Fanjoy's current assistant, Jean MacRae, confirmed that all non-accounting documentation that would have been prepared and stored on the firm's computers during the time period that Fanjoy represented Nicolardi (1993 to 1996) had been "purged", probably in 1997 or 1998. Wright stated that all available paper documents had been produced.

**15** On July 16, 2001 Davis responded by asking whether the documents were purged or whether they were deleted in a fashion where retrieval were possible, when the documents were purged and whether the hard drive that originally contained the data still exists. Davis indicated he required the answer right away or he would bring a motion for production of all computer documents. Later that day the plaintiff served a motion to compel production of computer records (as well as other relief).

**16** In support of this motion Nicolardi swore an affidavit in which he stated that when he received the file on Jan. 29, 1996 it was apparent that not all documents had been delivered, and in particular correspondence sent and received and copies of exhibits that had been produced by Dhillon at his discovery in the earlier action. He claimed that even after further documents were delivered by Fanjoy in September 1996, correspondence to non-parties requesting information, correspondence between Fanjoy and Dhillon's solicitor, and Dhillon's exhibits were still missing. The plaintiff stated that the missing documents would confirm the extent to which Fanjoy's actions were negligent or in breach of obligations owed to the plaintiff. He was also looking for evidence to support his allegation that the trial had been adjourned a number of times without his consent.

**17** On July 20, 2001 the motion came before me. Mr. Davis argued that a computer expert may be able to recover "purged" documents from any hard drive or other electronic storage media which may once have contained documents relating to the Nicolardi v. Dhillon action. Ms. Murray, acting for the defendants on the motion, argued that the plaintiff was only entitled to a disk which contained relevant information, and since the disk was purged, there was nothing to produce. She claimed that "purged" meant deleted and not retrievable.

**18** I refused the request to allow an expert to examine the computers and wrote brief reasons on the motion record. I stated that "it would be very intrusive to allow access to a law firm's computers to look for these documents, and there are privacy issues respecting other clients. I am not satisfied that such information still exists electronically or that there is any basis to engage in such examination." I stated that given the contrary opinions expressed about whether "purged"

documents could be retrieved, I would need expert evidence to satisfy me that a computer expert could retrieve "purged" information from the firm's computers. I ordered \$850 costs to the defendants in the cause (although the motion also dealt with additional refusals.) I then ordered the action into case management.

**19** The plaintiff thereafter instructed his solicitors to retain an expert in computer data recovery to provide evidence as to the recoverability of "purged" documents. On Nov. 8, 2001 the plaintiff served a second motion, returnable Nov. 15, 2001 to require the defendants to produce to the plaintiff, his solicitors, and a consulting computer technician all computer hardware containing any documentation created in the Nicolardi v. Dhillon matter. Included was an affidavit from Tim Margeson, an expert in data recovery, who opined that there was a 50% chance that some or all of the alleged "purged" data could be recovered, and that it depended on factors such as the condition of the hard drive, what usage it had experienced since the data was purged and whether it had ever been damaged. Margeson indicated the recovery software he used would perform particular specified or date sensitive searches.

**20** On Nov. 12, 2001, Sandi Smith, a lawyer acting for the defendants, wrote to Davis requesting evidence that the software used by Margeson would be sensitive enough to retrieve only Nicolardi v. Dhillon documents, an undertaking from Davis he would retrieve only Nicolardi v. Dhillon documents, and that the plaintiff would pay for the firm's down time. On Nov. 14, 2001 Neil Searles, a solicitor in Mr. Davis's firm, responded to the confidentiality concerns raised, confirmed that the plaintiff would be responsible for the firm's reasonable expenses and that the plaintiff would be responsible for the expert's costs, whether or not the search was successful.

**21** On the return of the motion before me on Nov. 15, 2001 Ms. Smith indicted for the first time that the computer may have been discarded, but that Fanjoy was away and when he returned the correct information would be provided. She requested, and obtained, an adjournment to Nov. 29, 2001 to file responding material, and if it should turn out that the computer still exists, to examine the expert, Mr. Margeson.

**22** At a case conference on Nov. 27, 2001 Mr. Wright stated that according to Fanjoy's secretary, the computers in use from 1993 to 1996 went out of the firm's possession in January 1997. I ordered the defendants to enquire and advise within 3 weeks whether a tape or other backup of the computer data existed, whether there was a transfer of data to a storage medium or other computer when the computer in question was removed from the firm's offices, and where Fanjoy's computer went. Mr. Wright indicated that he would thoroughly investigate and advise within 3 weeks. I adjourned the motion then scheduled for Nov. 29 to a date to be confirmed with the motions clerk.

**23** The full story was ultimately revealed for the first time in a letter from Mr. Wright to Mr. Davis on Dec. 18, 2001. He stated that according to Ms. Breda, the office manager, Fanjoy purchased a new computer in January 1997, but she had nothing to do with purging files from lawyers' computers. When the new computers were purchased, the old computers were put into

storage and it is her best recollection that "the contents of it were deleted." Attempts to sell or give away the old computers were unsuccessful and in 1999 the storage space was rented out and she cleared out the contents of the storage area including the computer. The computer was then thrown into a dumpster by the custodian. The firm's computers were neither networked nor backed up. Wright stated that Carrie Penner, Fanjoy's secretary during the relevant time, and up to Jan. 31, 1997, had no recollection of purging the Nicolardi file, although she did purge files when space was needed after a file was closed. He stated that Fanjoy had some data transferred from his old to his new computer, but did not believe it included the Nicolardi file because of the time and expense in converting the DOS based data given that the file was closed. Finally, he stated that Jean MacRae, Fanjoy's current secretary has never seen the Nicolardi file on any computers she has used since 1998.

**24** The motion came back on before me on January 31, 2002. The plaintiff filed a further supplementary affidavit sworn Jan. 25, 2002. In summary, Nicolardi claimed that Fanjoy first knew about the allegation of missing documents in February 1996 when Nicolardi wrote to him complaining about missing documents, and that the defendants knew in August 1999 at Nicolardi's examination that an investigation of Fanjoy's computer would be requested. Nicolardi stated that Fanjoy was directly asked for access to his computer at Fanjoy's examination on Jan. 16, 2001, which request was refused. He noted that when the plaintiff brought on his first motion for computer access in July 2001 the defendants stated the records had been "purged". After having then incurred the expense of obtaining expert evidence in early November 2001 that the purged documents might be recovered, he was advised on the return of the motion on Nov. 15, 2001 that the computer may have been discarded, a fact which was subsequently confirmed in Wright's letter of Dec. 18. He indicated that the expense of bringing the motion and hiring the expert "has proven to be fruitless because the computer never existed all along." He stated that "the sole remaining issue relating to the said Motion is what costs should be made payable as a consequence". The plaintiff is seeking an award of costs against the defendants on a substantial indemnity basis.

Was the Motion for Inspection of the Defendants' Computer Well Founded?

**25** The definition of "document" in rule 1.03 as amended includes "data and information in electronic form." In rule 30.01(1)(a) as amended "document" for purposes of Rule 30 includes "data and information recorded or stored by means of any device." This would include documents stored on a computer's hard drive, a diskette, a tape backup or any other storage medium. Rule 30.02(1) provides that "every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed," and rule 30.02(2) requires production of such documents for inspection unless privilege is claimed. Pursuant to rule 30.03(1), such documents are to be disclosed in the party's affidavit of documents.

**26** Rule 30.03(2)(c) requires a party to disclose in its affidavit of documents (Schedule C) all documents formerly in the party's possession but no longer in the party's possession "together with a statement as to when and how the party lost possession ... over them and their present location."

Relevant documents on a computer which have been purged must be listed in Schedule C if no electronic or paper copy exists.

**27** Rule 30.06 provides that if the court is satisfied "by any evidence" that a relevant document in a party's possession, control or power may have been omitted from the party's affidavit of documents, the court may order "the disclosure or production for inspection of the document."

**28** The documents of course must have a semblance of relevance to the issues in the action as framed by the pleadings. When it is alleged by a client that a former solicitor was negligent, or failed to properly prepare for trial or obtain critical evidence, or acted without a client's authority, then virtually every document in the solicitor's file would have a semblance of relevance to the action, if properly pleaded, and would be producible subject to privilege claims. I find that the statement of claim herein is sufficiently particularized so as to require production of all documents in the solicitor's file, particularly as the client has specifically pleaded that the solicitor failed to deliver to him all of the file documents.

**29** Since the definition of document in the Rules includes data stored electronically, then if production for inspection of a document stored on computer is ordered, then such production can only be made if the court orders a hard copy of all documents to be printed, or orders a duplicate of the electronic data be reproduced and delivered on diskette, or allows an inspection of the storage device in which the electronic information resides. Where a party on proper evidence convinces the court that documents that have not been produced are likely stored on a computer's hard drive or other electronic storage medium, but the party in possession of the computer asserts it has printed and produced all that it has, then the only solution that would allow inspection of a document, would be inspection of the storage medium itself, in this case the firm's hard drive, with proper safeguards.

**30** This is further supported by rule 32.01(1) which allows the court to make an order for the inspection of property "where it appears to be necessary for the proper determination of an issue in a proceeding." Terms may be imposed such as the "manner of inspection" or "the payment of compensation."

**31** Investigating a party's computers is a very intrusive exercise exposing all of a party's stored data, whether or not related to the action in issue. This is particularly sensitive when dealing with the hard drive on a law firm's computer. In the case of a law firm's computers there are issues that transcend the lawsuit between the law firm and one particular client, namely the expectation of privacy of other clients of the firm. Safeguards would therefore be required to ensure that the firm's duty of confidentiality to other clients is not breached. Evidence would be required by a data recovery expert, as was provided by Mr. Margeson on this motion, that the data recovery software used was sensitive enough to search for and recover only documents relevant to the matter in question and an undertaking would be required that the expert, the plaintiff and his solicitors not review, retain or disclose unrelated documents.

**32** It will not be every lawsuit against a lawyer for negligence that will expose the lawyer's computer to inspection by his former client. Actions in which such inspection will be ordered are likely to be rare. Lawyers, perhaps more than other litigants, are aware of the duties imposed under the Rules to disclose all relevant documents and to produce all relevant documents that are not privileged. When a party swears in an affidavit of documents that he has produced all relevant documents in his possession, power or control, it would take convincing evidence to go behind that affidavit and order an investigation of the firm's computers. Such evidence can come by way of affidavit of the client (or other knowledgeable person), or by examination for discovery or cross examination of the lawyer on his affidavit of documents. The evidence must convince the court of a real likelihood that documents not disclosed in the lawyer's affidavit of documents exist or have once existed.

**33** It is not sufficient for a client to say in the course of a lawsuit, "I believe there are more documents," or "it appears to me that documents are being hidden." That would be no more than a fishing expedition. There must be specific evidence of non-disclosure. This is an unusual case. Mr. Nicolardi has, since he first received his file from his former solicitor in January 1996, put his solicitor on notice of specific documents not produced. He has maintained that position throughout the Nicolardi v. Dhillon action, and in this lawsuit. Some of the missing documents of course would not reside on the firm's computers, such as expert reports, OHIP summaries and correspondence from Dhillon's solicitors. However, it is likely that letters to the experts, letters to OHIP, and letters to Dhillon's solicitors would have been created on the firm's computers, and unless the computers were discarded or the documents irretrievably deleted, would continue to reside electronically on the firm's computers. It is unknown whether memos of conversations between Fanjoy and either Nicolardi or Dhillon's solicitors, and memos to file were created, and if so, whether created on the computer or by handwriting.

**34** Therefore, contrary to the arguments of Mr. Triantafillopoulos, the solicitor for the defendant law firm on this motion, I do not believe that the motion for production of the computer for examination was merely a fishing expedition. I find that sufficient evidence has been produced to satisfy me of a real likelihood that documents which were not disclosed or produced by the defendants in this action either exist, or may once have existed, on the firm's computers. I further find that such documents would have a semblance of relevance to the issues in this action. Firstly, the failure to produce correspondence with experts may have hampered Nicolardi's prosecution of the action at the Nicolardi v. Dhillon trial, and missing memos and correspondence may provide evidence of the solicitor's negligence or failure to follow the instructions of his client with respect to settlement and with respect to the adjournments that were allegedly made without the plaintiff's consent. As Mr. Searles candidly puts it, he claims he has a right to see if there is a "smoking gun." I do not determine whether in fact such documents actually existed, or that if they did exist, they would have provided evidence in support of the plaintiff's allegations. I have determined only that sufficient evidence has been proffered to demonstrate a real likelihood that the documents probably once existed and have not been produced, and they are documents that have a semblance of relevance to the issues as framed in this action.



**35** Therefore, I do not accept the argument of Mr. Triantafillopoulos that even if there had been no error, and that the computers still existed with "purged" data, the motion to compel an inspection of the computers would have failed on the ground of relevance, i.e that the plaintiff failed to demonstrate that documents exist that were not produced.

**36** I also do not accept the argument of Mr. Triantafillopoulos that relevance fails because Mr. Davis inspected Fanjoy's file in September 1996 and found nothing further that would have been helpful at the trial. This begs the question as to whether other documents existed electronically at that time that were not provided in hard copy to Mr. Davis.

**37** However, given that the defendant now discloses that the computers were discarded in 1999, that no electronic backup of the data exists, and that the contents of the Nicolardi v. Dhillon file were never transferred to Fanjoy's new computer, the plaintiff quite appropriately withdraws his motion. Simply put, the computer no longer exists and there is no electronic data to examine.

Should Costs Thrown Away of the Motion be Paid Due to the Erroneous Advice?

**38** The plaintiff claims he was put to considerable expense between the time that he retained a data recovery expert following the initial dismissal of the motion in July 2001 until he was advised in November or December of 2001 that the computers were discarded with no backup of data. The firm was certainly aware that "missing documents" were an issue in February 1996 when they received the letter from the plaintiff, long before the computers were discarded. Further, the statement of claim herein was served in July 1997 and contained an allegation that the defendants "failed to deliver up to the Plaintiff the complete contents of their file." As it is not before me I decline to determine whether as a result of such notice the defendants were required to retain their complete computer file, or whether such retention would have required preservation of the original hard drive or an electronic copy.

**39** What I am required to determine is whether the defendant should bear the plaintiff's costs as a result of erroneous information as to the existence and state of the electronic records.

**40** A party's obligation to disclose and produce all documents in its possession, control or power, includes an obligation to accurately disclose all such documents in its sworn affidavit of documents, including documents once in a party's possession, but no longer in their possession. As indicated "documents" include documents that exist only in electronic form, and documents no longer in a party's possession would include documents purged from a computer where no paper or electronic copy exists. I am of the opinion that when a failure to deliver all documents is an issue in the action, the vigilance required to accurately convey this information is even more critical. Further, even in the absence of this requirement in the rules, a party should take proper care to ensure that information it conveys as to the existence or state of documents is accurate, particularly when the information it conveys is uniquely within the knowledge of that party. It is certainly foreseeable that an opposing party may rely on information provided as to the existence of documents, or as to the existence or state of a computer in which documents reside electronically, and may incur costs in

pursuing production or inspection of those documents.

**41** Mr. Searles suggests that the error was a result either of the defendants deliberately misleading the plaintiff, or alternatively of a "slipshod" attempt to obtain the correct information. Mr. Triantafillopoulos states that there was no malfeasance on the part of his clients. I accept that there is no evidence of a deliberate attempt to mislead. On the other hand, the information as to the state of the computers was solely within the knowledge of the defendants and their staff, who were aware as early as 1999 that the computers had been discarded, yet failed to take all reasonable and proper steps to convey that information accurately to the plaintiff.

**42** The initial refusal to provide access to the computers was made at the Jan. 10, 2001 discovery of Fanjoy, who was represented at that time by Mr. Wright. On July 10, 2001 Mr. Wright indicated that the computer files had been "purged", and this was confirmed by Ms. Murray on the return of the initial motion on July 20, 2001. It was not until the first motion was dismissed, and a second motion brought on Nov. 15, 2001 with expert evidence as to the likelihood of recovery of the data from "purged" files that the first hint was given that the computer itself may have been discarded. It was not until Mr. Wright's letter of Dec. 18, 2001 that accurate and complete particulars of the destruction of the computer and the absence of backup was given. That information should have been accurately provided either at the Jan. 10, 2001 discovery, or if the information was not then known, should have been provided in response to Mr. Davis's request on June 25, 2001. If the information was still not known then the defendants should have requested further time to provide an accurate response. The defendants must take responsibility for the erroneous information provided on June 10 and June 20, 2001. If they were not then in possession of the "full story" of what happened to the computers they should have said so.

**43** If the plaintiff had known on the return of the initial motion on July 20, 2001 that the computer was no longer in existence, it would not have argued that refusal on the July 20 motion, and thereby possibly avoided the costs awarded on that motion, would not have retained the services of a data recovery expert, and would not have prepared for and attended on a second motion to compel inspection of the computer.

**44** Section 131(1) of the Courts of Justice Act provides that "costs of and incidental to ... a step in the proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid." Rule 57.01(4) confirms that costs may be awarded in respect to a particular issue, and that all or a portion of costs may be awarded on a substantial indemnity basis. One of the factors in determining a cost award is set out in rule 57.01(1)(f)(ii), where a step was "taken through negligence [or] mistake." It is clear that the plaintiff took the steps it did as a direct result of the defendants' erroneous reporting on the status of the computer. I am of the view that the plaintiff incurred these costs solely as a result of the negligent actions of the defendants and that he should be fully indemnified for the needless costs he was put to in pursuing this motion. Further, parties are to be deterred from providing information that reasonably may be relied upon, when they have not taken the necessary steps to ensure the information is accurate. Therefore costs thrown

away of the plaintiff, including the costs of the return of the motion on Jan. 31 will be on a substantial indemnity basis.

#### Quantum of Costs

**45** The plaintiff attached as an exhibit to his affidavit of Jan. 25, 2002 his lawyer's fee ledger from August 20 to November 27, 2001, described by the plaintiff as "a copy of all docket entries recorded by my counsel in connection with the herein motion." Mr. Searles advises that these entries relate to the costs thrown away caused by the erroneous information and total approximately \$6000. He states that the entries deal with the data retrieval issue, including preparing the November motion record and preparing for and attending on the motion Nov. 15, communication with defendant's counsel and with his client and consultation with the expert. He has blacked out docket entries related to other matters, and these entries are not included in the above total. In addition the plaintiff seeks his costs of the preparation for and attendance on Jan. 31, 2002, which is not included in the \$6000. The plaintiff is not seeking reimbursement of the actual costs paid to the expert. He is not seeking the costs of the motion of July 20, 2001 when costs were awarded to the defendant, notwithstanding that such motion may have been avoided had the defendants provided accurate information.

**46** I have considerable difficulty in fixing the quantum of those costs. The only information before me as to quantum is the client ledger of the plaintiff's law firm, attached an exhibit to the client's affidavit. Mr. Triantafillopoulos opined that it was "preposterous" that all these dockets deal with the issue of acting upon the erroneous information. Mr. Searles admits that that some of the recorded time that is not blacked out may have dealt partly with other issues and suggests there be some apportionment but provided no guidance as to the extent of such apportionment. For example, one docket included correspondence to Dhillon's solicitor, which dealt with a different motion that had been launched by the plaintiff.

**47** For a party to recover substantial indemnification he should provide proper evidence by way of an affidavit from the solicitor verifying the time spent, detailing the work done with greater specificity, and explaining the short forms and entries on the ledger. In the absence of such evidence I must do the best I am able with the material at my disposal. I find that a reasonable assessment of costs of this motion thrown away to be in the amount of \$3000, plus an additional \$750 for the motion before me on Jan. 31, 2002, for a total of \$3750.

#### Order

**48** The plaintiff's motion to compel production of documents and to produce for inspection the defendant's computer hardware is withdrawn. The defendants shall pay to the plaintiff the costs of this motion, including costs thrown away, fixed in the amount of \$3750 within 30 days of the release of these reasons.

MASTER DASH

*Case Name:*

**Plaza Consulting Inc. (c.o.b. QA Consultants) v. Grieve**

**RE: Plaza Consulting Inc. operating as QA Consultants,  
Plaintiff, and  
Brian Grieve, Thomas Jefferson Downey, LeRoy Singh and  
Cloudpipe Inc., Defendants**

[2013] O.J. No. 3769

2013 ONSC 5338

Court File No. CV-12-468516

Ontario Superior Court of Justice

**E.M. Morgan J.**

Heard: July 24, 2013.

Judgment: August 16, 2013.

(46 paras.)

*Civil litigation -- Civil procedure -- Injunctions -- Circumstances when not granted -- Considerations affecting grant -- Irreparable injury -- Serious issue to be tried or strong prima facie case -- Motion by plaintiff for interlocutory injunction restraining former employees from wrongfully soliciting its clients and employees and requiring defendants to return any of its confidential and proprietary information in their possession dismissed -- Defendants created new company that competed with plaintiff -- Evidence did not establish there was anything unique about plaintiff's business operations -- No reliable evidence that any confidential information was actually taken by defendants or that any employees had been solicited -- No irreparable harm established.*

Motion by the plaintiff for an interlocutory injunction restraining the defendants from wrongfully soliciting its clients and employees and requiring the defendants to return any of its confidential and proprietary information that was in their possession. The individual defendants were former employees of the plaintiff. The defendants formed a new company that was in the same technology consulting business as the plaintiff and as such was a competitor of the plaintiff. The defendants denied having engaged in any misappropriation of confidential or proprietary information of the

plaintiff or in any wrongful solicitations. The defendants also argued that they were lower level employees of the plaintiff and should not be considered to be subject to any fiduciary obligations.

HELD: Motion dismissed. There was no reliable evidence that any confidential information was actually taken by the defendants. The plaintiff's marketing strategies, business approaches, training methods, and its much-vaunted Discovery Portfolio Assessment were described by the plaintiff in terms that could only be seen as highly generic. The plaintiff appeared to have put an attractive label on business methods that all good consultant firms would pursue. It seemed that much of what had been called confidential information was supplied to the defendants by parties who were doing so for their own benefit rather than to their detriment. The restrictive covenants in the employment contracts were sufficiently vague that the allegations made against the defendants were not clear breaches of those covenants. The plaintiff put forward nothing to suggest that the defendants were seeking new employees or actively soliciting the plaintiff's employees. The evidence was controversial at best with respect to whether any solicitation of employees occurred in the past, and non-existent as to whether there was any ongoing solicitation. There was no irreparable harm and no grounds for an injunction. If there had been any breach of an enforceable covenant not to solicit the plaintiff's employees, this could be addressed through an award of damages.

**Counsel:**

*Allyson M. Fischer and Mitchell R. Smith, for the Plaintiff.*

*Lou Brzezinski and Lea Nebel, for the Defendants.*

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**ENDORSEMENT**

**1 E.M. MORGAN J.:**-- The Plaintiff is in the technology consulting business. It provides integrated software consulting to numerous clients. According to its sole officer and director, Alex Rodov, it is the largest consultancy of its kind in North America.

**2** This motion is for an interlocutory injunction. The Plaintiff alleges that the Defendants are competing unfairly by appropriating its confidential information and wrongfully soliciting its clients and employees, contrary to their employment agreements and in breach of their fiduciary duties. It seeks an order that the Defendants refrain from these solicitations and requiring the Defendants to return any of its confidential and proprietary information that is in their possession.

**3** The Defendants are former employees or consultants of the Plaintiff as well as the company that they incorporated for their new business. They each worked for the Plaintiff for a different number of months, but the time frame of their employment goes from approximately mid-2010 to

mid-2012.

**4** The new company used by the Defendants, Cloudpipe Inc., is in the same technology consulting business as the Plaintiff and as such is a competitor of the Plaintiff. Rodov states in an affidavit that until the Defendants established Cloudpipe Inc., the Plaintiff was the only company in Canada to provide this type of technology and software consulting service, and that all of the other companies in this business operated offshore.

**5** While the Defendants concede that Cloudpipe Inc. provides software and other technology-oriented consulting services to business clients, they deny any wrongdoing. In particular, they deny having engaged in any misappropriation of confidential or proprietary information to the Plaintiff or in any wrongful solicitations.

**6** It is the Defendants' position that the Plaintiff's supposedly confidential information amounts to little more than generic marketing and business practices which are common in their industry. The Defendants also state that any customers of the Plaintiff's that they have approached had already left the Plaintiff and were seeking new technology consultants, and that any of the Plaintiff's employees with whom they have spoken had either left their job with the Plaintiff or independently responded to a job advertisement posted by the Defendants.

**7** Turning first to the allegation about unfair competition and misappropriation of confidential information, there is a debate between counsel as to what test applies to the Plaintiff's injunction request.

**8** Counsel for the Plaintiff submits that the ordinary test set out by the Supreme Court in *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 S.C.R. 311 applies, and that in the first stage of analysis the Plaintiff must merely show that there is a serious issue to be tried. Counsel for the Defendants, on the other hand, submits that the Plaintiff is attempting to enforce a restrictive covenant and to claim breach of fiduciary duties arising in the employment context, and that these claims require a moving party to establish a strong *prima facie* case rather than just an arguable case for trial. *Brown v First Contact Software Consultants Inc.* (2009), 77 C.C.E.L. (3d) 295, at para 44 (SCJ).

**9** The Defendants also argue that they were in any case lower level employees of the Plaintiff and should not be considered to be subject to any fiduciary obligations. They also argue that the employment agreements are not enforceable. Furthermore, they contend that they took no information belonging to the Plaintiff, and that all of the business methods that they have utilized since leaving the Plaintiff and starting their own business are of their own design or are standard methods in the technology consultant business.

**10** In *Imperial Sheet Metal Ltd. v Landry*, 2007 NBCA 51, at para 16, the New Brunswick Court of Appeal concluded that although the two tests are worded differently, there is in practice little difference between them. Key to both tests, however, is that that something must exist that requires

protection. It matters little whether the Plaintiff has to strongly establish or merely arguably establish that the Defendants took its corporate information and or practices in breach of their duties if it cannot establish that it had any such information to be taken.

**11** Under the circumstances, ascertaining the factual basis of the Plaintiff's claim is more important than identifying the precise legal test. Whether dealing with employees who allegedly misappropriate their former employer's business methods in breach of a restrictive covenant or in breach of fiduciary duties, the employer must at the very least establish that it "has a proprietary interest that is entitled to protection." *Aon Consulting Inc. v Watson Wyatt & Co.*, [2005] O.J. No. 3472, 2005 CarswellOnt 3706, at para 16 (SCJ).

**12** Plaintiff's counsel submits that at least one of the Defendants, Brian Grieve, had access to the Plaintiff's business plan containing its expansion plans, its patent applications for its business methodologies, its marketing strategies, recruiting methods, training materials, and its pricing strategy. Plaintiff's counsel further submits that Grieve had access to the Plaintiff's proprietary Discovery Portfolio Assessment (DPA) process by which it diagnosis clients' technology issues and needs.

**13** Despite the Plaintiff's strenuous assertions about the Defendants' breach their duty of confidentiality, the record before me contains no reliable evidence that any confidential information was actually taken by the Defendants.

**14** Rodov's affidavit and cross-examination evidence demonstrates that there is little to argue about here. The Plaintiff's marketing strategies, business approaches, training methods, and its much-vaunted DPA, are described by Rodov in terms that can only be seen as highly generic. Its "training curriculum" appears to be copied from a publicly available book, while its recruiting methods are to seek out the "brightest" and "smartest" students from university programs and to give them a test which it borrowed from a freely available internet site.

**15** The Plaintiff's primary business strategy was to establish a "Test Factory" and a "North American Test Centre of Excellence" that competes with offshore technology centres. The Plaintiff claims that these are the very methodologies pioneered by it and now used by the Defendants. These methodologies, however, are explained by Rodov as consisting of a group of skilled technology people working together in one dedicated work space. Other than a dedicated business premises and what Rodov describes as "top level" facilities, it is hard to pin down in Rodov's description any unique features of the "Test Factory".

**16** It is equally difficult to discern in Rodov's descriptions any unique or confidential aspects of the DPA that are in need of special protection. As indicated, the Plaintiff considers the DPA the centerpiece of its proprietary business method. In describing it, Rodov has characterized the DPA as essentially a series of meetings with the client over a two to four week period that are designed to assess the client's specific technology needs. In other words, the Plaintiff appears to have put an attractive label on business methods that all good consultant firms would pursue.

**17** Trade secrets and confidential business methodologies and other information "must not be of a general nature but rather must be specific." *GasTOPS Ltd. v Forsyth*, 2009 CarswellOnt 5773, at para 776 (SCJ). It is important to examine, at least in a preliminary way, "[t]he extent to which the information is known outside the specific business and to the trade generally". *Techform Products Ltd. v Wolda*, [2000] O.J. No. 5676, 2000 CarswellOnt 1402, at para 73 (SCJ). Indeed, it almost goes without say that, "information that is extensively known to the other members of the interested community (i.e., the trade) is not protectable." *Ibid.*

**18** In the Plaintiff's case, there is little in the record that could establish that there was anything unique about the Plaintiff's business operations. Indeed, Rodov's evidence is that his business is essentially the same as numerous technology consultants, except that for the convenience of Canadian clients it is located in Canada while its competitors (except for the Defendants) are located offshore.

**19** For the most part, Rodov's evidence confirms that the most innovative parts of the Plaintiff's business are the labels put onto what are otherwise widely shared approaches in the technology consultant industry. The Plaintiff is not the only business to have thought of hiring the best and the brightest, providing them with a dedicated and well equipped work space, and ensuring that they meet with each client to carefully evaluate the client's needs.

**20** This is to take nothing away from the Plaintiff's business, which by all accounts has been successful and profitable. It is simply to say that there was little in the way of proprietary or confidential business methodologies for the Defendants to have appropriated, even if they wanted to.

**21** Moreover, a party who receives allegedly confidential information and who is accused of misusing it must have done so to the detriment of the party that provided the information in the first place. *International Corona Resources Ltd. v Lac Minerals Ltd.* (1989), 26 C.P.R. (3d) 97, at 103 (SCC). In the circumstances alleged by the Plaintiff, it would appear that much of what has been called confidential information was supplied to the Defendants by parties who were doing so for their own benefit rather than to their detriment.

**22** Two of the more specific pieces of supposedly confidential information that the Plaintiff alleges the Defendants misappropriated appear to have been created not by the Plaintiff at all, but by their former clients. This includes a "GLAM QA Framework for assessing the technology needs of Goldcorp and a Test Plan for use with BIMM. Both Goldcorp and BIMM are companies whose business the Plaintiff alleges was wrongfully solicited by the Defendants; indeed, the Plaintiff contends that the use of its specially designed documents formed part of the unfair solicitation process.

**23** On cross-examination, however, Rodov was unsure whether the Plaintiff had even created the GLAM QA Framework for Goldcorp, conceding that it may have been a joint effort between the Plaintiff and Goldcorp itself. As for the BIMM Test Plan, the Defendants' evidence appears



uncontradicted that this document was created by BIMM rather than by the Plaintiff.

**24** It appears in both of these cases that the documents in question are little more than a list of technology questions and issues, and responses to those issues, encountered by Goldcorp and BIMM, respectively. They are the type of operational outlines that would be created by virtually any consultant servicing those clients, and were created specifically by the clients themselves so that their technology consultants would provide focused service. The clients provided the same information to the Defendants as they had provided to the Plaintiff, and they raise no complaint about the Defendants using it.

**25** In all, the evidentiary record regarding the alleged misuse of confidential information is so scanty that it is difficult to take seriously. The Plaintiff has spent its energy attempting to establish the misuse or wrongful appropriation side of the equation, but has failed to address in a credible way the key first question -- i.e. whether the information used by the Defendants was confidential or proprietary at all.

**26** To state what I believe should be obvious, it is not enough to assert that the Defendants have appropriated the Plaintiff's methods, and to contend that there is a serious issue to be tried with respect to that appropriation, when the methods themselves are described by the Plaintiff's sole officer and director as generic business practices: good service, competitive prices, and a dedicated work space. As Sachs J. said in *Techform, supra*, at para 73, "[a] trade secret cannot be within the realm of general skills or knowledge."

**27** Turning to the allegation that the Defendants in their new business have misappropriated the Plaintiff's clients, the Plaintiff contends that at least four of its clients are now clients of the Defendants' new business contrary to the specific prohibition on that activity in their respective employment agreements. These clients include Goldcorp and BIMM, as mentioned above, as well as the CIBC and a company called Praxair. The Plaintiff claims that the Defendants' new company now services those clients, and that the Defendants were able to approach these clients because they had been part of the team servicing the very same clients when they worked for the Plaintiff.

**28** The Plaintiff further points out that each of the three individual Defendants had employment agreements with the Plaintiff that specifically prohibited their working for or communicating with any of the Plaintiff's clients for periods ranging from 6 to 12 months. The Plaintiff contends that in soliciting and, through their new company, servicing the four named clients, the Defendants have breached their specific obligations in their employment agreements.

**29** Further, the Plaintiff submits that the Defendants were, during the time of their employment, fiduciaries of the Plaintiff, and so the solicitation of the Plaintiff's clients also amounts to a breach of fiduciary duties as well as a breach of contract.

**30** The Defendants make a number of points in respond to these claims. They submit, as indicated above, that they were not fiduciaries of the Plaintiff but rather were non-managerial

employees and/or consultants who fulfilled discreet tasks for the Plaintiff. In addition, Grieve, the one Defendant who is alleged to have been the most involved with the subject clients, alleges that he was terminated without cause. Citing *Zesta Engineering Ltd. v. Cloutier*, [2001] O.J. No. 621, 2001 CanLII 28294, at para 316 (SCJ), Defendants' counsel argues that Grieve's termination was a repudiation of the employment agreement, and that Grieve was thereby relieved from any further obligations thereunder (including the non-solicitation clause).

**31** Most importantly, the Defendants state that none of the four companies identified by the Plaintiff were actually the Plaintiff's clients. Evidence suggests that two of them, Goldcorp and Praxair, were former clients of the Plaintiff's who had already left the Plaintiff and came to the Defendants because they were actively seeking a new technology consulting firm. The third company, CIBC, appears to have once been a prospective client of the Plaintiff's, but never was solicited by the Defendants as an actual client of the Plaintiff's. And the fourth, BIMM, was a client of the Plaintiff's for a small, discreet task that lasted only a couple of days.

**32** In addition to the evidentiary weaknesses in the Plaintiff's claim of wrongful solicitation, all of the alleged solicitations occurred over a year ago. There is no evidence whatsoever of ongoing contact with any of the Plaintiff's clients, and therefore there is no irreparable harm taking place that cannot be compensated later in damages.

**33** To this, the Plaintiff replies that "where a moving party proves a clear breach by a defendant of a negative covenant, the Court will enforce the covenant on an interlocutory basis and proof of irreparable harm will not be required." *Canpages Inc. v. Quebecor Media Inc.*, 2008 CarswellOnt 3193, at para 8 (SCJ). While I concede that this court in *Canpages* found that the irreparable harm test is generally not applied to a breach of a negative covenant, the essential word in the *Canpages* ruling is "clear". Indeed, in *Canpages* itself, the court qualified the quoted statement in the very next sentence, and admonished that, "this proposition is applicable only in cases where the plaintiff's case is strong and where there is little doubt on the merits."

**34** In the present case, the alleged breach by the Defendants is anything but clear. The employment agreements do not define the word "client", and it is certainly not clear to me that this word would include either former or prospective clients.

**35** Defendants' counsel has submitted that the restrictive covenant may therefore be so vague as to be unenforceable. I am not inclined to opine on whether that is the case and will leave that question to the trial judge. I do find, however, that the restrictive covenants are sufficiently vague that the allegations made against the Defendants are not "clear" breaches of those covenants. I certainly cannot conclude that there is "little doubt on the merits", as it was put in *Canpage s*. Under the circumstances, irreparable harm would have to be demonstrated before injunctive relief was warranted, and no such irreparable harm has been demonstrated by the Plaintiff.

**36** The same analysis applies to the Plaintiff's allegation that the Defendants have solicited the Plaintiff's employees. The Plaintiff's claim applies to two employees in particular -- Amor Abanes

and Felipe De Oliveira. In respect of both of these employees, the Defendants have presented evidence suggesting that they were already looking for a new job before contacting the Defendants and that no solicitation was done.

**37** In any case, there is again no evidence of irreparable harm. The Plaintiff puts forward nothing to suggest that the Defendants are seeking new employees or actively soliciting the Plaintiff's employees. The evidence is controversial at best with respect to whether any solicitation of employees occurred in the past, and non-existent as to whether there is any ongoing solicitation.

**38** Under these circumstances, there is no irreparable harm and no grounds for an injunction. If indeed there has been any breach of an enforceable covenant not to solicit the Plaintiff's employees, this can be addressed later through an award of damages.

**39** Overall, the claim for an injunction prohibiting the further solicitation of clients and employees has the ring of a loaded question. That is, without any proof or even hint of ongoing solicitation it seeks to enjoin the Defendants from continuing to do that which they arguably have never done. On the record before me, it is quite clear that the test for an interlocutory injunction has not been met.

**40** Finally, the Plaintiff seeks an order with respect to certain computer materials held by the Defendants. Apparently, the Defendants had to use some of their own equipment when they were working for the Plaintiff, including a computer hard drive, some memory sticks, and a laptop belonging to one of the Defendants.

**41** The Defendants have advised the Plaintiff that any materials that were still lingering on these devices that were from their time working for the Plaintiff have been deleted, but the Plaintiff is not satisfied with this response. Rather, the Plaintiff wants this equipment to be handed over to it so that its own computer experts can conduct a forensic review to ensure that no confidential information belonging to the Plaintiff remains on it.

**42** The Plaintiff points to no specific information that it suspects is on the particular equipment in issue. It also makes no specific allegation that information on these devices is actually being used on an ongoing basis. Of course, the Defendants concede that they did use their own equipment when doing work for the Plaintiff, but they point out that this was a routine and expected part of their work and was done with the knowledge and encouragement of Rodov.

**43** As an interim measure, the Defendants have handed the equipment in question to their own legal counsel. Defendants' counsel has, in turn, advised the court that they have reviewed the equipment and have not found any material belonging to the Plaintiff. This assurance should be sufficient for the Plaintiffs at this point. Having required the Defendants to use some of their own computer equipment, the Plaintiff cannot now demand access to the Defendants' equipment without providing some evidence that this equipment actually still contains the Plaintiff's materials. A compelled forensic analysis of another party's computer equipment is an invasive order that would

require stronger evidence of misuse or failure to disclose than is contained in the present motion record.

**44** In the event that there is some doubt about any remaining information or documentation in the possession of the Defendants, those issues can be addressed in the discovery process. Indeed, if any forensic review is necessary in respect of any computer equipment, that can be raised during discovery. There is no reason for an order of any kind at this stage in the proceedings.

**45** The Plaintiff's motion is therefore dismissed in its entirety.

**46** Counsel indicated to me at the end of the hearing that they wish to make submissions as to costs once my ruling has been issued. These submissions may be made in writing, and are to be sent directly to my attention at the courthouse in Toronto rather than filed through the motions office. I would ask counsel to forward these submissions to me within two weeks of the date of this endorsement.

E.M. MORGAN J.

cp/e/qlrxg/qlpmg/qljac

2005 CarswellOnt 734  
Ontario Superior Court of Justice (Divisional Court)

Roach v. Oniel

2005 CarswellOnt 734, [2005] O.J. No. 745, 137 A.C.W.S. (3d) 474

**CHARLES C. ROACH (Plaintiff / Appellant) and MICHAEL  
ONIEL and LEGAL AID ONTARIO (Defendants / Respondents)**

Molloy J.

Heard: February 24, 2005  
Judgment: February 28, 2005  
Docket: 62/05

Counsel: Samuel Willoughby for Appellant  
Lee David for Respondent, Legal Aid Ontario  
Michael Oniel for himself

Subject: Civil Practice and Procedure

**Headnote**

**Civil practice and procedure**

***Molloy J.:***

**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.



*Case Name:*

**Rossi v. Vaughan (City)**

**RE: Patrizia Emilia Rossi, Plaintiff, and  
The Corporation of the City of Vaughan, Micahel DiBiase, John  
Zipay, Kathleen Tribe and Resolve 360 Inc., Defendants**

[2010] O.J. No. 203

2010 ONSC 214

184 A.C.W.S. (3d) 635

2010 CarswellOnt 201

Court File No. 07-CV-326105PD2

Ontario Superior Court of Justice

**Master M. Sproat**

Heard: January 7, 2010.

Judgment: January 19, 2010.

(16 paras.)

*Civil litigation -- Civil procedure -- Discovery -- Electronic discovery and production -- Scope -- Reasonableness of request -- Motion by plaintiff to compel defendant DiBiase, a former mayor, to answer undertakings and refusals and for an order to compel the defendant City to conduct a review of its server and computer systems and provide any correspondence to or from DiBiase concerning the matters at issue in the action dismissed -- City had already searched its computer system and found no documents subject to disclosure -- Plaintiff was not entitled to forensically examine DiBiase's computers.*

Motion by the plaintiff to compel the defendant DiBiase to answer undertakings and refusals and for an order to compel the defendant City to conduct a review of its server and computer systems and provide any correspondence to or from DiBiase concerning the matters at issue in the action. DiBiase was a former mayor of the City. The essence of the motion respecting him was to obtain

forensic inspection of the computer he used as mayor and his personal computer.

HELD: Motion dismissed. The City had already undertaken a search of its computer system and no documents subject to disclosure were found. There was no basis for questioning the parameters of the City's search. There was no evidence to suggest that the City had failed to disclose relevant documents. The plaintiff was not entitled to forensically examine DiBiase's computers. There was no evidence that there were relevant documents or data in electronic form contained on either of the computers. There was no evidence of non-disclosure or of any omission from production and disclosure obligations on the part of DiBiase. There was no basis to depart from the general rule that a litigant had the initial or primary onus or obligation of disclosing relevant documents in the first instance.

**Counsel:**

D. Powrie, counsel for the plaintiff.

A. Tibble, counsel for Vaughan (City).

J. deVries, counsel for DiBiase.

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**REASONS FOR DECISION**

**1 MASTER M. SPROAT:**-- This motion by the plaintiff was brought for an order to compel the defendant, Michael DiBiase ("DiBiase") to answer undertakings and refusals and for an order to compel the defendant, The Corporation of the City of Vaughan (the "City") to conduct a review of its server and computer systems and provide any correspondence to or from DiBiase concerning the matters at issue in the action.

**2** For the reasons that follow, the motion is dismissed in its entirety, but without prejudice to a further motion on further evidence, if so advised.

**3** Dealing first with the motion against the City, it is clear from the affidavit of Glenn Christie filed in response that the City has already conducted a search of its computer system and that no emails or other documents were discovered that would be subject to production and/or disclosure. I am not prepared to order the City to undertake a search that it has already done.

**4** The plaintiff accepts that the search took place but takes issue with the parameters of the search. The plaintiff submits that without the court order, the plaintiff has no ability to question the parameters of the search. In my view, the plaintiff's concerns are baseless. It is important to note that the plaintiff at no time questioned the City as to its efforts to search or requested particulars as

to the parameters of the search that was undertaken. More importantly, there was no evidence to suggest that the City had failed to disclose relevant documents.

**5** As to the motion against DiBiase, the essence of the motion was to obtain a forensic inspection of two computers: the first being a computer used by DiBiase when he was the mayor of the City and which computer he purchased upon leaving office (referred to on the hearing as the "Business Computer") and the second being DiBiase's personal computer purchased in April, 2006 and kept at his personal residence (referred to on the hearing as the "Personal Computer").

**6** Counsel for DiBiase took the position on the motion that while the issue of the forensic investigation of the Business Computer was properly considered by the court, the issue of the forensic investigation of the Personal Computer was not. This position was based on the submission that the notice of motion did not specifically refer to a forensic inspection of the Personal Computer. I disagree. Q. 343 of the transcript on DiBiase's examination for discovery sets forth the refusal to preserve the Personal Computer and to allow the plaintiff to review the Personal Computer for relevant documents. The plaintiff moved on this refusal.

**7** It is my view that the issues of the forensic investigation of both the Business Computer and the Personal Computer are properly before the court on this motion.

**8** However, for the following reasons, it is my view that the plaintiff is not entitled to forensically examine the Business Computer and the Personal Computer.

**9** First, it is important to note that there is no evidence that there are relevant documents or data in electronic form contained on either of the computers.

**10** Second, there is no evidence of non-disclosure or of any omission from production and disclosure obligations on the part of DiBiase. I accept that the threshold of proof is a low one, but nonetheless, there must be some evidence that there has been an omission such that production and/or inspection ought to be ordered. (See *Vector Transportation Services Inc. v. Traffic Tech Inc.* [1008] O.J. No. 1020 (S.C.) per Perell J. at paras. 15 and 16).

**11** Third, there is no basis to depart from the general rule that a litigant has the initial or primary onus or obligation of disclosing relevant documents in the first instance. There is no right to rummage through an opponent's filing cabinets (or in this case, computers) to see if there is anything interesting. (See *Borst v. Zilli* [2009] O.J. No. 4115 (S.C.) per Master Brott at para. 5).

**12** Related to this point was a submission that a party was entitled, as of right, to a forensic obligation of a computer or, alternatively, that because this action involved allegations of political conspiracy, the plaintiff had a stronger entitlement to the relief sought. In my view, there is no entitlement as of right to the investigation sought by the plaintiff absent some evidence of non disclosure or omission and upon a proper consideration of the issue of proportionality now required under the new rules. Furthermore, and the nature of this case does not give this plaintiff a better

entitlement than other plaintiffs. All litigants have a right to disclosure of relevant documents, regardless of the nature of the case. I do accept that electronic discovery may have a greater role or be of greater importance in certain cases over others depending on the allegations in the action (for example, if there is a dispute concerning when a key document was prepared), but this is not such a case so far as this court can discern.

**13** Fourth, the investigation requested by the plaintiff is costly, in my experience. There is nothing in the record that would support such expense. The new rules require the court to consider proportionality and there is no evidence to suggest that the benefits of such an investigation would warrant the costs.

**14** Fifth, it would appear, in any event, that DiBiase did complete a computer search and that this search did not disclose any further relevant documents.

**15** For these reasons, I dismiss the motion as to the forensic investigation of the computers.

**16** If the parties cannot resolve the issue of costs, written submissions as to costs shall be filed as follows:

- (a) the defendants' costs outlines to be delivered to the plaintiff by January 25, 2010, maximum 3 pages in length;
- (b) the plaintiff's responding submissions to be delivered to the defendants by February 1, 2010, maximum 3 pages;
- (c) the defendants' reply submissions, if any to be delivered to the plaintiff by February 5, 2010, maximum 2 pages; and
- (d) the defendants shall deliver to the court, via my registrar, Gbemi Kester, a complete brief or package containing all costs submissions by no later than February 12, 2010. The parties shall not file the costs submissions on a piece-meal basis.

Orders accordingly.

MASTER M. SPROAT

*Case Name:*  
**Simmonds v. Simmonds**

**Between**  
**Garfield Simmonds, Applicant (Appellant), and**  
**Michelle Simmonds, Respondent (Respondent in Appeal)**

[2013] O.J. No. 4680

2013 ONCA 479

117 O.R. (3d) 479

Docket: C56555

Ontario Court of Appeal  
Toronto, Ontario

**A. Hoy A.C.J.O., K.N. Feldman and J.M. Simmons JJ.A.**

Heard: July 5, 2013.  
Oral judgment: July 5, 2013.  
Released: July 16, 2013.

(6 paras.)

*Family law -- Maintenance and support -- Practice and procedure -- Courts -- Jurisdiction -- Contempt -- Orders -- Interim or interlocutory orders -- Appeals and judicial review -- Appeal by husband from dismissal of motion for a finding wife was in contempt for failing to comply with court order dismissed -- Motion judge found wife complied with order that required her to provide disclosure in respect of her income loss claim arising from motor vehicle accident that occurred in 2004 -- Court lacked jurisdiction as motion judge's order was interlocutory and not binding on trial judge.*

**Appeal From:**

On appeal from the order of Justice E. Ria Tzimas of the Superior Court of Justice, dated January 22, 2013.

**Counsel:**

Peter M. Callahan, for the appellant.

Orlando da Silva Santos, for the respondent.

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**ENDORSEMENT**

The judgment of the Court was delivered by

**1** THE COURT (orally):-- The appellant appeals the January 22, 2013 order of the motion judge dismissing his motion for a finding that the respondent was in contempt of court because she had failed to comply with the August 3, 2012 order of Mossip J. requiring her to provide specified disclosure in respect of her income loss claim arising from the motor vehicle accident that occurred in 2004.

**2** The motion judge reviewed the materials that had been provided and found that the respondent had complied with the order of Mossip J. and provided all relevant disclosure.

**3** The appellant relies on *Pimiskern v. Brophay*, [2013] O.J. No. 505 to argue that an order dismissing a motion for contempt is a final order.

**4** The respondent concedes that an order finding contempt is a final order but argues that because the motion judge dismissed the motion for contempt, the motion judge's order is interlocutory and not binding on the trial judge, and that an appeal accordingly does not lie to this court.

**5** We agree with the respondent and reject the conclusion reached in *Pimiskern*.

**6** This appeal is accordingly dismissed for lack of jurisdiction. Costs are fixed in the amount of \$3,500 all inclusive.

A. HOY A.C.J.O.

K.N. FELDMAN J.A.

J.M. SIMMONS J.A.

*Case Name:*

**Waldman v. Thomson Reuters Canada Ltd.**

**Between**

**Lorne Waldman, Plaintiff (Appellant), and  
Thomson Reuters Canada Limited, Defendant (Respondent)**

[2015] O.J. No. 395

2015 ONCA 53

2015 CarswellOnt 857

249 A.C.W.S. (3d) 251

127 C.P.R. (4th) 401

330 O.A.C. 142

71 C.P.C. (7th) 33

Docket: C58585

Ontario Court of Appeal

**J.M. Simmons, J.L. MacFarland and M.L. Benotto JJ.A.**

Heard: November 18, 2014.

Judgment: January 28, 2015.

(25 paras.)

*Civil litigation -- Civil procedure -- Parties -- Class or representative action -- Settlements -- Approval -- Appeals -- Interlocutory or final orders -- Quashing or dismissal of -- Appeal by plaintiff from refusal to approve settlement of class action quashed -- Parties entered into agreement to settle copyright class action -- Judge refused to approve settlement, retainer agreement and class counsel fees -- Appeal properly lay to Divisional Court with leave as order appealed from was interlocutory because there was no approval and therefore there was no finality.*

**Statutes, Regulations and Rules Cited:**

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 29(2)

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 6(1)(b), s. 6(2), s. 6(3), s. 19(1)(a)

Rules of Civil Procedure, Rule 49.09

**Appeal From:**

On appeal from the order of Justice Paul M. Perell of the Superior Court of Justice, dated March 4, 2014, with reasons reported at 2014 ONSC 1288.

**Counsel:**

Paul J. Pape and Shantona Chaudhury, for the appellant.

Andrew E. Bernstein and Sarah Whitmore, for the respondent.

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The judgment of the Court was delivered by

**1 J.L. MacFARLAND J.A.:**-- On October 3, 2013, the appellant and the respondent reached an agreement to settle a copyright infringement class action. By order dated March 4, 2014, Perell J. refused to approve the settlement, as well as the retainer agreement and class counsel fees sought as part of that agreement. The appellant, supported by the respondent, appeals that refusal to this court.

**2** Prior to the hearing of the appeal, this court, through its senior legal officer, raised with counsel the question of whether this court has jurisdiction to hear the appeal. Counsel were asked to address whether the appeal properly lay to this court or to the Divisional Court with leave.

**3** It is of note that both the appellant and the respondent are allied in interest on this appeal and there is no party *contra*. Prior to the hearing on the issue of jurisdiction, counsel were informed that, should the court conclude the appeal was properly before this court, the hearing of the appeal on the merits would be adjourned to permit the appointment of *amicus*.

**Background**

**4** The nature of the proceeding, the terms of the settlement agreement and the motion judge's disposition are all succinctly set out in the first eight paragraphs of his reasons as follows:

[1] In this certified class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 [("*CPA*")], the Representative Plaintiff, Lorne Waldman, moves for



approval of a settlement of a copyright infringement class action against Thomson Reuters Canada Limited ("Thomson").

[2] The action was commenced because Thomson, through its legal publishing branch known as Carswell, makes available court documents authored by the lawyers who constitute the Class Members. Carswell copies documents from public court files, replicates them on an electronic database and search and retrieval service known as "Litigator", and makes the copies available to subscribers. Documents authored by Mr. Waldman, who is a lawyer, were included in Litigator without his permission.

[3] In the class action, Mr. Waldman alleges that Thomson infringes the copyright of the Class Members under the *Canadian Copyright Act*, R.S.C. 1985, c. C-42 by making available, without permission and for a fee, copies of court documents authored by Class Members and their law firms.

[4] Subject to court approval, Mr. Waldman and Thomson have signed a Settlement Agreement. Under the Agreement, Thomson settles a \$350,000 cy-près trust fund to support public interest litigation. Thomson also agrees to make changes to the copyright notices on Litigator and to the terms of its contract with subscribers. The individual Class Members, who may opt-out, receive no monetary award under the Settlement Agreement, and they sign a release and grant a non-exclusive license of their copyrights in the court documents to Thomson.

[5] Class Counsel, Sack Goldblatt Mitchell LLP, which was assisted by Deeth Williams Wall LLP in regard to copyright law, moves for approval of its contingent fee agreement with Mr. Waldman and for court approval of counsel fees of \$825,000, all inclusive. Class Counsel's fee is paid as a term of the proposed Settlement Agreement.

[6] The proposed settlement is supported by, among others, Mr. Waldman, Class Counsel, a blue-ribbon group of lawyers who are prepared to be trustees for the cy-près trust fund, several Canadian law schools, the Canadian Bar Association, the Canadian Civil Liberties Association, and the British Columbia Civil Liberties Association.

[7] After a thorough notice program, the Settlement Agreement is opposed by seven Class Members.

[8] For the reasons that follow, I conclude that the proposed Settlement is not fair, reasonable, and in the best interests of the Class Members. I, therefore, dismiss the motions for settlement and fee approval.

## Analysis

5 Section 29(2) of the *Class Proceedings Act, 1992, S.O. 1992, c. 6 ("CPA")* provides that a settlement of a class proceeding is not binding unless approved by the court. The CPA does not address the appeal route from an order refusing to approve a settlement agreement. Accordingly, the *Courts of Justice Act, R.S.O. 1990, c. C.43 ("CJA")* governs the appeal route in this case: see *Locking v. Armtec Infrastructure Inc.*, 2012 ONCA 774, 299 O.A.C. 20, at para. 11.

6 Section 6(1)(b) of the CJA provides that:

An appeal lies to the Court of Appeal from ... a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19(1)(a) or an order from which an appeal lies to the Divisional Court under another Act.

7 The preliminary issue in determining the jurisdiction of this court is therefore whether the order appealed from is final or interlocutory. If the order is final, this court has jurisdiction over the matter, subject to certain exceptions outlined in s. 19(1)(a) of the CJA or the provisions of another Act. If the order is interlocutory, then this court has no jurisdiction and an appeal lies to the Divisional Court with leave, pursuant to s. 19(1)(b) of the CJA.

8 The question of whether an order is final or interlocutory is one that has vexed courts for years. Courts asked to consider this issue often begin with the observation of Middleton J.A. in *Hendrickson v. Kallio*, [1932] O.R. 675 (C.A.), at p. 678:

The interlocutory order from which there is no appeal is an order which does not determine the real matter in dispute between the parties -- the very subject matter of the litigation, but only some matter collateral. It may be final in the sense that it determines the very question raised by the application, but it is interlocutory if the merits of the case remain to be determined.

9 The appellant asserts that the order which is the subject of this appeal dealt with three separate matters:

1. approval of the settlement agreement;

2. approval of the fee retainer agreement; and
3. approval of the fees sought.<sup>1</sup>

On the motion, the appellant sought approval of the fee retainer agreement and the approval of class counsel fees. I assume that, in refusing to approve the fees sought, the motion judge also effectively refused to approve the fee agreement. The appellant treated these two issues as distinct on appeal.

**10** The appellant submits that this court has the jurisdiction to hear the appeal from all three parts of the order. There are two prongs to the appellant's argument. First, he submits that the motion judge's refusal to approve the settlement agreement was a final order. Second, he submits that, even if the motion judge's refusal to approve the settlement was an interlocutory order, his refusal to approve the fee agreements and the amount of fees sought was a final order, and this court therefore has jurisdiction to review the entire order pursuant to s. 6(2) of the *CJA*.

**11** Section 6(2) of the *CJA* provides that:

The Court of Appeal has jurisdiction to hear and determine an appeal that lies to the Divisional Court or the Superior Court of Justice if an appeal in the same proceeding lies to and is taken to the Court of Appeal.

**12** I shall begin by addressing the second part of this argument.

**13** The appellant submits that this court has previously determined that appeals in relation to the approval of fee retainer agreements and fees lie to this court. In this respect he relies on this court's decision in *Sutts, Strosberg LLP v. Atlas Cold Storage Holdings Inc.*, 2009 ONCA 690, 311 D.L.R. (4th) 323.

**14** I cannot agree that *Sutts, Strosberg* stands for the proposition that all appeals from orders related to fee retainer agreements and fees lie to this court. In *Sutts, Strosberg*, this court did indeed refuse to quash an appeal from the order of a motion judge reducing the amount of fees payable pursuant to a settlement agreement. In *that case*, however, the motion judge had approved the settlement agreement but, in so doing, she reduced the amount of fees sought by class counsel. She ultimately approved both the settlement and the reduced quantum of fees. Her order finally determined the issues between the parties and, subject to an appeal, the litigation.

**15** This case differs from *Sutts, Strosberg* because here there was no approval and therefore, in my view, no finality -- here, the litigation continues.

**16** I would therefore reject the appellant's argument that the appeal from the portion of the motion judge's order refusing to approve the fee agreement and the fees themselves is properly before this court on the basis of the *Sutts, Strosberg* decision.

**17** Even if I had concluded otherwise, the appellant's submission that this court would then have jurisdiction under s. 6(2) of the *CJA* to hear the appeal in respect of the entire order would still fail. An appeal from an interlocutory order only "lies to the Divisional Court" within the meaning of s. 6(2) once leave to appeal that order has been granted: see *Albert v. Spiegel* (1993), 17 C.P.C. (3d) 90 (Ont. C.A.), at p. 91; *Merling v. Southam Inc.* (2000), 128 O.A.C. 261, at para. 2; *Cole v. Hamilton* (2002), 60 O.R. (3d) 284 (C.A.), at paras. 6 and 15; *Diversitel Communications Inc. v. Glacier Bay Inc.* (2004), 181 O.A.C. 6 (C.A.), at para. 6. If the motion judge's order refusing to approve the settlement agreement was interlocutory, then this court still would not have jurisdiction to hear the appeal from that order under s. 6(2) of the *CJA* unless and until the appellant obtained leave to appeal to the Divisional Court. Only then could the appellant bring a motion, under s. 6(3) of the *CJA* to transfer that appeal to this court. Section 6(3) of the *CJA* provides that:

The Court of Appeal may, on motion, transfer an appeal that has already been commenced in the Divisional Court or the Superior Court of Justice to the Court of Appeal for the purpose of subsection (2).

**18** The appellant, supported by the respondent, argues that, in any event, an appeal lies to this court under s. 6(1)(b) of the *CJA* because the order refusing to approve the settlement agreement is a final order of a judge of the Superior Court. He argues that this is a final order because, although the litigation could continue, the settlement agreement has been finally dismissed. The appellant submits that, where the approval of a settlement has been determined, substantive rights are affected. He argues that this situation is therefore different from the dismissal of a motion for summary judgment, which typically neither finally determines an issue in the litigation nor affects substantive rights.

**19** More specifically, the appellant argues that the settlement agreement is a contract that binds the parties, even if it is subject to court approval, and that the motion judge's refusal to approve the settlement puts an end to these contractual rights. This, he submits, amounts to a final order. In this regard the appellant relies on this court's decision in *Wu Estate v. Zurich Insurance Co.* (2006), 211 O.A.C. 133, 268 D.L.R. (4th) 670.

**20** In my view, *Wu Estate* gives no comfort to the parties. In that case, the order under appeal dismissed an application, brought by the deceased plaintiff's estate, her estate trustees, and her relatives, to enforce minutes of settlement. It was a final order because it finally ended the particular proceeding before the court: see *Buck Brothers Ltd. v. Frontenac Builders Ltd.* (1994), 19 O.R. (3d) 97, 73 O.A.C. 298 (C.A.). The same cannot be said of the motion judge's order refusing to approve the settlement agreement in this case. That order did not end the class proceeding; rather, it requires the proceeding to continue.

**21** Likewise, the jurisprudence dealing with appellate jurisdiction over orders made pursuant to rule 49.09 does not assist the parties in this case. When a judge concludes, on a motion under rule 49.09, that an action has not been settled, that factual issue is finally determined for the purposes of

the litigation: see *Fusarelli v. Dube*, [2005] O.J. No. 4398, 2005 CanLII 37251 (C.A.); *Capital Gains Income Streams Corp. v. Merrill Lynch Canada Inc.*, 2007 ONCA 497, 87 O.R. (3d) 443, at paras. 30-31. The same cannot be said here, where court approval of any settlement agreement between the parties is statutorily required and a settlement is not binding unless and until court approval is obtained.

**22** The appellant's argument amounts to a claim that, because this particular settlement agreement cannot be reconsidered if the litigation goes forward, the order is a final order with respect to the agreement, and is therefore also a final order for the purposes of s. 6(1)(b) of the *CJA*. This submission presumes that, to be a final order, an order need only dispose finally of whatever issue was before the motion judge irrespective of whether the order terminates the action or resolves a substantive claim or defence of the parties. Were that so, the distinction between interlocutory and final orders would cease to exist. Some might say that would be a good thing. Still, I hearken back to the words of Middleton J.A. in *Hendrikson*:

... it may be final in the sense that it determines the very question raised by the application, but it is interlocutory if the merits of the case remain to be determined.

**23** Here, although the settlement agreement was not approved, the litigation continues, and the parties cannot be said to have lost a substantive right relating to the merits of the litigation. The order is interlocutory and any appeal lies to the Divisional Court with leave.

**24** I would therefore quash the appeal.

**25** In the circumstances of the case where both the appellant and the respondent were allied in interest and argued in favour of this court's jurisdiction, I would order that there be no costs of the appeal.

J.L. MacFARLAND J.A.

J.M. SIMMONS J.A.:-- I agree.

M.L. BENOTTO.:-- I agree.

1 The order under appeal states:

1. THIS COURT ORDERS that the settlement agreement dated October 3, 2013 is not approved.

2. THIS COURT ORDERS that the class counsel fees sought are not approved.
3. THIS COURT ORDERS that there shall be no order as to costs.

*Case Name:*

**Zenex Enterprises Ltd. v. Pioneer Balloon Canada Ltd.**

**RE: Zenex Enterprises Limited, Plaintiff, and  
Pioneer Balloon Canada Limited, S. Rossy Inc., Dollarama  
S.E.C., and Dollarama L.P., Defendants**

[2012] O.J. No. 6082

2012 ONSC 7243

Court File No. 07-CV-335466PD3

Ontario Superior Court of Justice

**E.M. Morgan J.**

Heard: November 23, 2012.

Judgment: December 11, 2012.

Released: December 19, 2012.

(28 paras.)

*Civil litigation -- Civil procedure -- Discovery -- Examination for discovery -- Persons who may be examined -- Undertakings -- Production and inspection of documents -- Objections and compelling production -- Scope -- Electronic discovery and production -- Duties respecting production of electronic evidence -- Disclosure rules and obligations -- Production or inspection of hard disks -- Scope -- Discoverability of email -- Application by plaintiff against defendant for several orders for increased discovery dismissed -- Plaintiff was not entitled to make mirror copy of defendant's hard drive -- Defendant was not obligated to provide information about its searches to compile its productions for discovery -- Defendant's information technology manager was person with authority to make decisions about litigation and plaintiff's counsel could only be in contact with him through defendant's counsel -- Defendant complied with its undertakings and it did not provide undertaking to fully explain searches it conducted on its computer system.*

*Information technology -- Electronic evidence -- Disclosure -- Discovery -- Documentary evidence -- Email -- Production -- Application by plaintiff against defendant for several orders for increased discovery dismissed -- Plaintiff was not entitled to make mirror copy of defendant's hard drive -- Defendant was not obligated to provide information about its searches to compile its productions*

*for discovery -- Defendant's information technology manager was person with authority to make decisions about litigation and plaintiff's counsel could only be in contact with him through defendant's counsel -- Defendant complied with its undertakings and it did not provide undertaking to fully explain searches it conducted on its computer system.*

Application by the plaintiff Zenex Enterprises Ltd. against the defendant Pioneer Balloon Canada Limited for several orders for increased discovery. The parties were engaged in a contractual dispute in which Zenex claimed a percentage of certain sales made by Pioneer. The first order sought was to permit Zenex to make a mirror copy of Pioneer's hard drive. It claimed it would be able to search the drive in a manner that no privileged matters on Pioneer's system would be accessed. The second order sought was for extensive information related to the search of documents performed by Pioneer in compiling its productions for discovery. Zenex wanted to speak to Pioneer's information technology manager, Douglas, and the third order sought was a declaration that Douglas was not a person with authority to make decisions for Pioneer about the course of the litigation. The fourth order sought was to enforce an undertaking it claimed was given by Pioneer's counsel to provide a full explanation of the searches done by Douglas of email communications stored on Pioneer's computer system and to forward a statement by Douglas regarding the results of these searches. Zenex, in the fifth requested order, sought further answers to a series of undertakings given by Borondy, who was Pioneer's representative who was examined for discovery. The undertakings related to Pioneer's internal communications with Douglas and searches conducted by him during the course of this litigation.

HELD: Application dismissed. The Rules of Civil Procedure required a party to disclose and produce relevant documents. They did not require a party to explain how or where the relevant documents were found or the methodology of its search for these documents. Pioneer's counsel advised Zenex's counsel that it produced all relevant documents in its possession. To the extent that its original productions were incomplete, it produced all of the documents that it conceded were subsequently located. It fulfilled its obligation to produce what it found. The fact that documents were not initially produced was due to human error and such was insufficient to allow Zenex to take control of the search through Pioneer's computer hard drive. Zenex's claim that there were more relevant documents that were not produced was mere speculation. Borondy's undertakings were properly answered. Pioneer did not provide the undertaking that was the subject of the fourth order. It only undertook to obtain information from Douglas as to whether there were any other relevant emails and to provide such information to Zenex's counsel, which it did. Douglas was a person with authority to make decisions for Pioneer about the course of the litigation. Thus, Zenex's counsel could only be in contact with him through Pioneer's counsel.

#### **Statutes, Regulations and Rules Cited:**

Ontario Rules of Civil Procedure, Rule 30.02, Rule 30.07

Rules of Professional Conduct, Rule 6.03(9)



**Counsel:**

*Michael S. Deverett*, for the Plaintiff.

*Derek Collins*, for the Defendant.

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**ENDORSEMENT**

**1 E.M. MORGAN J.:**-- The parties are engaged in a contractual dispute in which the Plaintiff claims a percentage of certain sales made by the one Defendant remaining in the action, Pioneer Balloon Canada Limited. The Plaintiff is not satisfied with the documentary production by the Defendant and has conducted an aggressive campaign of discovery, of which this motion is the latest and most aggressive step.

**2** First and foremost, the Plaintiff seeks an order permitting it to make a "mirror copy" of the Defendant's entire hard drive. In order to do this the Plaintiff proposes certain key words that will be searched on the Defendant's computer system and puts forward various assurances that no privileged or other matters on the Defendant's system will be accessed.

**3** The Plaintiff also moves for extensive information relating to the search of documents performed by the Defendant in compiling its productions for discovery, as follows:

An order that Pioneer produce the particulars of the searches conducted by it of its digital documents, including without limitation emails, including without limitation the searches conducted by Chris Douglas that are referred to in the Examination of Discovery of MaryLynn Borondy and the recent searches conducted by Chris Douglas in August and/or September 2011 including without limitation:

- (a) When the search was conducted;
- (b) The step-by-step details of how the search was conducted including without limitation the methods and parameters used to conduct the search;
- (c) Whether or not the search was conducted to discover all of the defendant's documents that refer to Starr or Zenex, and if not why not;
- (d) The results of the search and the production of print-screen or similar report generated by the computer without amendment confirming the results of the search;
- (e) The details of all backups of digital documents that are maintained by Pioneer

and whether it is possible to conduct other searches of documents using any of those backups;

- (f) Emails back and forth between Chris Douglas and Derek Collins; and,
- (g) Notes, memorandums and other documents made by Derek Collins with respect to his telephone conversations with Chris Douglas.

**4** The Plaintiff would also like to speak with the Defendant's I.T. manager, Christopher Douglas, and here seeks a declaration that Mr. Douglas is not a "person with authority" to make decisions for the Defendant about the course of the litigation.

**5** In addition, the Plaintiff seeks to enforce an undertaking which it says was given by counsel for the Defendant to provide a full explanation of the searches done by Christopher Douglas of email communications stored on the Defendant's computer system, and to forward a statement by Christopher Douglas regarding the results of these searches.

**6** Finally, the Plaintiff seeks further answers to a series of undertakings given by MaryLynn Borondy, the representative of the Defendant who was examined for discovery. These undertakings all relate to the Defendant's internal communications with and searches conducted by Christopher Douglas during the course of this litigation.

**7** Rule 30.02 of the *Rules of Civil Procedure*, RRO 1990, Reg. 194 requires a party to disclose and produce for inspection "[e]very document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party to the action ..." Furthermore, Rule 30.07 requires a party who, subsequent to serving an affidavit of documents, discovers that the affidavit was inaccurate or incomplete, to "serve a supplementary affidavit specifying the extent to which the affidavit of documents requires modification and disclosing any additional documents."

**8** The first thing to note is that the *Rules* require a party to disclose and to produce relevant documents. They do not require a party to explain how or where the relevant documents were found or the methodology of its search for those documents. The purpose of documentary discovery is for one party to know what documents exist for potential use at trial; discovery is not, however, an end in itself. By insisting on examining the methods used by the Defendant to conduct its search for documents, the Plaintiff has lost sight of the rationale for the discovery process and is focusing on the way the Defendant is coping with the litigation rather than the merits of the action.

**9** The Defendant, through its counsel, has advised Plaintiff's counsel that it has now produced all relevant documents in its possession. To the extent that its original productions were incomplete, it has produced all of the documents that it concedes that it subsequently located. As already indicated, its obligation is not to explain how it found the relevant documents, nor how it found the ones that were originally overlooked. Its obligation is to produce what it has found, which it apparently has done.

**10** The Plaintiff argues that since the Defendant has advised that it has now found certain

documents not contained in its first affidavit of documents, there must be even more undisclosed documents lurking in its computer. With respect, the disclosure by the Defendant of what it is obliged to disclose under Rule 30.07 cannot be seen as evidence that the Defendant has withheld other documents.

**11** Quite the contrary, the Defendant appears to have made appropriate efforts to meet its disclosure requirements. Plaintiff's counsel submits that computers do not err, and the fact that a document was overlooked the first time implies that the search was unredeemably deficient. However, computer storage and search systems, like traditional filing systems, are subject to human error. The Defendant's obligation is to make every effort to produce what the *Rules* require it to produce, but there must be evidence stronger than a corrected error for a court to order that the Plaintiff actually take control of the search through the Defendant's computer hard drive.

**12** The underlying claim is based on an agreement that the Plaintiff alleges was reached in an exchange of correspondence, or a series of communications, between the parties. The Plaintiff, of course, will have copies of the correspondence that was sent back and forth to its own personnel. To the extent that the Defendant has not produced its side of some of that correspondence, it has explained the reason that some emails may have been deleted prior to litigation arising.

**13** What the Plaintiff must therefore be seeking in its quest to search through the Defendant's computer system is internal email enabling the Plaintiff to make its case, but of which it has no actual knowledge. This, however, is the kind of trolling through unknown waters that goes beyond rightful discovery. *Marrello Valve Ltd. v. Orbit Valve Canada Ltd.*, [1988] O.J. No. 2710, at para. 22 (SCJ). I agree that the obligation to produce all relevant documents includes electronically stored data, *Nicolardi v. Daley*, [2002] O.J. No. 595, but I also am cognizant of the fact that "[a] motion under Rule 30.06 requires evidence, as opposed to mere speculation, that potentially relevant undisclosed documents exist." *Frangione v. Vandongen*, 2010 ONSC 2823, at para. 14.

**14** As stated in *Warman v. National Post Co.*, 2010 ONSC 3670, at para. 93, "it is not sufficient for a moving party to say 'I believe there are more documents' or 'it appears to me that documents are being hidden.'" The Plaintiff cannot be permitted to take over the Defendant's search of its own computer system, and to make a "mirror copy" of the Defendant's hard drive, on mere speculation that there might be more than has been produced to date.

**15** Separate from the obligation to produce all relevant documents, it is also incumbent on a party to fulfill undertakings given during the course of the discovery process. This is especially true where the undertaking is given by a lawyer for the party, as a solicitor's undertaking is an important and solemn matter that courts are bound to enforce.

**16** The Plaintiff claims that it was provided with undertakings to produce to it the very information regarding computer searches that the Plaintiff would not otherwise be entitled to obtain. It is possible, of course, that a party and/or its counsel might be foolish enough to undertake to produce information or documents that it was not obliged under the *Rules* to produce.

**17** That does not appear to me to be the case here. The specific undertakings given on the Defendant's behalf by MaryLynn Borondy were addressed by Defendant's counsel in correspondence to Plaintiff's counsel dated September 11, 2009. In this letter, the undertakings were either fulfilled by advising Plaintiff's counsel that there are no further relevant emails on the Defendant's computer, or were answered by passing on a note from Christopher Douglas explaining that the Defendant is a privately held corporation and as such is not under the same obligations as a public company might be to retain email correspondence in its computer system unless it is engaged in litigation.

**18** The latter response, I would point out, is an answer to an undertaking that probably did not need to be given; as noted above, a party is not generally under an obligation to explain why it does not have a certain document except to disclose that it does not have a document that it may once have had. In any case, the undertaking given by Ms. Borondy is fulfilled by the answer, even if the Plaintiff is not satisfied with the information.

**19** The Plaintiff also seeks an answer to a solicitor's undertaking given by Defendant's counsel, Mr. Collins, on July 5, 2011. That undertaking took the following form:

... I will undertake to speak with Mr. Douglas and provide you with a statement that specifically addresses the issue as to whether any other emails exist which are relevant to any of the issues raised in this litigation.

**20** Mr. Collins did not, as the Plaintiff contends, undertake to provide a written statement from Mr. Douglas. Reading his correspondence carefully, it appears to me that he undertook to seek information from Mr. Douglas about whether there are any other relevant emails and to provide an answer to Plaintiff's counsel, Mr. Deverett.

**21** Mr. Collins apparently did communicate with Mr. Douglas in early September 2011. Mr. Collins spoke with Mr. Deverett on September 6th and told him as much. At the time, he indicated that he was still trying to follow up with Mr. Douglas to clarify the time line contained in his explanation about his search for further emails.

**22** Mr. Deverett followed up the September 6th conversation with a letter to Mr. Douglas. In that letter, he states: "You have undertaken to obtain and produce Mr. Douglas' statement including without limitation when and how he conducted his search of all of the defendant's emails that refer to Starr or Zenex, what methods and parameters he used, what results he obtained, and how he explains that not all of the emails were produced previously."

**23** Mr. Collins denies that he made such an undertaking in the September 6th phone call. Indeed, it would be very surprising had he given such an undertaking, as there was no legal obligation to do so and the information recited by Mr. Deverett is exceedingly far-reaching. I am loathe to impugn a solicitor with such a sweeping and unnecessary undertaking when there is no evidence other than a unilateral letter from opposing counsel supposedly confirming it. A solicitor's undertaking should

be in the solicitor's own words, and not be found only in a follow-up letter from the person trying to enforce the undertaking.

**24** I do not fault Mr. Deverett for writing back to Mr. Collins after a phone call. For his part, Mr. Collins should have responded to Mr. Deverett's letter and clarified that he did not make the alleged undertaking. Nevertheless, I cannot take what could be seen as a self-serving letter by Plaintiff's counsel as reflecting an undertaking by Defendant's counsel that would dramatically change the contours of the litigation by focusing it on process rather than substance.

**25** Fulfilling the undertaking that Mr. Collins is alleged to have given on September 6th would allow the Plaintiff to inspect the inner workings of the Defendant in searching its computer system. That would be highly invasive, and would be well beyond what the *Rules* call for. Indeed, it would intrude on the Defendant's conduct of the litigation, and would transform the mutual obligation of disclosure to a situation wherein the Plaintiff was supervising the Defendant's disclosure. While there might be times where such an intrusion is warranted, it cannot be inferred from a solicitor's silence that he undertook to let the other side into his client's business in this way.

**26** As for the Plaintiff's desire to speak with Christopher Douglas, that strikes me as inappropriate under the circumstances. While Ms. Borondy may not have included Mr. Douglas when she was asked at discoveries to list her superiors at work, that does not mean that Mr. Douglas is not someone that the Defendant has entrusted with authority to instruct counsel and take advice on the Defendant's behalf in the context of the present litigation. Corporate parties will often have a team of people in that position, and here Mr. Douglas is a member of that team.

**27** Rule 6.03(9) of the Rules of Professional Conduct prohibits counsel from contacting those individuals actively involved in the conduct of the litigation for the opposing side. Mr. Douglas is obviously involved in the decision-making process for the Defendant in steering various issues in the litigation, and he has the authority to deal directly with Defendant's counsel in this respect. The fact that he is a key decision-maker in the discovery process and a conduit to Defendant's counsel is no doubt what makes him such an attractive person for the Plaintiff to speak with. Under the circumstances, Plaintiff's counsel must not be in contact with Christopher Douglas except through Defendant's counsel.

**28** The motion is dismissed. Counsel have agreed that costs should be in the cause, which I consider to be an appropriate order here.

E.M. MORGAN J.

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

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

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**BRIEF OF AUTHORITIES OF THE DEFENDANT  
WEST FACE CAPITAL INC.  
RE: MOTION TO EXTEND TIME AND  
FOR LEAVE TO APPEAL  
(Returnable January 21, 2016)**

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**DAVIES WARD PHILLIPS & VINEBERG LLP**

Suite 4000  
155 Wellington Street West  
Toronto, ON M5V 3J7

Kent E. Thomson (LSUC #24264J)  
(KentThomson@dwpv.com)  
Matthew Milne-Smith (LSUC #44266P)  
(mmilne-smith@dwpv.com)

Tel.: 416.863.0900  
Fax: 416.863.0871

Lawyers for the Defendant/Responding  
Party, West Face Capital Inc.

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

B E T W E E N :

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THE CATALYST CAPITAL GROUP INC.

and

BRANDON MOYSE and WEST FACE  
CAPITAL INC.

Plaintiff/Moving Party

Defendants/Responding Parties

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

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**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

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**BOOK OF AUTHORITIES OF THE  
DEFENDANT**

**WEST FACE CAPITAL INC.  
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**DAVIES WARD PHILLIPS & VINEBERG LLP**  
155 Wellington Street West  
Toronto ON M5V 3J7

Kent E. Thomson (LSUC #24264J)  
(kentthomson@dwpv.com)  
Matthew Milne-Smith (LSUC #44266P)  
(mmilne-smith@dwpv.com)

Tel: 416.863.0900  
Fax: 416.863.0871

Lawyers for the Defendant/Responding  
Party, West Face Capital Inc.