Court of Appeal File No.: C60799/M45387
Superior Court File No.: CV-14-507120

COURT OF APPEAL FOR ONTARIO

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff
(Appellant/Responding Party)

- and -

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants
(Respondents/Moving Parties)

BOOK OF AUTHORITIES OF THE MOVING PARTY DEFENDANT (RESPONDENT) WEST FACE CAPITAL INC. (MOTION TO QUASH APPEAL)

September 10, 2015

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TAB 1

Indexed as:

813302 Ontario Ltd. v. 815970 Ontario Inc.

Between
813302 Ontario Limited et al, plaintiffs, and
815970 Ontario et al, appellant (defendant) (respondents)

[1996] O.J. No. 4531

Court File No. C25493

Ontario Court of Appeal
Toronto, Ontario

Catzman, Weiler and Moldaver JJ.A.

December 18, 1996.

(2 pp.)

Practice -- Appeals -- Quashing of appeals -- Grounds for.

This was a motion by 815790 to quash an appeal from an order.

HELD: The motion was allowed and the appeal was quashed. The order was essentially interlocutory in nature. The concern of the responding party that it would be precluding from proceeding with its cross-claim or asserting a claim for damages was met by the moving party's concession that it would not take such a position. The order quashing the appeal was without prejudice to the right of the responding party to apply to the Divisional Court to hear this issue together with the appeal brought by the appellant.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, s. 6(2).

Counsel:

Joseph C. Vieni for the applicant.
Jeff Dicker for the respondent.

The judgment of the Court was delivered by

1 **CATZMAN J.A.** (endorsement):-- It is clear to us that the order made of MacPherson J. is essentially interlocutory in its nature. The concern of the responding party that it will be precluded hereafter from proceeding with its claim for the relief sought in the cross-claim or from asserting a claim for damages, regardless of whether or not the property is sold, is answered by the concession made before us by counsel for the moving party that his client will not take such a position. A concession with which we agree.

2 The appeal is quashed. The order quashing the appeal will be without prejudice to the right of the responding party, should it obtain leave to appeal the order of MacPherson J. to the Divisional Court, to move under sec. 6(2) of the courts of justice act to hear the appeal in this over together with the appeal brought by the plaintiffs in this action. We in so ordering, are not to be taken as expressing any view as to the desirability of the granting of leave to appeal to the Division Court from the order of MacPherson J.

3 The moving party is entitled to its costs of the appeal, forthwith appeal assessment, including the motion is quash, on a societal and client scale in accordance with the provisions of the mortgage between the parties.

CATZMAN J.A.

qp/mmr/DRS/DRS

TAB 2

See para. 5

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).

---

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.

TAB 3

See paras. 86-88

Case Name:

Cavanaugh v. Grenville Christian College

Between
Lisa Cavanaugh, Andrew Hale-Byrne, Richard Van Dusen, Margaret Granger and Tim Blacklock, Appellants, and Grenville Christian College, the Incorporated Synod of the Diocese of Ontario, Charles Farnsworth, Betty Farnsworth, Judy Hay the Executrix for the Estate of J. Alastair Haig and Mary Haig, Respondents

[2013] O.J. No. 1007

2013 ONCA 139

304 O.A.C. 163

32 C.P.C. (7th) 1

360 D.L.R. (4th) 670

225 A.C.W.S. (3d) 613

2013 CarswellOnt 2500

Docket: C55627

Ontario Court of Appeal
Toronto, Ontario
D.R. O'Connor A.C.J.O.,[1] D.H. Doherty and

R.A. Blair JJ.A.

Heard: December 20, 2012.
Judgment: March 8, 2013.

(95 paras.)

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Certification --

Procedure -- Pleadings -- Striking out pleadings or allegations -- Grounds -- Failure to disclose a cause of action or defence -- Appeals -- Courts -- Jurisdiction -- Provincial and territorial courts -- Superior courts -- Courts of appeal -- Appeal by the plaintiffs from a motion judge's refusal to certify their action as a class action dismissed -- The plaintiffs alleged they had been abused at a residential religious school operated by the defendants -- Appeal from motion judge's dismissal of plaintiffs' claim against the Diocese on grounds the pleading failed to disclose a cause of action was properly before the Court of Appeal -- However, the appeal from the motion judge's refusal to certify the action against the remaining defendants on grounds a class proceeding was not the preferable procedure should have been brought before the Divisional Court.

Tort law -- Negligence -- Duty and standard of care -- Duty of care -- Fiduciary duty -- Appeal by the plaintiffs from a motion judge's decision dismissing their action against the defendant Diocese dismissed -- The plaintiffs alleged they had been abused at a residential religious school operated by the defendants -- Motion judge dismissed their claim against the Diocese, finding the pleadings failed to disclose a cause of action -- The pleading was devoid of any material facts substantiating the allegations the Diocese was liable in negligence or breach of fiduciary duty for the actions of the school's headmasters, who also happened to be priests.

Appeal by the plaintiffs from a motion judge's refusal to certify their class action against the defendants and dismissal of their action against the defendant Diocese. The plaintiffs had all been students at Grenville Christian College, a private religious school. The plaintiffs alleged they and other residential students at the school were physically and psychologically abused. They brought actions in negligence, assault, battery, intentional infliction of mental suffering and breach of fiduciary duty against the school, its two headmasters (who were Anglican priests) and the Incorporated Synod of the Diocese of Ontario. The Diocese was responsible for the administration of Anglican churches and related activities in the area in which the school was located. The motion judge found the claim against the Diocese did not reveal a cause of action and ordered the action against the Diocese dismissed. With respect to the other defendants, the motion judge found the appellants failed to show a class proceeding was the preferable procedure and dismissed the motion to certify with leave to apply to continue the proceedings in an amended form. The plaintiffs appealed both parts of the motion judge's order. A preliminary issue related to the court's jurisdiction to hear the appeal, as the appeal of the refusal to certify the proceedings against the defendants, other than the Diocese, was to the Divisional Court, not the Court of Appeal. The parties argued the court should exercise its discretion to join the appeal against the other defendants with the appeal against the Diocese.

HELD: Appeal from the refusal to certify the action against the remaining respondents was transferred to the Divisional Court; appeal from the order dismissing the action against the Diocese dismissed. The motion judge's decision to dismiss the action against the Diocese was not grounded in the Class Proceedings Act but rather was grounded in the court's inherent power to dismiss an action when the claim did not disclose a reasonable cause of action. The appeal from that decision

was properly before the Court of Appeal as opposed to the Divisional Court. Regarding the claims against the Diocese itself, the pleading failed to show any cause of action in negligence or breach of fiduciary duty. The diocese's relationship to its priests did not automatically create a duty of care by the diocese to persons who engaged with those priests. The existence of any duty had to be determined by reference to the specific facts of the case. Here, the pleadings were devoid of material facts substantiating the allegations the Diocese was liable for the actions of the school's headmasters, who also happened to be priests. There was no allegation of a direct relationship between the Diocese and the plaintiffs, between the Diocese and the school, or between the Diocese and the headmasters insofar as the operation of the school was concerned. Given the facts as pleaded failed to disclose a duty of care to the plaintiffs in negligence, it followed the fiduciary duty claim also failed. No material facts were pleaded to suggest the plaintiffs were in any way under the Diocese's power or discretion while attending the school. With respect to the motion judge's refusal to certify the action against the remaining defendants, the parties did not make out a case for joinder of the appeals. The appeals raised distinct issues. The appeal from the dismissal of the claim against the Diocese raised a straightforward pleadings issue. Although that issue arose in the context of a certification proceeding, it was not a certification issue in the sense it engaged any law or procedure particular to certification of class proceedings. On the other hand, the issues raised on the appeal brought against the other defendants engaged the very core of the certification process. There was no risk of inconsistent results and very little overlap in the matters to be addressed on the two appeals.

Statutes, Regulations and Rules Cited:

Class Proceedings Act 1992, S.O. 1992, c. 6, s. 5(1), s. 5(1)(a), s. 5(1)(d), s. 6(1)(b), s. 6(2), s. 7, s. 30, s. 30(1), s. 30(2), ss. 30(6)-(11)

Courts of Justice Act, R.S.O. 1990, c. C.43

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 21, Rule 21.01(1)(b)

Appeal From:

On appeal from the order of Justice Paul M. Perell of the Superior Court of Justice, dated May 23, 2012, with reasons reported at 2012 ONSC 2995.

Counsel:

Kirk Baert, Russell Raikes, Sean O'Donnell, Michael Saelhof Loretta Merritt and Christopher Haber, for the appellants.

Steven Steiber and Linda Phillips-Smith, for the respondent the Incorporated Synod of the Diocese of Ontario.

Geoffrey Adair and Alexa Sulzenko, for the respondents
Grenville Christian College, Charles Farnsworth and Judy Hay
the Executrix for the Estate of J. Alastair Haig.

The judgment of the Court was delivered by

D.H. DOHERTY J.A.:--

I

OVERVIEW

1 The appellants brought a motion to certify their action against the respondents as a class proceeding pursuant to the *Class Proceedings Act 1992*, S.O. 1992, c. 6 ("*CPA*"). The motion judge refused to certify the action against any of the respondents. In respect of one of the respondents, the Incorporated Synod of the Diocese of Ontario (the "Diocese"), the motion judge held that the claim as framed did not reveal a cause of action. He ordered the action against the Diocese "immediately dismissed". With respect to the other respondents, the motion judge found that the appellants failed to show that a class proceeding was the preferable procedure and dismissed the motion to certify with leave to apply under s. 7 of the *CPA* to continue the proceedings in an amended form.

2 The appellants appealed from both parts of the motion judge's order.

3 Appellate jurisdiction in proceedings under the *CPA* is divided between the Court of Appeal and the Divisional Court. Some appeals go to the Divisional Court under s. 30 of the *CPA* and others go to this court. The general appeal power provisions in the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*") are also relevant when the specific provisions of s. 30 have no application.

4 All parties to this appeal agreed that the appeal from the order refusing to certify the proceedings as against the respondents other than the Diocese was properly to the Divisional Court under s. 30(1) of the *CPA*. The parties also agreed, however, that this court did have jurisdiction under s. 6(1)(b) of the *CJA* to hear the appeal from the order dismissing the claim against the Diocese. The parties submitted that the court should exercise its discretion under s. 6(2) of the *CJA* to join the appeal against the other respondents with the appeal against the Diocese.

5 After hearing oral argument on the jurisdictional issues, the court reserved on the question of whether it had jurisdiction to hear the appeal from the order dismissing the claim against the Diocese. The court further indicated that, assuming it did have jurisdiction to hear that appeal, it

would not exercise its jurisdiction under s. 6(2) to hear the appeal against the refusal to certify the claim against the other respondents. The court ordered that appeal transferred to the Divisional Court. The court then heard the merits of the appeal from the order dismissing the claim against the Diocese and reserved judgment.

6 For the reasons that follow, I would hold that this court does have jurisdiction to hear the appeal from the order dismissing the action against the Diocese. I would dismiss that appeal.

7 I will also, in accordance with the court's endorsement during the oral hearing, provide reasons for declining to exercise our jurisdiction in favour of hearing the appeal from the refusal to certify the claim against the other respondents.

II

THE PROCEEDINGS IN THE SUPERIOR COURT

8 Lisa Cavanaugh, Andrew Hale-Byrne, Richard Van Dusen, Margaret Granger and Tim Blacklock (the "appellants") were all students at Grenville Christian College, a private religious school in Brockville, Ontario. The school is no longer in operation. They allege that they and other residential students at the school were physically and psychologically abused over a period spanning several decades. They brought actions in negligence, assault, battery, intentional infliction of mental suffering and breach of fiduciary duty against Grenville Christian College, Charles Farnsworth ("Father Farnsworth"), the estate of J. Alastair Haig ("Father Haig") and the Diocese (collectively the "respondents").[2] Both Father Farnsworth and Father Haig were headmasters at the school. The Diocese is responsible for the administration of Anglican churches and related activities in the Brockville area.

9 The appellants moved to certify the action under the *CPA* as a class proceeding. The motion judge dismissed the motion against all the respondents. He did so, however, for two quite different reasons and he made two very different orders. He refused to certify the action against the Diocese because the claim as pleaded did not allege a cause of action as required under s. 5(1)(a) of the *CPA*. In contrast, he refused to certify the claim against the other respondents because in his view the appellants had not demonstrated that a class proceeding was "the preferable procedure" as required under s. 5(1)(d) of the *CPA*.

10 The different reasons for refusing to certify the action against the Diocese compared with the other respondents are reflected in the terms of the order. In para. 1 of his order, the motion judge "immediately dismissed the action" against the Diocese. In paras. 2 and 3, he dismissed the appellants' application for certification against the other respondents, but allowed the appellants to apply for an order under s. 7 of the *CPA* for a continuation of the action.

III

THE APPEAL AGAINST THE DIOCESE

A. THE JURISDICTIONAL ISSUE

11 Appeals are creatures of statute: see *R. v. Meltzer*, [1989] 1 S.C.R. 1764, at p. 1773; *Canadian Broadcasting Corporation v. Ontario*, 2011 ONCA 624, 107 O.R. (3d) 161, at para. 16. This court can hear only appeals authorized by statute.

12 In civil matters, most appeals are brought to this court under s. 6(1)(b) of the *CJA*. Section 6(1)(b) 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[.]

13 The order dismissing the action against the Diocese is a final order. It is not an order "referred to in clause 19(1)(a)". Consequently, an appeal lies to this court from the order dismissing the action against the Diocese unless "an appeal lies to the Divisional Court under another Act". The *CPA* is the only other Act of possible application.

14 Section 30 of the *CPA* contains various appeal provisions governing appeals in the class action context. Under s. 30, most appeals go to the Divisional Court, but some come to this court. Sections 30(1) and (2) specifically address orders made granting or refusing a motion for certification as a class proceeding. For present purposes, s. 30(1) is relevant. It provides in part:

> A party may appeal to the Divisional Court from an order refusing to certify a proceeding as a class proceeding and from an order decertifying a proceeding.

15 A motion judge must refuse certification unless the statutory preconditions to certification set out in s. 5(1) of the *CPA* are met. Section 5(1) provides that:

> The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
> (c) the claims or defences of the class members raise common issues;
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. [Emphasis added.]

16 The motion judge refused to certify the action against the respondents other than the Diocese because the appellants failed to show that a class proceeding was "the preferable procedure" as required by s. 5(1)(d). His order dismissing the motion for certification against these respondents is clearly appealable to the Divisional Court under s. 30(1) of the *CPA*.

17 With respect to the Diocese, the motion judge also refused to certify the action, albeit because the claim as pleaded did not reveal a cause of action as required by s. 5(1)(a). If the motion judge's order in respect of the Diocese is properly characterized as a refusal to certify a class proceeding, the appeal lies to the Divisional Court. However, the motion judge's order does much more than simply refuse to certify the action as a class proceeding against the Diocese. The order dismisses the claim "immediately". The motion judge's order goes well beyond a determination that the Diocese will not be part of any class proceeding. Under that order, the appellants are barred not only from proceeding against the Diocese by way of a class action proceeding, but are precluded from proceeding against the Diocese entirely. If that order stands, the appellants' action against the Diocese is over.

18 I read nothing in the remedial powers available on a motion for certification under the *CPA* that empowers a judge to dismiss the action in its entirety. To the extent that the *CPA* speaks to the inadequacy of pleadings, s. 7 authorizes the judge who refuses to certify the proceeding as a class proceeding to order the amendment of the pleadings or to make any other order deemed appropriate. Section 7 does not authorize the motion judge to dismiss the action. In my view, the motion judge's order dismissing the action against the Diocese could not have had its genesis in the powers granted in the *CPA* to judges hearing a motion for certification.

19 A Superior Court has the inherent power to dismiss an action when the claim does not disclose a reasonable cause of action: see *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 968. That power is most commonly exercised on a motion brought under Rule 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to strike a pleading on the basis that it does not disclose a reasonable cause of action. The Diocese could have brought a motion under Rule 21.01(1)(b) and joined that motion with the appellants' motion for certification. Had the Diocese followed that procedure, the motion judge would clearly have had the power to dismiss the action against the Diocese under Rule 21.01(1)(b). Any appeal from that order would have been to this court pursuant to s. 6(1)(b) of the *CJA*.

20 In *Menegon v. Philip Services Corp.* (2001), 23 B.L.R. (3d) 151 (Ont. S.C.), aff'd 167 O.A.C. 277 (C.A.), the defendant did bring a motion under Rule 21 to dismiss for failure to disclose a cause

of action. That motion was heard with the certification motion and appealed to the Divisional Court: *Menegon v. Philip Services Corp.* (2002), 155 O.A.C. 365 (Div. Ct.). In holding that the Divisional Court had no jurisdiction to hear the appeal from the order dismissing the action for failure to disclose a cause of action, Farley J. stated, at p. 366:

> Although an appeal from a refusal to certify an action as a class proceeding is to the Divisional Court, the refusal here was based on the failure of Menegon in his statement of claim to disclose a cause of action. However, that same failure is the foundation of the determination of Gans J., to dismiss the action and refuse leave to amend. The action having been dismissed, the question of its certification as a class proceeding is moot; in order to have certification of the action, the judgment dismissing the action would have to be put aside. The dismissal of the action, as discussed, is a final order, an appeal from which only lies to the Court of Appeal in these circumstances of the thrust of the claim being for more than $25,000. ...[3] [Emphasis added.]

21 This court has also heard appeals from orders dismissing claims made under Rule 21.01(1)(b) when that motion was brought in conjunction with a motion for certification under the *CPA*: see e.g., *Drady v. Canada (Minister of Health)*, 2008 ONCA 659, 270 O.A.C. 1; *McCracken v. Canadian National Railway Co.*, 2012 ONCA 445, 111 O.R. (3d) 745. The jurisdiction of this court to hear the appeals was not raised in either case.[4]

22 I do not think that the absence of a Rule 21.01(1)(b) motion is determinative on the jurisdiction question. The appropriate appellate forum should be determined by the substance of the order made. The fact that a motion judge dismissed an action in the absence of a motion under Rule 21.01(1)(b) may give rise to procedural fairness arguments on appeal. Those arguments must, however, be made in the appropriate forum.

23 The language of the motion judge's order could not be clearer. The action against the Diocese was "immediately dismissed". If there is no power in s. 30 of the *CPA* to appeal the dismissal of the action against the Diocese to the Divisional Court, then under the terms of s. 6(1)(b) of the *CJA*, the appeal is to this court.

24 The provisions in s. 30 of the *CPA* which direct appeals to the Divisional Court refer to "an order refusing to certify a proceeding" (s. 30(1)), "an order certifying a proceeding as a class proceeding" (s. 30(2)), and orders "determining an individual claim" (s. 30(6)-(11)). None of the provisions that create appellate jurisdiction in the Divisional Court under s. 30 refer to orders dismissing an action. A plain reading of s. 30 of the *CPA* does not give the Divisional Court the jurisdiction to hear appeals from orders dismissing claims even though the order is made in the context of a class proceeding motion. Instead, s. 6(1)(b) of the *CJA* gives this court jurisdiction over this appeal.

25 My reading of the interaction between the rights of appeal peculiar to class proceedings

created in s. 30 of the *CPA* and the more general rights of appeal in s. 6(1)(b) of the *CJA* is reinforced by the analysis in two cases in which this court has addressed that relationship. Neither case, however, deals with the problem raised here.

26 In *Dabbs v. Sun Life Assurance Company of Canada* (1998), 41 O.R. (3d) 97 (C.A.), a member of a class who was not a party to the class proceeding sought to appeal an order certifying an action as a class proceeding and approving a settlement agreement entered into between the representative plaintiff and the defendants. The *CPA* limited any right of appeal to a party to the proceeding. In holding that the appellant could not rely on s. 6(1)(b) of the *CJA* to give him a right of appeal, this court stated, at p. 102:

> The intent of the Act [*CPA*] is clear that the rights of appeal to this court are conferred on parties, not class members. A class member requires leave under s. 30(5) to act as a representative party for the purpose of bringing an appeal under s. 30(3). If ... a class member has a right of appeal under s. 6(1)(b) of the *Courts of Justice Act*, that intent would be defeated. [Emphasis added.]

27 The result in *Dabbs* flows from a reading of the *CPA* as creating a specific right of appeal applicable to the circumstances before the court and limited to a party. The court held that when a statute creates a specific right of appeal, another statute providing a more general right of appeal, like the *CJA*, cannot be used to create a different right of appeal than that set out in the specific legislation.

28 *Dabbs* is consistent with the language of s. 6(1)(b) of the *CJA*. Because *Dabbs* interpreted the relevant part of the *CPA* as creating a specific right of appeal applicable in the circumstances of the case and limited to parties, s. 6(1)(b) could not be used to expand that right of appeal to entities who were not parties. *Dabbs* is distinguishable from this case because, for the reasons set out above, I do not read the appeal provisions in s. 30 of the *CPA* as speaking to an appeal from an order dismissing an action.

29 In *Locking v. Armtec Infrastructure Inc.*, 2012 ONCA 774, the court considered an appeal from an order granting certain plaintiffs carriage of a class action proceeding. The court held that none of the appeal powers in s. 30 of the *CPA* applied to an appeal from a carriage order. The court stated, at para. 8:

> Where the Act [*CPA*] does not specifically address the rights and avenues of appeal, s. 6(1)(b) of the *Courts of Justice Act* governs appeal to the Court of Appeal in class proceedings.

30 I agree with the above observation. Of course, whether the Act does or does not "specifically address rights and avenues of appeal" will be a matter of statutory interpretation.

31 *Obiter dicta* in *Locking*, at para. 10, also speaks directly to the issue raised on this appeal:

> So, for example, an appeal in a class proceeding from an order striking out a statement of claim as disclosing no reasonable cause of action is appealable to the Court of Appeal.

32 In summary, the order as it relates to the Diocese is an order dismissing the action. It is not an order granting or refusing certification. Under the terms of s. 6(1)(b) of the *CJA*, the order dismissing the action against the Diocese is appealable to this court unless there is an appeal to the Divisional Court. If there is an appeal to the Divisional Court, it must be found within the terms of s. 30 of the *CPA*. None of the provisions in that section directing appeals to the Divisional Court have any application to an order dismissing the action. Therefore, there is no appeal from that order to the Divisional Court. The appeal is to this court.

33 Finally, I see no practical difficulties in holding that this court is the appropriate appellate forum. Experience shows that in most cases in which the defendant intends to challenge the adequacy of the pleadings on a certification motion, an appropriate Rule 21 motion will be brought in conjunction with the certification motion. If the Rule 21 motion is brought, everyone accepts that the appeal comes to this court. My conclusion that the appeal still comes to this court even when there is no formal Rule 21 motion does nothing to complicate the appellate landscape. The distinction between orders referable to certification, which is a procedural issue, and orders dismissing a claim is not difficult to make. That distinction determines the appropriate appellate forum.

B. THE MERITS OF THE APPEAL

(a) The absence of a motion to dismiss

34 As indicated above, at para. 19, the motion judge had jurisdiction to dismiss the claim for failure to disclose a cause of action even absent a formal motion to dismiss. Clearly, however, it would have been better had the Diocese brought a formal motion to dismiss under Rule 21.01(1)(b). It would also have been better had the judge managing the proceedings required the Diocese to bring that motion upon being advised that the Diocese would take the position that the claim did not plead a proper cause of action against the Diocese. A helpful example of the proper procedure is found in *Drady*. The defendants, who contended that the claim did not reveal a cause of action, with the permission of the case management judge, brought a Rule 21.01(1)(b) motion to be heard immediately before the certification motion by the same judge who was to hear the certification motion: see also *Kang v. Sun Life Assurance Company of Canada*, 2013 ONCA 118, at paras. 25-27, aff'g 2011 ONSC 6335, 4 C.C.L.I. (5th) 86.

35 I am satisfied, however, that the appellants were not prejudiced by the Diocese's failure to bring a formal motion to dismiss. There is no reason to think that the appellants' arguments or the motion judge's analysis and conclusion would have been any different had the Diocese brought that motion.

36 In holding that the appellants are not prejudiced by the absence of a formal motion, I do not ignore the appellants' submission that they were not given a proper opportunity to amend their pleadings before the motion judge. The merits of that submission, however, do not depend on whether there was a formal motion brought under Rule 21.01(1)(b). The appellants have argued that they should have been given the opportunity to amend by the motion judge and that they can amend now if so required. This court can fully address the merits of that argument.

(b) The Claims against the Diocese

37 There are no facts at this stage of the proceeding, only allegations in the Amended Amended Statement of Claim (the "Claim"). Those allegations are assumed to be true for present purposes: *R. v. Imperial Tobacco Canada Limited*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 34.

38 In the Claim, the appellants allege that the respondents Father Farnsworth and Father Haig founded Grenville Christian College in 1969. They had been operating the school for about nine years when they were ordained as Anglican ministers in 1977. Father Farnsworth and Father Haig ran Grenville Christian College together until 1983 when Father Farnsworth became the sole headmaster. He operated the school until 1997. The appellants acknowledge that the Diocese has no liability for anything that occurred at the school before the ordination of Father Farnsworth and Father Haig.

39 The appellants, and the class members they would represent, were all students at Grenville Christian College at various times between 1973 and 1997. They allege various forms of physical, psychological, emotional and spiritual abuse at the hands of Father Farnsworth, Father Haig and others at the school.

40 The appellants' claim against the Diocese is founded in negligence and a breach of fiduciary duty. The relevant allegations against the Diocese can be summarized as follows:

* The Diocese is responsible for the "training, ordination and supervision of Fathers Farnsworth and Haig" (Claim, at para. 9).
* The Diocese is "affiliated with Grenville Christian College" (Claim, at para. 9).
* Following the ordination of Father Farnsworth and Father Haig in 1977, they were "licensed by the Bishop of Ontario and/or the Dioceses of Ontario to act as Anglican clergy at Grenville Christian College" (Claim, at para. 18).
* Following the ordination of Father Farnsworth and Father Haig, "Grenville Christian College held itself out as an Anglican private school where children who attended would be taught in the Anglican faith and with Anglican values" (Claim, at para. 22).
* The Diocese was required to "educate the Plaintiffs in accordance with Anglican faith and values" (Claim, at para. 26).

41 In respect of the negligence claim, the appellants further allege that the Diocese breached its duty to the appellants by failing to:

* undertake adequate investigation into the background of Father Farnsworth and Father Haig (Claim, at para. 33(k));
* provide adequate education, training and supervision of Father Farnsworth and Father Haig (Claim, at para. 33(l)); and
* ensure that the teachings and practices at Grenville Christian College promoted the Anglican faith and values (Claim, at para. 33(m)).

42 The appellants also allege that the Diocese knew or should have known of the misconduct of Father Farnsworth and Father Haig, and knew or should have known that as a consequence of the mistreatment, students would suffer significant sexual, physical, emotional, psychological and spiritual harm resulting in various forms of damage: Claim, at paras. 42, 43.

43 The pleadings alleging breach of fiduciary duty do not distinguish the Diocese from the other respondents. Those pleadings allege that the students were "entirely within the power and control of the Defendants": Claim, at para. 27. The pleadings further allege that the respondents' control over the students gave rise to a "fiduciary obligation to the Plaintiffs consistent with the obligations of a parent": Claim, at para. 28.

(c) The Duty of Care Analysis

44 The appellants' main ground of appeal arises from the motion judge's finding that on the facts as pleaded, the Diocese did not owe the appellants a duty of care. I will set the framework for my review of the motion judge's reasons and the appellants' arguments by describing the approach to be taken when deciding whether for the purposes of a claim in negligence a defendant owes a duty of care to a plaintiff. The approach is well established in the case law and was recently examined in detail by this court in *Taylor v. Canada (Attorney General)*, 2012 ONCA 479, 111 O.R. (3d) 161. The approach was applied by the motion judge and is not a matter of contention between the parties. I can be brief.

45 The duty of care inquiry proceeds through two stages. When the inquiry is made at the pleadings stage, the first stage involves a determination of whether the facts as pleaded disclose a sufficiently close relationship between the defendant and the plaintiff to establish a *prima facie* duty of care. To answer this question, one must first decide whether the facts as pleaded bring the claim, either directly or by analogy, within a category of cases in which the courts have previously recognized a *prima facie* duty of care. If the case falls within a recognized category of cases, the court will assume that a *prima facie* duty of care exists and move to the second stage of the duty of care inquiry. If, however, the facts do not place the case within an established category, the court must determine whether a new duty of care should be recognized in the circumstances. This determination is guided by the twin principles of foreseeability of harm and proximity of relationship.

46 If the court determines that the pleadings do not reveal a *prima facie* duty of care, the inquiry is over and the negligence claim must fail. If, however, the court concludes that a *prima facie* duty of care has been made out, the court must go on to the second stage of the inquiry. At that stage, the court asks whether there are any residual policy considerations that justify negating the duty of care and denying liability.

47 This case is not concerned with the second stage of the inquiry. The motion judge did not reach that stage. Nor do I.

(d) The Motion Judge's Reasons

48 The motion judge began, at paras. 64-67 of his reasons, by referencing and summarizing the well-known law surrounding the "plain and obvious" criterion against which the adequacy of the pleadings must be measured. He then turned to the negligence allegation.

49 The motion judge first considered whether the claim fell within a recognized or analogous category. He characterized the claim as the failure by the Diocese to use its connection with Grenville Christian College to intervene and stop the wrongdoing at the school: at para. 89. The motion judge concluded that this claim was not within or analogous to any recognized class of negligence claims: at para. 89.

50 The motion judge then turned his attention to the questions of foreseeability and proximity. He determined that neither existed on the facts as pleaded by the appellants. With respect to foreseeability, he stated, at para. 91:

> [I]n my opinion it is not foreseeable that the Diocese would have a duty of care to the students of the school based on the circumstances that the private school conducted Anglican religious services, described itself as Anglican, and had headmasters ordained as Anglican ministers nine years after they had established the school as an independently-owned and operated school.

51 In considering the relationship between the appellants and the Diocese, the motion judge stated, at para. 92:

> The students have an indirect relationship with the Diocese. Moreover, the relationship or connection between the school and the Diocese, upon which the indirect relationship is built, is also remote, at least legally speaking. The Diocese did not own or contract with the school. There is no employee-employer relationship between the Diocese and Fathers Haig and Farnsworth. The Diocese has no control over the school's operations. There were no corporate or organizational connections. The Diocese was not relied upon for operational advice, and no parent asked for or received advice from the Diocese about enrolling their children in the school. The Diocese had no legal right or legal duty

to control or intervene in the operation of the school.

52 The motion judge concluded his analysis of the negligence claim, at para. 97:

> [I]t is not the case that the Diocese was involved in the management, operation, supervision and staffing of the school. The most that can be said is that the Bishop of the Diocese ordained Fathers Haig and Farnsworth as Anglican ministers and Fathers Haig and Farnsworth performed Anglican services and celebrations at the school. It is plain and obvious that the pleaded claim against the Diocese, even if factually proven, does not constitute a reasonable cause of action because there is no duty of care.

53 The motion judge next examined the breach of fiduciary duty claim. After summarizing the essential elements of that cause of action and referring to the relevant parts of the Claim, the motion judge observed, at paras. 110-11:

> The Diocese had no power or influence over the students. The students were not vulnerable or dependent upon the Diocese. The Diocese did not have any direct contact with the students, and the Diocese did not take advantage or betray the students. The Diocese did not undertake to act with loyalty to the students.
>
> Indeed, for some students who had faith, other than Anglican, it is doubtful that there was any relationship at all between the student and the Diocese.

54 The motion judge concluded that the pleadings did not reveal a cause of action for breach of fiduciary duty.[5]

(e) The Parties' Arguments

(i) The appellants

55 The claims against the Diocese focus on the ordination of Father Farnsworth and Father Haig in 1977. The appellants argue that the ordination and the "licens[ing]" of Father Farnsworth and Father Haig to "act as Anglican clergy" at Grenville Christian College created a duty of care owed by the Diocese to all students who attended the school after the ordination in 1977. The appellants contend that the duty extended to the proper training and supervision of Father Farnsworth and Father Haig, as well as to ensuring that the students received an education that accorded with the "Anglican faith and values".

56 The appellants submit that the case law has recognized that a diocese owes a duty of care to persons who, by virtue of a task or responsibility assigned to a priest by a diocese, come under the

influence, direction or authority of that priest. The appellants referred to several cases in which a diocese has been held liable in negligence to victims who were abused by priests in that diocese. The appellants cite these as examples of the category of case into which they contend these pleadings put this case. The appellants argue that on a proper approach to the duty of care analysis, the motion judge should have found that this case fell within an established category and thus a *prima facie* duty of care existed.

57 Alternatively, the appellants argue that if the claim does not fall within a category of cases in which a duty of care has been recognized, the facts as pleaded demonstrate sufficient foreseeability of harm and proximity between the Diocese and the appellants to warrant a finding of a duty of care, or at least a finding that it was not "plain and obvious" that no such duty existed.

58 The breach of fiduciary duty claim, like the negligence claim, relies heavily on the ordination of Father Farnsworth and Father Haig and their "licens[ing]" to serve as Anglican clergy at Grenville Christian College. The appellants contend that on the facts as pleaded, Father Farnsworth and Father Haig were in a fiduciary relationship with the students and that the Diocese's power to supervise and direct Father Farnsworth and Father Haig placed the Diocese in that same relationship with the students. The appellants further submit that the Diocese's licensing of Father Farnsworth and Father Haig to "act as Anglican clergy" at Grenville Christian College constituted an implied undertaking to the students by the Diocese that it would properly train, monitor and supervise Father Farnsworth and Father Haig. The appellants argue that the Diocese breached that undertaking to the appellants.

(ii) The Diocese

59 The Diocese responds to the appellants' submissions primarily by relying on the reasons of the motion judge. The Diocese submits that the case law does not establish a category of cases recognizing a duty of care owed by a diocese to persons harmed by priests ordained by and working within the diocese. The Diocese contends that the cases relied on by the appellants involve fact situations in which the relationship between the diocese and the priest was very different than the relationship alleged in the appellants' pleadings. The Diocese argues that the duty of care established in those cases flowed from the nature of the relationship, not from the mere fact that the priests were ordained by and worked in the diocese.

60 The Diocese contends that the motion judge properly identified foreseeability and proximity as the principles to guide his duty of care analysis. The Diocese, relying particularly on the proximity analysis, submits that the motion judge came to the right conclusion.

61 Insofar as the breach of fiduciary duty claim is concerned, the Diocese emphasizes that the appellants did not plead any material facts capable of supporting the bald assertions in the Claim. Nor, according to the Diocese, do the appellants distinguish in their breach of fiduciary duty claim between the Diocese and the other respondents, despite the obviously very different relationship that the other respondents had with the appellants and other students. The Diocese asserts that the

mere ordaining of Father Farnsworth and Father Haig as clergy could no more create a duty of care to the students, much less a fiduciary relationship, than could the Law Society's licensing of a lawyer create a duty of care or fiduciary relationship between the Law Society and subsequent clients of the lawyer: see *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562.

(f) Analysis

(i) The negligence claim

62 Liability in negligence is premised in part on the existence of a duty owed by the defendant to the plaintiff to take reasonable care in the circumstances. Absent that duty, there can be no liability for negligent conduct: see *Taylor*, at para. 65.

63 If, even on a generous reading of the material facts as pleaded by the plaintiff, the defendant could not be found to owe a duty of care to the plaintiff, the pleading must be struck subject to allowing the plaintiff an opportunity to amend that pleading: see *Eliopoulos (Litigation Trustee of) v. Ontario (Minister of Health and Long-Term Care)* (2006), 82 O.R. (3d) 321 (C.A.), at paras. 8ff; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, at paras. 21ff; *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at paras. 14ff; and *Imperial Tobacco Canada Limited*, at paras. 17ff.

64 I begin with the appellants' submission that their claim falls within an established class of cases in which a duty of care has been recognized. The appellants refer to several cases in which a diocese was held liable in negligence for its failure to prevent abuse by priests who were working under the auspices of the diocese: *John Doe v. Bennett*, 2002 NFCA 47, 218 D.L.R. (4th) 276, aff'd 2004 SCC 17, [2004] 1 S.C.R. 436; *Swales v. Glendenning* (2004), 237 D.L.R. (4th) 304 (Ont. S.C.); and *W.K. v. Pornbacher* (1997), 32 B.C.L.R. (3d) 360 (S.C.). None of the cases relied on by the appellants engaged in any duty of care analysis, although the courts clearly found a duty of care since they found the diocese liable in negligence.

65 I do not read these cases as broadly as do the appellants. In my view, those cases do not create a category of cases recognizing a duty of care owed in all circumstances by a diocese to persons who are abused by priests ordained by and working in the diocese. In the cases relied on by the appellants, the relationship between the diocese and the priest went well beyond ordination and assignment of the priest. For example, in *John Doe* (S.C.C.), at para. 15, the bishop (found to be legally synonymous with the diocese) was responsible for the "direction, control and discipline" of priests in the diocese. This very broad authority over the priest who perpetrated the abuse, combined with the bishop's knowledge of the abusive conduct, was held to justify a finding of negligence against the diocese.

66 In *Swales*, at paras. 207-8, the diocese acknowledged that it owed a duty of care to the victims,

but argued that it had not breached that duty. The trial judge, relying primarily on the location where the abuse had occurred (in the priest's room in the actual seminary), concluded that the conduct ought to have caused the diocese to appreciate the risk of wrongdoing and make appropriate inquiries. The combination of the acknowledged duty of care and the failure by the diocese to make inquiries when fixed with knowledge of conduct that did not conform to accepted practices was sufficient to impose liability in negligence.

67 In *W.K.*, at para. 54, the trial judge found that the relationship between the diocese and the priest had "all of the common law indicia of the employer/employee relationship". Given that finding, it is hardly surprising that there was little dispute that the Bishop owed a duty of care to the young parishioner who was assaulted by the priest.

68 In my view, the cases relied on by the appellants do not demonstrate that the relationship of a diocese to its priests automatically creates a duty of care owed by the diocese to persons who engage with those priests. Rather, the cases demonstrate that the existence of any duty must be determined by reference to the specific facts of the case, particularly the nature of the relationship that exists between the diocese, the priests and those affected by the conduct of the priests. The impact of the relationship on the existence of any duty of care owed by a diocese to those harmed by priests in that diocese must be examined using the first principles of foreseeability of harm and proximity of relationship.

69 The concepts of foreseeability of harm and proximity are used to characterize the nature of the relationship between a plaintiff and a defendant for the purpose of determining whether that relationship gives rise to a duty of care. In *Imperial Tobacco Canada Limited*, at para. 41, McLachlin C.J. stated:

> Proximity and foreseeability are two aspects of one inquiry -- the inquiry into whether the facts disclose a relationship that gives rise to a *prima facie* duty of care at common law. Foreseeability is the touchstone of negligence law. However, not every foreseeable outcome will attract a commensurate duty of care. Foreseeability must be grounded in a relationship of sufficient closeness, or proximity, to make it just and reasonable to impose an obligation on one party to take reasonable care not to injure the other.

70 The motion judge used foreseeability in two different ways in his reasons. He referred to foreseeability of harm to the appellants (at paras. 81, 90), but he also referred to foreseeability of the existence of a duty of care (at paras. 91-92). Only foreseeability of harm to the plaintiff is relevant to the duty of care inquiry: *Hill v. Hamilton Wentworth Regional Police Services*, 2007 SCC 41, [2007] 3 S.C.R. 129, at para. 22.

71 The Claim contains two allegations against the Diocese that are germane to foreseeability:

* The Diocese was aware that Father Farnsworth and Father Haig were

adherents of a religious group known as the Community of Jesus and followed its teachings and practices at Grenville Christian College (Claim, at paras. 19-21, 30); and

* The Diocese was aware of or should have been aware of the misconduct of the individual respondents and staff at Grenville Christian College, but took no steps to report the abuse to appropriate authorities or parents (Claim, at para. 42).

72 The first allegation does not assist the appellants in establishing foreseeability of harm. The pleadings contain no description of the teachings or practices of the Community of Jesus. Without more, the allegation in the pleading adds nothing.

73 The allegation that the Diocese knew or should have known of the ongoing abuse at the school goes directly to foreseeability of harm to students at the school. The pleading is, however, devoid of any material facts substantiating the allegation that the Diocese knew or ought to have known of the abuse. A bald assertion of foreseeability cannot suffice to establish foreseeability for the purposes of the duty of care inquiry. The material facts upon which the assertion that the Diocese knew or ought to have known should be pleaded.

74 In any event, even if the foreseeability pleading could be cured by pleading material facts to substantiate the allegation, the pleading also fails to establish sufficient proximity in the relationship between the Diocese and the appellants to warrant the imposition of a duty of care.

75 The pleading does not allege any direct relationship between the Diocese and the appellants. The appellants do not plead that the Diocese made any representations or did anything that the appellants in any way relied on at any time either before or while they were students at Grenville Christian College. Indeed, the pleadings do not allege any conduct of any kind by the Diocese toward the appellants, or any contact in any way between the Diocese and the appellants or their parents. The absence of any direct relationship between a plaintiff and a defendant is certainly not determinative of the existence of a duty of care. It is, however, an important factor which can point strongly away from a finding of proximity: *Hill*, at para. 30.

76 Not only does the pleading not allege any direct relationship between the Diocese and the appellants, it says virtually nothing about any relationship between the Diocese and Grenville Christian College. There is no allegation that the Diocese had any control over or involvement with the school's property, finances, staff, enrollment, curriculum or day-to-day management. Nor does the pleading allege a more general supervisory power as might reside in a Board of Governors. The Claim pleads only an undefined "affiliation" with Grenville Christian College (at para. 9), and a "licens[ing]" of Father Farnsworth and Father Haig to act as Anglican clergy at the school (at para. 18). Neither allegation speaks to any supervisory authority over the operation of the school. Upon reading the pleadings, one is left wondering what exactly, if anything, the Diocese had to do with the operation of the school.

77 Similarly, the pleadings do not say much about the relationship between the Diocese on the one hand, and Father Farnsworth and Father Haig on the other insofar as the operation of Grenville Christian College is concerned. There is no allegation of anything approaching an employer/employee relationship. There is no allegation that the Diocese had any power to dismiss or otherwise discipline Father Farnsworth or Father Haig in respect of their operation of the school. There is no allegation that the ordination of Father Farnsworth and Father Haig changed anything about the operation of Grenville Christian College.

78 For the reasons set out above, I agree with the conclusion of the motion judge that the relationship between the Diocese and the appellants was not such as to impose a duty of care on the Diocese. The negligence claim was properly struck.

(ii) The fiduciary duty claim

79 In my view, if, as I would hold, the motion judge was correct in concluding that the facts as pleaded did not support a finding that the Diocese owed a duty of care to the appellants in negligence, it must follow that the fiduciary duty claim fails. If the facts as pleaded do not demonstrate sufficient proximity to warrant the imposition of a duty of care, I do not see how they could warrant the finding of a fiduciary relationship.

80 There can be no fiduciary relationship unless the alleged fiduciary is in a position to exercise unilaterally some discretion or power that will affect the putative beneficiary's legal or practical interests: see *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at para. 83. The only allegation in the Claim that touches on this component of a fiduciary duty claim is found at para. 27:

> The Plaintiffs state that, at all material times, the children who attended the school were entirely within the power and control of the Defendants, and were subject to the unilateral exercise of the Defendants' power or discretion.

81 Unlike with the other respondents, there is nothing in the rest of the Claim that supports the conclusory statement in para. 27 as it relates to the Diocese. There are no material facts pleaded to suggest that the appellants were in any way under the power or discretion of the Diocese while attending Grenville Christian College. The pleading fails to show any cause of action for breach of fiduciary duty against the Diocese.

(iii) Should the appellants be given an opportunity to amend their pleading?

82 It does not appear from the motion judge's reasons that he considered the possibility of an amendment of the pleadings and it is not clear that he was asked to consider an amendment. During oral argument in this court, counsel for the appellants indicated that the appellants could and would, if necessary, amend their pleadings. However, counsel did not put forward any additional material facts, other than those already pleaded, that could form the basis of a negligence or fiduciary duty

claim against the Diocese. No proposed amended pleading was placed before the court.

83 This proceeding is five years old and is still at the pleadings stage. The weaknesses in the statement of claim as it relates to the action against the Diocese have been an issue since the commencement of the certification proceedings. The appellants have had ample opportunity to address those weaknesses and put forward any amendments available to them that would cure the deficiencies identified in the pleadings. No amendments have been offered. Absent any concrete proposed amendments, I see no point in extending the proceedings against the Diocese further by allowing leave to amend. I would not grant leave to amend.

IV

SECTION 6(2) OF THE *CJA*

84 As indicated above, the court determined, after hearing oral argument, that it would not exercise its jurisdiction under s. 6(2) of the *CJA* even if it had jurisdiction to hear the appeal from the dismissal of the action against the Diocese. These are our reasons for refusing to exercise that jurisdiction.

85 Section 6(2) of the *CJA* provides:

> The Court of Appeal has jurisdiction to hear and determine an appeal that lies to the Divisional Court ... if an appeal in the same proceeding lies to and is taken to the Court of Appeal.

86 Section 6(2) recognizes that multiple appeals to different courts in the same proceeding can potentially generate inconsistent results and will inevitably increase the costs of litigation to the parties and impair the efficient use of judicial resources. In most cases, especially as here when all parties agree, the interests of justice will favour joinder.

87 The jurisdiction to join appeals in s. 6(2) is, however, discretionary and not mandatory. There will be cases when factors relevant to the administration of justice are sufficiently strong to override the wishes of the parties to the appeal and any efficiencies achieved by joinder. This is one such case.

88 First of all, I see little to be gained by joinder. The Divisional Court will no doubt await the result of this appeal. These reasons address only the adequacy of the pleadings against the Diocese, an entirely distinct issue from that arising out of the refusal to certify the action against the other respondents. Just as this court had no need to address the certification issues on this appeal, the Divisional Court will have no need to address the adequacy of the pleadings as against the Diocese. Whatever combination of results might have occurred on the two appeals, there is no risk of inconsistent results and very little overlap in the matters to be addressed on the two appeals.

89 Lastly, and most importantly, I think the very different nature of the issues raised on the two appeals contraindicates joinder. The appeal to this court from the dismissal of the claim against the Diocese raises a straightforward pleadings issue. That issue, while it arises in a certification proceeding because of s. 5(1)(a) of the *CPA*, is not a certification issue in the sense that it engages any law or procedure particular to certification of class proceedings. The issue before this court could just as easily have arisen, and usually does arise, in litigation that has nothing to do with class proceedings.

90 The issues raised on the appeal brought against the other respondents do engage the very core of the certification process and the judicial management of that process. Those "nuts and bolts" issues require evaluations best made by those with experience in the practical management of class action proceedings.

91 Section 30 of the *CPA* directs appeals granting or refusing certification to the Divisional Court. Members of the Divisional Court, who as Superior Court judges also preside over class action proceedings, have experience in class action matters which members of this court do not have. By directing appeals in respect of certification to the Divisional Court, I think the legislature must be taken as having determined that the practical experience of those judges is important in resolving the difficult and often unique problems that arise in the context of certification applications. The legislature seeks to take advantage of that expertise by directing initial appeals to the Divisional Court while maintaining this court's ultimate jurisprudential responsibility by allowing a further appeal to this court with leave: *CJA*, s. 6(1)(a).

92 Joinder of an appeal properly taken to the Divisional Court which raises certification-related issues, with an appeal in this court that has nothing to do with issues unique to certification, would circumvent the clear legislative choice as to the appropriate appellate forum reflected in s. 30 of the *CPA*.

93 The parties did not make out a case for joinder of these appeals.

V

CONCLUSIONS

94 For the reasons above, I would dismiss the appeal from the order dismissing the action against the Diocese. The remainder of the appeal has been transferred to the Divisional Court.

95 The parties have not had an opportunity to make submissions about costs. The appellants should file written submissions of no more than 6 pages within 20 days of the release of these reasons. The Diocese and the other respondents may file submissions of no more than 3 pages within 30 days of the release of these reasons.

D.H. DOHERTY J.A.

R.A. BLAIR J.A.:-- I agree.

1 O'Connor A.C.J.O. took no part in the judgment.

2 Actions against Betty Farnsworth (the spouse of Father Farnsworth) and Mary Haig (the spouse of Father Haig) were discontinued: *Cavanaugh v. Grenville Christian College*, 2012 ONSC 2398.

3 This court's decision dismissing the appeal is found at (2003), 167 O.A.C. 277 (C.A.). The jurisdictional issue is not discussed.

4 This court has also heard an appeal from a dismissal of an action for failure to disclose a cause of action made in the context of a certification application when there was no Rule 21.01(1)(b) motion: see *Attis v. Canada (Minister of Health)*, 2008 ONCA 660, 93 O.R. (3d) 35. Recently, in *Brown v. Canada (Attorney General)*, 2013 ONCA 18, the motion judge purported to "conditionally" certify a class proceeding subject to the appropriate amendments to the statement of claim so that it would allege a cause of action. The defendant had brought a Rule 21.01(1)(b) motion to dismiss the action. An appeal was taken to the Divisional Court under s. 30 of the *CPA*, and then to this court with leave. Jurisdictional questions were not raised in either *Attis* or *Brown*.

5 The motion judge also dismissed what he described as a vicarious liability claim against the Diocese: at paras. 99-105. It is not clear to me that there was a freestanding vicarious liability claim against the Diocese: see Claim, at para. 35. In any event, the appellants have not relied on a vicarious liability claim in advancing the appeal and I will not address that part of the motion judge's reasons.

TAB 4

See paras. 10-11

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.

TAB 5

See paras. 1, 6

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 mad 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.

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.

TAB 6

Case Name:

Leduc v. Roman

RE: John E. Leduc and Zeana Myerscough-Leduc, Joey Myerscough and Ronald Myerscough, represented by their litigation guardian John E. Leduc, and Janice L. Roman

[2009] O.J. No. 681

308 D.L.R. (4th) 353

73 C.P.C. (6th) 323

2009 CarswellOnt 843

2009 CanLII 6838

Court File No. 06-CV-3054666PD3

Ontario Superior Court of Justice

D.M. Brown J.

Heard: February 2, 2009.
Judgment: February 20, 2009.

(38 paras.)

Information technology -- Electronic evidence -- Documentary evidence -- Discovery -- Appeal by the defendant from the dismissal of her motion to compel the plaintiff to produce pages from his social networking website allowed in part -- The Master determined that the defendant failed to show that the plaintiff's Facebook profile contained evidence relevant to the defence of the plaintiff's personal injury action -- The appellate court found that the nature of Facebook permitted an inference of relevance -- Having ordered the plaintiff to preserve his postings and deliver a supplementary affidavit of documents, the Master should have permitted cross-examination on the affidavit to ascertain relevance of the content -- Ontario Rules of Civil Procedure, Rule 30.06.

Information technology -- Personal information and privacy -- Data -- Disclosure -- Sale or

sharing of data -- Appeal by the defendant from the dismissal of her motion to compel the plaintiff to produce pages from his social networking website allowed in part -- The Master determined that the defendant failed to show that the plaintiff's Facebook profile contained evidence relevant to the defence of the plaintiff's personal injury action -- The appellate court found that the nature of Facebook permitted an inference of relevance -- Having ordered the plaintiff to preserve his postings and deliver a supplementary affidavit of documents, the Master should have permitted cross-examination on the affidavit to ascertain relevance of the content -- Ontario Rules of Civil Procedure, Rule 30.06.

Civil litigation -- Civil procedure -- Discovery -- Electronic discovery and production -- Scope -- Duties respecting production of electronic evidence -- Affidavit or list of documents -- Appeal by the defendant from the dismissal of her motion to compel the plaintiff to produce pages from his social networking website allowed in part -- The Master determined that the defendant failed to show that the plaintiff's Facebook profile contained evidence relevant to the defence of the plaintiff's personal injury action -- The appellate court found that the nature of Facebook permitted an inference of relevance -- Having ordered the plaintiff to preserve his postings and deliver a supplementary affidavit of documents, the Master should have permitted cross-examination on the affidavit to ascertain relevance of the content -- Ontario Rules of Civil Procedure, Rule 30.06.

Appeal by the defendant, Roman, from a Master's order dismissing her motion for an order to compel production from the plaintiff, Leduc, of his profile pages from an online social networking site, Facebook. The plaintiff was involved in a car accident that he claimed was caused by the defendant's negligent driving. He claimed that his enjoyment of life was diminished and that he was no longer able to engage in sporting activities. In November 2006, the plaintiff was examined for discovery. No questions were asked regarding his Facebook profile. In September 2007, the defence conducted a psychiatric evaluation of the plaintiff. The medical report indicated that the plaintiff mentioned having several friends on Facebook. Defence counsel located the plaintiff's Facebook account, but access to his site was restricted to his Facebook friends. In June 2008, the defendant moved for, among other things, production of all information in the profile. The Master found that the Facebook profile pages were documents that lay within the control of the plaintiff. The Master concluded that the profile could potentially contain information that had relevance to demonstrating the plaintiff's physical and social activities, his enjoyment of life, and his psychological well-being. However, the Master refused to order production on the basis that the defendant failed to demonstrate that the plaintiff actually had relevant materials on his website. The Master noted that no questions were asked at discovery related to whether the defendant had online materials that were demonstrative of his lifestyle. The Master noted that had the plaintiff posted such lifestyle information on his Facebook profile, those documents should be listed in his supplementary affidavit of documents. The defendant appealed.

HELD: Appeal allowed in part. In contrast to the Master's ruling, it was reasonable to infer that the plaintiff's Facebook site potentially contained content relevant to the issue of the plaintiff's

post-accident lifestyle given the social networking nature of Facebook. The defendant's request for production was not a fishing expedition, as characterized by the Master. However, mere proof of the existence of a Facebook profile did not entitle the defendant to access to all of the material placed on that site. As correctly noted by the Master, Rule 30.06 required some evidence of relevant content in order to compel production. Trial fairness dictated that the defendant should be permitted an opportunity to test whether the plaintiff's Facebook profile was relevant to any matter in issue. Having granted a consent order to serve a supplementary affidavit of documents, the Master should have permitted the defendant to cross-examine the plaintiff on the affidavit in order to ascertain the relevance of the content posted by the plaintiff on his site.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 134(1)

Ontario Rules of Civil Procedure, Rule 30.02(1), Rule 30.02(2), Rule 30.03(4), Rule 30.06, Rule 30.07

Counsel:

J. Strype, for the Plaintiffs/Respondents.

B. Marta, for the Defendant/Appellant.

ENDORSEMENT

D.M. BROWN J.:--

I. Overview

1 Over the past few years Canadian popular culture has embraced www.facebook.com ("Facebook"), a social networking website, as a means by which to reveal one's personal life to other members of the community - one's "Facebook friends". In this motor vehicle action the defendant, Janice Roman, appeals from the decision of Master Dash made August 14, 2008, dismissing her motion to compel production from the plaintiff, John Leduc, of all pages on his Facebook webpage (also called a Facebook profile).

II. Background facts

2 John Leduc was involved in a car accident on February 7, 2004, in Lindsay, Ontario. In this action he claims that as a result of the defendant's negligent driving his enjoyment of life has been

lessened and the accident caused limitations to his personal life (Statement of Claim, paras. 9 and 11).

3 Mr. Leduc was examined for discovery in November, 2006; no questions were asked whether he maintained an active Facebook profile. Mr. Leduc underwent several medical examinations. During an examination in May, 2006, he advised the psychologist that he was not able to engage in the sporting activities he had enjoyed before the accident. In September, 2007, Dr. Bruun-Meyer conducted a defence psychiatric evaluation of Mr. Leduc. The resulting medical report recorded that Mr. Leduc had told Dr. Bruun-Meyer that he did not have friends in his current area, although he had "a lot on Facebook".

4 Mr. Leduc served an unsworn affidavit of documents in August, 2006. On May 28, 2008, defence counsel wrote Mr. Leduc's lawyer requesting a sworn up-to-date Affidavit of Documents.

5 At the same time defence counsel's office conducted a search of Facebook profiles and discovered that Mr. Leduc kept a Facebook account. Mr. Leduc's publicly available Facebook profile showed only his name and picture. Because Mr. Leduc had restricted access to his site only to his "Facebook friends", defence counsel's office was not able to view the content of his site.

6 Early in June, 2008, the defence moved for several production-related orders, including orders for (i) the interim preservation of all information contained on Mr. Leduc's Facebook profile, (ii) production of all information on the Facebook profile,[1] and, (iii) the production of a sworn Supplementary Affidavit of Documents.

III. Decision of the Master

7 On the initial return of the motion Master Dash ordered Mr. Leduc to copy and preserve every page from his Facebook profile until the main hearing of the motion.

8 On the further return of the motion on August 14, 2008, the plaintiff consented to an order to produce a supplementary affidavit of documents. As to the request that Mr. Leduc produce his Facebook pages, Master Dash held that (i) the Facebook profile pages were "documents" and (ii) they lay within the control of the plaintiff. The master also concluded that the Facebook profile could contain information that "might have some relevance to demonstrating the Plaintiff's physical and social activities, enjoyment of life and psychological well being".

9 Master Dash, however, refused to order Mr. Leduc to produce the pages from his Facebook profile. He held that the defendant bore the onus "to demonstrate that this Plaintiff has relevant materials on this Plaintiff's website." He continued:

> I agree with the sentiments expressed in paragraph 30 of the Plaintiff's factum with respect to the precedent that would be created by allowing a Defendant to gain access to any Plaintiff's Facebook merely by proving its existence. Same

> would be true of a photo album or a diary. The Defendant had an opportunity to ask at discovery whether the Plaintiff had photos - either a hard album or electronically that are demonstrative of his lifestyle but I have no evidence such questions were asked.
>
> In my view speculation of what may be on the Plaintiff's site or what is on a 'typical' site is insufficient. Surely the one head shot produced on the one public page is neither relevant nor indicative of what may be on the site. I am also concerned about the Plaintiff's privacy interests; however I am bound by the decision of Rady J. in *Murphy v. Preger* (October 3, 2007, Court File 45623/04, unreported). I do however agree that that decision may be distinguished as set out in paragraphs 27 to 29 of the Plaintiff's factum. In my view, unlike in *Murphy*, the request by the Defendant herein is clearly a fishing expedition. Even if I were to consider a production order, the Defendant's request for the entire site is far too broad and has not been restricted to specified relevant items. The motion will be dismissed.

10 Master Dash went on to note that if Mr. Leduc had posted photographs or other information on his Facebook profile depicting his activities or other enjoyment of life, those documents should be listed in his supplementary affidavit of documents. The master commented that if the production of Facebook profiles should become the new standard in personal injury actions, the decision in *Murphy v. Preger* should be reviewed at an appellate level.

IV. Standard of review

11 An appellate court should only interfere with a decision of a master if he made an error of law, exercised his discretion on the wrong principles, or misapprehended the evidence such that there was a palpable and overriding error. Where the master has erred in law, the standard of review is one of correctness: *Zeitoun v. Economical Insurance Group* (2008), 292 D.L.R. (4th) 313 (Ont. Div. Ct.), paras. 40 and 41.

V. Analysis

A. The obligation to identify and produce relevant documents

12 Our *Rules of Civil Procedure* impose on each party a positive obligation to disclose "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" and to produce each such document unless privilege is claimed over it: Rules 30.02(1) and (2). Proper compliance with this obligation is so critical to the functioning of our civil system of justice that each party must produce a sworn affidavit identifying relevant documents. This obligation to disclose continues throughout the course of the action: Rule 30.07.

13 One mechanism established by the Rules to monitor compliance with this disclosure duty consists of permitting an opposite party to move for relief before the courts where it has reason to believe that the other party has not complied with his disclosure obligations. On its motion to secure the production of Mr. Leduc's Facebook profile the appellant relied on Rule 30.06 which provides:

> Where 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
>
> (a) order cross-examination on the affidavit of documents;
> (b) order service of a further and better affidavit of documents;
> (c) order the disclosure or production for inspection of the document, or a part of the document, if it is not privileged ...

14 Rule 30.06 does not detract from the governing principle that the onus for reviewing documents to determine their relevance rests, in the first instance, with the party bearing the obligation to produce. Nonetheless, a motion under Rule 30.06 requires evidence, as opposed to mere speculation, that potentially relevant undisclosed documents exist. However, the level of proof required should take into account the fact that one party has access to the documents and the other does not: *RCP Inc. v. Wilding*, [2002] O.J. No. 2752 (Master), para. 12. When dealing with categories of documents it may not be possible to determine the extent or depth of required production until preliminary questions have been asked, or a preliminary level of production of a category of documents has been made: *RCP Inc., supra.*

15 Master Dash did not err in his articulation of the law regarding motions under Rule 30.06. He acknowledged that Mr. Leduc had an obligation to produce all relevant documents in his possession, including any information posted on his private Facebook profile demonstrating activities and enjoyment of life, "even if it is contrary to his interests in this action". Master Dash also correctly noted that where, on a Rule 30.06 motion, the defendant contends that the plaintiff has not met his obligation to produce relevant documents, then the defendant must provide some evidence that the plaintiff has relevant materials in his possession or control.

B. The existence of relevant information on Mr. Leduc's Facebook profile

16 Master Dash had before him two kinds of evidence: general evidence about Facebook, and specific evidence concerning Mr. Leduc's profile on it.

B.1 General evidence about Facebook

17 The general evidence described Facebook as a "social website" or, as put by its Terms of Use, "a social utility that connects you with the people around you". As of June, 2008, Facebook had more than 70 million active users. Although originally designed for use by American college

students, more than half of Facebook's users now are outside of college, and users over 25 years of age make up its fastest growing demographic.

18 The site is available for the personal, non-commercial use of its users. Content which users may post on Facebook includes photos, profiles (name, image, likeness), messages, notes, text, information, music, video, advertisements, listing and other content. The sites' "Facebook Principles" indicates that a user may "set up your personal profile, form relationships, send messages, perform searches and queries, form groups, set up events, add applications, and transmit information through various channels."

19 When a person registers with Facebook, he creates his own profile and privacy settings. Profile information is displayed to people in the networks specified by the user in his privacy settings - e.g. a user may choose to make his private profile information available to others within his school, geographic area, employment network, or to "friends" of "friends". A user can set privacy options that limit access to his profile only to those to whom he grants permission - the so-called "friends" of the user.

20 Facebook contains several applications. A user can post basic personal information - age, contact information, address, employment, personal facts, relationship status, etc. A user can post Photo Albums; Facebook is the largest photo-sharing application on the Web, with more than 14 million photos uploaded daily. A user can create a "wall", or chat board, where friends can post messages to each other. These postings can be viewed by all friends looking at the webpage, unlike emails which only the recipient can read. A user also can join a Facebook "group", essentially a community based on common interests.

B.2 Specific evidence about Mr. Leduc's Facebook profile

21 Turning to the specific evidence that was before Master Dash about Mr. Leduc's Facebook profile, the defence filed a copy of the plaintiff's publicly available Facebook profile which showed his name, photo, and city of residence, Toronto. Mr. Leduc set his privacy options to limit access to his posted material to "friends", so the defence was not able to view any content posted by Mr. Leduc on his profile. According to Mr. Leduc's statement to Dr. Bruun-Meyer, he had "a lot" of friends on Facebook.

22 Master Dash concluded that it would be speculative to infer from the various applications available to a Facebook user what content might exist on a specific Facebook site. He was not prepared to conclude that the one head shot of Mr. Leduc was indicative of what else might be on his site.

C. The approach of other courts to Facebook postings

23 That a person's Facebook profile may contain documents relevant to the issues in an action is beyond controversy. Photographs of parties posted to their Facebook profiles have been admitted as

evidence relevant to demonstrating a party's ability to engage in sports and other recreational activities where the plaintiff has put his enjoyment of life or ability to work in issue: *Cikojevic v. Timm*, [2008] B.C.J. No. 72, 2008 BCSC 74 (Master), para. 47; *R.(C.M.) v. R.(O.D.)*, [2008] N.B.J. No. 367, 2008 NBQB 253, paras. 54 and 61; *Kourtesis v. Joris*, [2007] O.J. No. 2677 (Sup. Ct.), paras. 72 to 75; *Goodridge (Litigation Guardian of) v. King*, [2007] O.J. No. 4611, 161 A.C.W.S. (3d) 984 (Ont. Sup. Ct.), para. 128. In one case the discovery of photographs of a party posted on a MySpace webpage formed the basis for a request to produce additional photographs not posted on the site: *Weber v. Dyck*, [2007] O.J. No. 2384 (Sup. Ct., Master).

24 The only case, however, to which counsel referred me on the question of the production of the access-limited contents of a Facebook profile was that of Rady, J. in *Murphy v. Perger*, [2007] O.J. No. 5511 (S.C.J.). That case also involved a claim for damages resulting from injuries suffered in a car accident, including a claim regarding loss of enjoyment of life. The plaintiff had posted photographs on her publicly-accessible Facebook profile showing her engaged in various social activities. The defendant moved for production of any photographs maintained on the private Facebook profile over which the plaintiff had control. In considering whether the defendant's request represented a mere fishing expedition or whether relevant photographs likely were posted on the private site, Rady J. stated:

> 17 It seems reasonable to conclude that there are likely to be relevant photographs on the site for two reasons. First, www.facebook.com is a social networking site where I understand a very large number of photographs are deposited by its audience. Second, given that the public site includes photographs, it seems reasonable to conclude the private site would as well.
>
> 18 On the issue of relevancy, in this case, clearly the plaintiff must consider that some photographs are relevant to her claim because she has served photographs of her prior to the accident, notwithstanding that they are only "snapshots in time".

25 Rady J. discounted that any significant privacy concerns arose in the circumstances before her:

> 20 Having considered these competing interests, I have concluded that any invasion of privacy is minimal and is outweighed by the defendant's need to have the photographs in order to assess the case. The plaintiff could not have a serious expectation of privacy given that 366 people have been granted access to the private site.

Rady J. ordered the plaintiff to produce copies of the web pages posted on her private site, subject to the ability of plaintiff's counsel to make future submissions in the event that any of the photographs personally embarrassed the plaintiff.

26 Master Dash was not prepared to follow the principle articulated by Rady J. in *Murphy v. Preger* that one could infer from the nature of the Facebook service the likely existence of photographs on the plaintiff's private profile. Master Dash characterized as "speculation" the drawing of any inferences from a "typical" Facebook profile about what content likely would be found on a specific Facebook profile. Master Dash also distinguished the *Murphy* decision on the basis that in that case the plaintiff had posted photographs on her public Facebook profile, had given the defence photographs as part of her productions, and evidence existed that 366 people had access to her site.

D. Review of Master Dash's decision

27 Although web-based social networking sites such as Facebook and MySpace are recent phenomena, their posted content constitutes "data and information in electronic form" producible as "documents" under the *Rules of Civil Procedure.* Facebook's Terms of Use and Principles make it clear that a person's postings fall under that party's control or power since the account user may post or remove content. If a party to an action posts on Facebook content that "relates to any matter in issue in an action", that party must identify such content in his affidavit of documents. Master Dash re-iterated this obligation in his reasons.

28 The *Rules of Civil Procedure* also impose an obligation on a party's counsel to certify that he has explained to the deponent of an affidavit of documents "what kinds of documents are likely to be relevant to the allegations in the pleadings": Rule 30.03(4). Given the pervasive use of Facebook and the large volume of photographs typically posted on Facebook sites, it is now incumbent on a party's counsel to explain to the client, in appropriate cases, that documents posted on the party's Facebook profile may be relevant to allegations made in the pleadings.

29 Where a party makes extensive postings of personal information on his publicly-accessible Facebook profile, few production issues arise. Any relevant public postings by a party are producible. An opposite party who discovers and downloads postings from another's public profile also operates subject to the disclosure and production obligations imposed by the Rules.

30 Where, in addition to a publicly-accessible profile, a party maintains a private Facebook profile viewable only by the party's "friends", I agree with Rady J. that it is reasonable to infer from the presence of content on the party's public profile that similar content likely exists on the private profile. A court then can order the production of relevant postings on the private profile.

31 Where, as in the present case, a party maintains only a private Facebook profile and his public page posts nothing other than information about the user's identity, I also agree with Rady J. that a court can infer from the social networking purpose of Facebook, and the applications it offers to users such as the posting of photographs, that users intend to take advantage of Facebook's applications to make personal information available to others. From the general evidence about Facebook filed on this motion it is clear that Facebook is not used as a means by which account holders carry on monologues with themselves; it is a device by which users share with others

information about who they are, what they like, what they do, and where they go, in varying degrees of detail. Facebook profiles are not designed to function as diaries; they enable users to construct personal networks or communities of "friends" with whom they can share information about themselves, and on which "friends" can post information about the user.

32 A party who maintains a private, or limited access, Facebook profile stands in no different position than one who sets up a publicly-available profile. Both are obliged to identify and produce any postings that relate to any matter in issue in an action. Master Dash characterized the defendant's request for content from Mr. Leduc's private profile as "a fishing expedition", and he was not prepared to grant production merely by proving the existence of the plaintiff's Facebook page. With respect, I do not regard the defendant's request as a fishing expedition. Mr. Leduc exercised control over a social networking and information site to which he allowed designated "friends" access. It is reasonable to infer that his social networking site likely contains some content relevant to the issue of how Mr. Leduc has been able to lead his life since the accident.

33 I do agree with Master Dash that mere proof of the existence of a Facebook profile does not entitle a party to gain access to all material placed on that site. Some material may relate to matters in issue; some may not. Rule 30.06 requires the presentation of some evidence that a party possesses a relevant document before a court can order production. Most often such evidence will emerge from questions asked on a party's examination for discovery about the existence and content of the person's Facebook profile. Where the party's answers reveal that his Facebook profile contains content that may relate to issues in an action, production can be ordered of the relevant content.

34 Here, the defendant did not ask Mr. Leduc any questions about his Facebook profile on his November, 2006 discovery; the defence only learned about the existence of the profile following a medical examination of the plaintiff. Simplified Rules cases do not permit discovery as of right, so other circumstances may arise where a party learns of the existence of another's Facebook profile, but cannot examine the person on the site's content. In such cases trial fairness dictates that the party who discovers the Facebook profile should enjoy some opportunity to ascertain and test whether the Facebook profile contains content relevant to any matter in issue in an action. One way to ensure this opportunity is to require the Facebook user to preserve and print-out the posted material, swear a supplementary affidavit of documents identifying any relevant Facebook documents and, where few or no documents are disclosed, permit the opposite party to cross-examine on the affidavit of documents in order to ascertain what content is posted on the site. Where the parties do not consent to following this process, recourse to the courts may be made.

35 Master Dash adopted the first two steps: he ordered Mr. Leduc to preserve his Facebook postings and to deliver a supplementary affidavit of documents. However, he dismissed the defendant's motion for production of all site materials as overly broad. While I share the Master's concern about the breadth of the defendant's request, I think the court should have permitted the defendant to cross-examine on the supplementary affidavit of documents to learn what relevant

content, if any, was posted on Mr. Leduc's Facebook profile. To permit a party claiming very substantial damages for loss of enjoyment of life to hide behind self-set privacy controls on a website, the primary purpose of which is to enable people to share information about how they lead their social lives, risks depriving the opposite party of access to material that may be relevant to ensuring a fair trial.

36 To summarize, Master Dash correctly stated the law that postings on Facebook profiles are documents within the meaning of the *Rules of Civil Procedure* and a party must produce any of his Facebook postings that relate to any matter in issue in an action. Although the Master correctly interpreted Rule 30.06 as requiring some evidence from a moving party pointing to the omission of a relevant document in the other's affidavit of documents, in my view the learned Master erred in exercising his discretion under that rule without applying the principle articulated by Rady J. in *Murphy v. Preger* that a court can infer, from the nature of the Facebook service, the likely existence of relevant documents on a limited-access Facebook profile. Further, having granted a consent order that Mr. Leduc serve a supplementary affidavit of documents, in my view the Master erred in dismissing the motion to produce without affording the defendant an opportunity to cross-examine Mr. Leduc on that affidavit regarding the kind of content posted on his Facebook profile.

37 I therefore allow the appeal to the extent of setting aside paragraph 3 of the order of Master Dash made August 14, 2008. Pursuant to section 134(1) of the *Courts of Justice Act*, I grant leave to the defendant to cross-examine Mr. Leduc on his supplementary of affidavit of documents about the nature of the content he posted on his Facebook profile.

V. Costs

38 As Master Dash observed in his endorsement, only in very recent times have courts turned to considering production requests involving Facebook profiles. In those circumstances, my inclination would be to order costs of this appeal and the motion before Master Dash payable in the cause. However, if the parties wish to make submissions on costs, the defendant may serve and file with my office written cost submissions, together with a Bill of Costs, by Friday, February 27, 2009. The plaintiff may serve and file with my office responding written cost submissions by Friday, March 6, 2009. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.

D.M. BROWN J.

1 In its Notice of Motion the defendant sought an order for production to her counsel "of

copies of all pages, photographs, profiles, groups, applications, friend lists, wall and funwall postings and video and inspection by [defendant's counsel] of all information contained in the Facebook webpage of the Plaintiff John E. Leduc on or before June 9, 2008".

TAB 7

See para. 2

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.

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 tort feasors 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.

TAB 8

Indexed as:

Ontario Realty Corp. v. P. Gabriele & Sons Ltd.

Between
Ontario Realty Corporation, (plaintiff), and
P. Gabriele & Sons Limited, Gabbro Construction Ltd., Gabriel Environmental Services Inc., 1331679 Ontario Limited, Pierino Gabriele, Frank Angelo Gabriele, Antonio Gabriele, Sirman Associates Limited, Ivan A. Sirman, Progressive Environmental Inc., Cynthia D.J. Stiles, 1287512 Ontario Limited, Integrated Property Solutions Inc., Robert W. Allan, Environmental and Development Solutions Ltd., 780551 Ontario Limited c.o.b. Master Environmental Services, 981602 Ontario Inc. c.o.b. Tri-Spade, Vincent Catalfo and Ross Farewell, Kent Banting and Tate Street Capital Inc., (defendants)

[2001] O.J. No. 477

142 O.A.C. 93

103 A.C.W.S. (3d) 168

Court File No. 752/2000

Ontario Superior Court of Justice
Divisional Court

Dunnet J.

Heard: January 31, 2001.
Judgment: February 13, 2001.

(42 paras.)

Practice -- Interim proceedings -- Preservation of property -- Anton Piller Order, setting aside -- Appeals -- Leave to appeal.

This was an application by the defendants, P Gabriele & Sons and others, for leave to appeal from a

decision upholding and continuing an Anton Piller order. Ontario Realty Corporation brought an action against the defendants alleging fraud. The original motion seeking the Anton Piller order was brought without notice on the basis that documents containing evidence relating to the alleged fraud would be destroyed by parties privy to the fraud. The motion was supported by the affidavit of a forensic accountant. The motions judge determined that there had been no failure of material disclosure and that an extremely strong prima facie case had been made. Gabriele argued that Ontario Realty had failed to make full and fair disclosure of all material facts, and that the judge had erred in not setting aside the ex parte order.

HELD: Application dismissed. A review of the evidence failed to reveal that there had been a material lack of disclosure which would serve to exculpate Gabriele, and no evidence that there were material facts known to Ontario Realty which were deliberately withheld from the court. The matter involved issues of interest between the parties with respect to documents within their power and was not a matter of public importance. The proposed appeal did not involve the interpretation of a statute or regulation. It related solely to the legal basis upon which the motions judge exercised his discretion. There were no conflicting decisions and no point of law of sufficient importance to warrant the attention of the Divisional Court.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, s. 66(2)(k).

Ontario Rules of Civil Procedure, Rule 45.01.

Counsel:

Peter R. Greene, for the applicants, 981602 Ontario Inc. c.o.b. Tri-Spade and as counsel for Smith Lyons, solicitors of record for the applicant P. Gabriele & Sons Limited, Gabbro Construction Ltd., Gabriele Environmental Services Inc., 1331679 Ontario Limited, Pierino Gabriele, Frank Angelo Gabriele and Antonio Gabriele.
Kenneth Prehogan, for the respondent, Ontario Realty Corporation.

DUNNET J. (endorsement):--

OVERVIEW

1 The applicants, P. Gabriele & Sons Limited, Gabbro Construction Ltd., Gabriel Environmental Services Inc., 1331679 Ontario Limited, Pierino Gabriele, Frank Angelo Gabriele and Antonio Gabriele (the Gabriele Group) and 981602 Ontario Inc. c.o.b. Tri-Spade (Tri-Spade), seek leave to appeal to the Divisional Court from Ontario Realty Corp. v. P. Gabriele & Sons Ltd., [2000] O.J.

No. 4341 (S.C.J.) In that decision, Farley J. upheld and continued an Anton Piller order in a case of alleged fraud against employees of the respondent, Ontario Realty Corporation (ORC) and third parties.

2 The original motion seeking an Anton Piller order was brought on April 19, 2000 without notice on the basis that the allegations of fraud led to a concern that documents containing evidence relating to the alleged fraud would be destroyed by parties privy to the fraud and that the respondent would then be precluded from obtaining the evidence required to prove its case.

3 The motion was supported by the affidavit of Craig Malcolm, Director of Forensic Accounting and Investigative Services, a division of Grant Thornton, LLP, Chartered Accountants and Management Accountants, who was retained by the Management Board Secretariat for the Province of Ontario in March 2000. His affidavit contained 116 paragraphs and 60 exhibits.

4 In his reasons, the motions judge determined that there had been no failure of material disclosure and an extremely strong prima facie case had been made.

5 It is the applicants' position that the respondent failed to make full and fair disclosure of all material facts and the motion judge's decision not to set aside his ex parte order is in direct conflict with the decisions in Chitel v. Rothbart (1983), 39 O.R. (2d) 513 (C.A.) and Lynian Ltd. v. Dubois (1990), 45 C.P.C. (2d) 231 (Ont. Gen. Div.).

6 Alternatively, there is good reason to doubt the correctness of the April 19, 2000 order because it is in essence a civil search warrant. As such, the far reaching powers of search and seizure granted to parties interested in the litigation is of sufficient cause for concern that there should be appellate authority on the availability of and guidelines for such an order.

ISSUES OF MATERIAL NON-DISCLOSURE

Frank Gabriele's Letter of March 6, 2000

7 In the spring of 2000, the Globe & Mail newspaper ran a series of investigative reports which included allegations that Frank Gabriele purchased nine hectares on Tomken Road in Mississauga from the Ontario government for $1.92 million in March 1999 and sold the land in November unimproved for $4.39 million.

8 On March 6, 2000, Gabriele wrote to Tony Miele, President and Chief Executive Officer of the respondent, explaining his position and inviting Miele to discuss the matter. The letter was not disclosed by Malcolm in his affidavit. In his reasons, the motions judge said:

> The offer of Frank Gabriele on March 6, 2000 to sit down with the President of ORC to discuss ("and disprove") allegations circulating in the newspapers should be viewed in context. These discussions were only as to properties discussed in

> the news and should not be taken as an offer to provide full disclosure on all properties (including implicitly any preservation of evidence).

9 I am satisfied that Malcolm did not know about the letter prior to the ex parte motion. Further, his affidavit made no reference to the allegations in the newspaper, or to specific allegations regarding the Tomken Road transaction. The motions judge concluded that the offer did not impact on the extremely strong prima facie case, nor did it demonstrate that incriminating documents would not be suppressed.

10 I am also satisfied that Malcolm's draft affidavit, dated April 18, 2000, which was delivered to Farley J. with the motion materials and amended when he swore his affidavit used on the motion the following day, has no relevance to this application.

Tri-Spade's Invoice No. 161804 re: Markam-Pickering Environmental Clean Up

11 Malcolm's affidavit stated that Ken Froese, a partner of Grant Thornton, spoke with Damian Spadafora, a director of Tri-Spade, at his home on April 2, 2000. A van with the name "P. Gabriele & Sons" was parked in the driveway. When questioned by Froese, Mr. and Mrs. Spadafora were unwilling to confirm or deny whether invoice No. 161804 had been prepared by Tri-Spade. In his affidavit of May 15, 2000, Spadafora denied his alleged unwillingness to respond. He swore that he told Froese, he should contact Spadafora during business hours the following week and he would respond. Froese did not do so.

12 On his cross-examination, Spadafora admitted that he knew Tri-Spade had not submitted the invoice. There is clear evidence that the bid was not that of Tri-Spade and the beneficiary of the clean-up contract awarded was the Gabriele Group whose companies and principals are related to the Spadaforas.

13 The motions judge found that it was reasonable for Malcolm to conclude on the facts as known on April 19, 2000 that the Tri-Spade bid was not legitimate. He said:

> One would do well to ask (if as now denied that it was a Tri-Spade legitimate bid) why would the Spadaforas wish to delay answering that simple question with a denial - a denial (which since it is in fact now disclaimed) which would not expose them or Tri-Spade to any liability, unless it were for the purpose of discussing the situation with someone else.

Documents Missing from ORC Files

14 In his affidavit, Malcolm alleged that some of the information in the respondent's files had been removed or was missing. Specifically, there was no appraisal or competitive tender for clean-up of the property owned by P. Gabriele & Sons Limited at Hurontario Street and Derry Road in Mississauga (HDR Property).

15 The applicants' position is that the respondent failed to disclose that ORC had substantially downsized its workforce, resulting in files being misplaced or that ORC could have requested copies of the missing files from other Ministries within the government.

16 In his endorsement of April 19, 2000, the motions judge wrote that the gaps in the files in isolation "would not be unusual, given human frailties of filing but in the pattern exhibited here, quite suspicious".

17 The applicants submit that a copy of the appraisal was in fact requested of the appraiser prior to the motion and this should have been disclosed to the motions judge, especially since the appraisal was eventually sent to Grant Thornton. On this issue, the motions judge found that documents seized from the residence of Vincent Catalfo, former Manager of Institutional and Environmental Services of ORC, related to several ORC properties, including the HDR Property, concerning which there were allegations of fraudulent dealings with the Gabriele Group.

The OPP Investigation

18 The applicants allege that the respondent failed to disclose in any admissible evidence under oath on the motion that the Ontario Provincial Police were conducting a criminal investigation into the same transactions.

19 I accept that these facts were made known to the motions judge at the hearing by counsel for the respondent.

The HDR Property

20 It is the applicants' position that the respondent failed to disclose that efforts had been made to locate the appraisal for the HDR Property missing from the ORC file.

21 The motions judge noted that it was unfortunate the appraisal was not located before, since he had found a suspicious pattern of missing documents. He also went on to say at paragraph 5 that: "A suspicion does not of course found an extremely strong prima facie case".

22 The issue, however, is not the missing appraisal nor the failure to disclose that it had been requested. Malcolm's affidavit makes the point that the Gabriele Companies, having received a rebate of the purchase price on the HDR Property for environmental work allegedly performed, subsequently delivered another invoice for the same work. Both were approved for payment by employees formerly employed by ORC.

STRONG PRIMA FACIE CASE AGAINST TRI-SPADE

23 The respondent alleges that Tri-Spade was involved in a fraudulent bidding scheme. The applicants submit that the only fact deposed to in support of the ex parte motion was the allegation that the bid for the Markham-Pickering environmental clean-up was not legitimate.

24 In response, Spadafora's affidavit of May 15, 2000 states that he was directly related by marriage to the Gabrieles. His company, Tri-Spade, did substantially all of its business as a subcontractor to P. Gabriele & Sons Limited. Further, he had never submitted a written bid for any work with ORC and he lied to Mr. Froese about the Tri-Spade bid on the Markham-Pickering property.

25 The motions judge did not take into account evidence other than the affidavit of Malcolm when he made his finding on April 19, 2000 of a strong prima facie case. Based upon all of the evidence before the motions judge on the ex parte motion and the subsequent evidence of Spadafora himself of his family relationship and untruthfulness, there is no reason to doubt the correctness of the motion judge's decision to grant and to continue the order.

STRONG PRIMA FACIE CASE AGAINST THE GABRIELE GROUP

26 The affidavit of Malcolm stated that the Gabriele Group, among others, operated under name and numbered corporations, both registered and unregistered, and the information sought by the respondent would assist in identifying properties for which those individuals and entities contracted with the ORC to provide environmental clean-up work which may not have been completed.

27 The motions judge concluded that it appeared that Gabriel Environmental Services Inc. could not have completed the environmental clean-up of the HDR Property as it had confirmed it had by rendering invoices for the total project and accepting payment. He ruled that a double billing would not of itself warrant an Anton Piller order; however, it appeared from subsequent information that at least one major part of the clean up on the HDR Property was not completed. That, he said, was sufficient grounds to issue the order.

ANALYSIS

28 In his reasons at paragraphs 56-57, the motions judge made a finding that the defendants had not made out a case upon lack of disclosure. He said:

> The Defendants have not - despite over five months of effort, including combing through thousands of pages of documents and conducting days of cross-examination - come up with anything which has demonstrated that the ORC has failed to make disclosure of something which may tend to have an exculpatory benefit to any of the defendants ...
>
> Even if I were of the opinion that there had been some element of lack of full disclosure, I would be of the view that this was not one of those exceptional cases referred to Browne-Wilkinson V-C at p. 200 of Dormeuil Frères when he was dealing with an AP order:

> In my judgment, save in exceptional cases, it is not the correct procedure to apply to discharge an ex parte injunction on the grounds of lack of full disclosure at the interlocutory stage of proceedings. The purpose of interlocutory proceedings is to regulate the future of the case until trial.

29 On this motion, counsel for the applicants extensively reviewed the evidence. Nevertheless, I am not persuaded that there has been a material lack of disclosure which would serve to exculpate the applicants, nor is there evidence that any facts which could be regarded as material were known to the respondent and were deliberately withheld from the court. In his reasons at paragraphs 51-55, the motions judge said:

> The defendants here point to Chitel as laying down a hard and fast rule that when there has been a failure to make full and frank disclosure of all relevant material facts the order is to be rescinded. They cite Lynian Ltd. v. Dubois, [1990] O.J. No. 2344; 45 C.P.C. (2d) 231 (Gen. Div.) as supporting this view when Then J. stated at p. 2 of his endorsement:
>
> > Moreover the law is clear that an "Anton Piller" order will be rescinded even where the disclosure of the material omitted would have had no effect on the granting of the original order. (J.P. Goldfluss Ltd. v. 306569 Ontario Ltd. (1977), 4 C.P.C. 296 (Ont. H.C.), Bardeau Ltd. et al. v. Crown Food Services Equipment Ltd. et al. (1982), 38 O.R. (2d) 411 at 413 (H.C.J.)).
>
> However I am of the view that Chitel did not lay down such a hard and fast rule that there was absolutely no discretion.

30 This is not a situation like Chitel where, because of the failure to make full disclosure with the resulting incomplete and misleading picture of the relationship between the parties, the Mareva injunction was not continued.

31 I agree with the motions judge that Chitel did not lay down a rule that there was no discretion in Anton Piller cases. Rather, it is the leading case in ex parte Mareva injunctions and the leading Court of Appeal decision on the requirements for disclosure.

32 The motions judge preferred the reasoning of Sharpe J. [as he then was] in United States of America v. Friedland, [1996] O.J. No. 4399 (Gen. Div.), where he held at paragraph 31:

> The duty of full and frank disclosure is, however, not to be imposed in a formal or mechanical manner. Ex parte applications are almost by definition brought

> quickly and with little time for preparation of material. A plaintiff should not be deprived of a remedy because there are mere imperfections in the affidavit or because inconsequential facts have not been disclosed. There must be some latitude and the defects complained of must be relevant and material to the discretion to be exercised by the Court. (See Mooney v. Orr (1994), 100 B.C.L.R. (2d) 335; Rust Check v. Buckowski (1994), 58 C.P.R. (3d) 324) [sic].

33 A Mareva injunction ties up the assets of the defendant and he is at a personal disadvantage until the matter has been finally determined; however, with an Anton Piller order, the defendant has what would otherwise be his obligation to provide production of documentation and any such evidence is preserved.

34 Accordingly, I am satisfied that there are no conflicting decisions or material non-disclosure providing sufficient grounds for leave to be granted.

35 The applicants allege that the order is akin to a civil search warrant since the respondent admitted to the motions judge that the documentation to be seized was needed for the purpose of an ongoing audit and investigation.

36 The motions judge stated that there was to be no access by the criminal authorities to any of the material seized. He also stated that one of the purposes of the order was to deal with missing documentation, some of which was located in the homes of former ORC employees, and it would be appropriate for those documents to be used for the ongoing audit by Grant Thornton in the civil litigation. The purpose of the order, therefore, was to protect documents from destruction.

37 In Dunlop Holdings Ltd. & Another v. Staravia, [1982] Com. L.R. 3 (C.A.) Oliver L.J. commented on the expanding use of the Anton Piller order:

> It is an order which, although it was originally directed to be made only in the most exceptional circumstances, is very, very commonly employed now, largely as a result of the very widespread practice of pirating records on tapes (although it has extended to other equipment as well). It has now become almost a commonplace. Although in the original Anton Piller case, [1976] Ch. 55, [1976] 1 All E.R. 779, there was clear evidence of the possibility that the evidence might be destroyed, it has certainly become customary to infer the probability of disappearance or destruction of evidence where it is clearly established on the evidence before the court that the defendant is engaged in a nefarious activity which renders it likely that he is an untrustworthy person. It is seldom that one can get cogent or actual evidence of a threat to destroy material or documents, so it is necessary for it to be inferred from the evidence which is before the court. Indeed, in the recent case of Yousif v. Salama, [1980] 3 All E.R. 405, (1980), 1 W.L.R. 910, [1980] FSR 444, Lord Denning said this: "In many cases such an order would not be granted. But in this case, there is evidence (if it

is accepted) which shows the defendant to be untrustworthy."

DISPOSITION

38 I find that there is no reason to doubt the correctness of the decision of the motions judge. He was concerned about missing ORC documentation and about the potential destruction of evidence. On the basis of the submissions made before me on this motion, I find there is no merit to the allegation that the order is akin to a civil search warrant.

39 The applicants have brought an appeal before the Court of Appeal to challenge the constitutionality of s. 66(2)(k) of the Courts of Justice Act and Rule 45.01 of the Rules of Civil Procedure. Accordingly, it is not necessary for this court to comment further on the allegation that the order is akin to a civil search warrant.

40 Further, there is no reason to doubt the correctness of the order as to a strong prima facie case against the applicants. In making that finding, the motions judge did not take into account any evidence other than that contained in the affidavit of Malcolm.

41 This matter involves issues of interest between the parties with respect to documents within their power and is not a matter of public importance. The proposed appeal does not involve the interpretation of a statute or regulation. It relates solely to the legal basis upon which the motions judge exercised his discretion.

42 In all the circumstances, I am of the view that there are no conflicting decisions and no point of law of sufficient importance to warrant the attention of a full panel of this court on appeal, nor any reason to doubt the correctness of the decision. The case is essentially fact-driven. Leave to appeal is denied. Costs to the respondent fixed in the amount of $5,000.

DUNNET J.

TAB 9

See paras 1-3, 17-18, 25

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

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.

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.[1]

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.

THE CATALYST CAPITAL GROUP INC.
Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.
Defendants

Court of Appeal File No.: C60799/M45387
Superior Court File No.: CV-14-507120

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THE MOVING PARTY, WEST FACE CAPITAL INC. (MOTION TO QUASH)

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