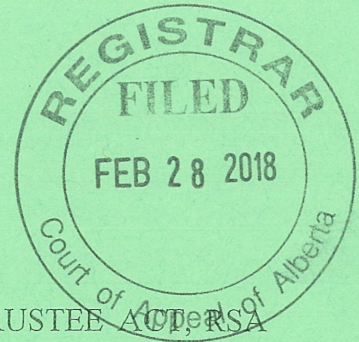
COURT OF APPEAL OF ALBERTA



Fast Track

COURT OF APPEAL FILE NUMBER:	1703 0239AC
COURT FILE NUMBER:	1103 14112
REGISTRY OFFICE:	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c T-8, AS AMENDED, and
	IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS:	MAURICE FELIX STONEY AND HIS BROTHERS AND SISTERS
STATUS ON APPEAL:	Interested Party
RESPONDENTS (ORIGINAL APPLICANTS):	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust (the "Sawridge Trustees")
STATUS ON APPEAL:	Respondents
RESPONDENT	PUBLIC TRUSTEE OF ALBERTA (the "OPGT")
STATUS ON APPEAL:	Not a Party to the Appeal
INTERVENOR:	SAWRIDGE FIRST NATION
STATUS ON APPEAL:	Respondent
INTERESTED PARTY:	PRISCILLA KENNEDY, Counsel for Maurice Felix Stoney and His Brothers and Sisters
STATUS ON APPEAL:	Appellant
DOCUMENT:	**BOOK OF AUTHORITIES OF THE RESPONDENT, SAWRIDGE FIRST NATION**

Appeal from the Case Management Order of
The Honourable Mr. Justice D.R.G. Thomas
Dated the 31st day of August, 2017
Filed the 6th day of October, 2017

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COURT OF APPEAL OF ALBERTA

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BOOK OF AUTHORITIES OF THE RESPONDENT, SAWRIDGE FIRST NATION

Volume 1 of 1

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TABLE OF AUTHORITIES

1. *Bun v Seng*, 2015 ABCA 165 (CanLII)
2. *Quebec (Director of Criminal and Penal Prosecutions) v Jodoin*, 2017 SCC 26, [2017] 1 SCR 478
3. *Alberta Rules of Court*, Alta Reg 124/2010, Rules 2.6, 10.50, Appendix – Definitions
4. *Young v Young*, [1993] 4 SCR 3
5. *Young v Young*, 1990 CanLII 3813 (BC CA)
6. *Best v Ranking*, 2015 ONSC 6279 (CanLII)
7. *Best v Ranking*, 2016 ONCA 492 (CanLII)
8. *Soderstrom v Hoffman-La Roche Limited*, 2008 CanLII 15778 (ON SC)
9. *Donmor Industries Ltd. v Kremlin Canada Inc. (No. 2)*, 1992 CanLII 7543 (ON SC)
10. *2403177 Ontario Inc. v Bending lake Iron Group Limited*, 2017 ONSC 3566 (CanLII)
11. *Sawridge Band v Canada*, [2003] 4 FC 748, 2003 FCT 347 (CanLII)
12. *Sawridge Band v Canada*, 2004 FCA 16 (CanLII)
13. *R v Barros*, 2010 ABCA 116 (CanLII)
14. *Goodfellow v Knight* (1977), 5 AR 573, 1977 CanLII 538 (QB)
15. *Federal Court Rules*, SOR/98-106, Rule 114
16. *Leader Media Productions Ltd. v Sentinel Hill Alliance Atlantis Equicap Limited Partnership*, 2008 ONCA 463 (CanLII)
17. *High-Crest Enterprises Limited v Canada*, 2017 FCA 88 (CanLII)

Tab 1

In the Court of Appeal of Alberta

Citation: Bun v Seng, 2015 ABCA 165

Date: 20150515
Docket: 1503-0107-AC
Registry: Edmonton

2015 ABCA 165 (CanLII)

Between:

Heang Bun

Applicant
(Appellant)

- and -

Pheap Seng and The Cambodian Canadian Friendship Society of Edmonton and Areas

Respondent
(Respondent)

Reasons for Decision of
The Honourable Madam Justice Ellen Picard

Application for Permission to Appeal

Reasons for Decision of
The Honourable Madam Justice Ellen Picard

2015 ABCA 165 (CanLII)

[1] The self-represented Mr. Bun seeks permission to appeal the March 26, 2015 costs order of Mr. Justice Verville.

[2] Mr. Bun brought a claim against The Cambodian Canadian Friendship Society of Edmonton and Areas and Pheap Seng (an officer of the Society), alleging irregularities in the Society's financial records and requesting further information from the Society. Mr. Bun was not satisfied by the materials he received and sought assistance of the Court. Justice Verville was appointed case manager.

[3] A case management meeting was scheduled for March 26, 2015 at Mr. Bun's request. At the case management meeting, the Society brought forward a cross-application to strike Mr. Bun's claim and prevent him from filing any further claims against the Society; that application was adjourned to a later date. Mr. Bun did not file an application or supporting affidavit in advance of the case management meeting, and the case management justice ordered him to pay the costs of the March 26 appearance to the Society. It is those costs that Mr. Bun seeks to appeal to this Court.

[4] Rule 14.5(1)(e) requires a party to obtain permission to appeal a decision as to costs only. The case law is clear that permission to appeal costs orders should be granted sparingly, and a party seeking permission to appeal such an award must meet a high threshold: ***Lameman v Alberta***, 2011 ABQB 724 at para 9, 521 AR 121; ***Gutierrez v Jeske***, 2005 ABQB 971 at para 4, 396 AR 1. This Court has held that it is appropriate to rely on the test for permission to appeal a costs award that was established under the former appellate Rules: ***Jackson v Canadian National Railway Company***, 2015 ABCA 89 at para 10. That test requires an applicant to demonstrate: (i) a good arguable case having sufficient merit to warrant scrutiny by this Court; (ii) issues of importance to the parties and in general; (iii) that the costs appeal has practical utility; and (iv) no delay in proceedings caused by the costs appeal.

[5] The standard of appellate review of a costs award is important in assessing the first step of the test, the merits of the appeal. Costs decisions are highly discretionary and will not be interfered with lightly: ***British Columbia (Minister of Forests) v Okanagan Indian Band***, 2003 SCC 71 at para 42, [2003] 3 SCR 371. Costs awards should not be set aside on appeal unless the judge below made an error in principle or the award is plainly wrong: ***Hamilton v Open Window Bakery Ltd***, 2004 SCC 9 at para 27, [2004] 1 SCR 303. Discretionary orders of case management justices are similarly afforded deference, and absent an error of law, this Court will not interfere unless the decision was unreasonable: ***Decock v Alberta***, 2000 ABCA 122 at para 13, 255 AR 234; ***Attila Dogan Construction and Installation Co Inc v AMEC Americas Ltd***, 2014 ABCA 74 at para 17, 569 AR 308.

[6] On the facts of this case and given the high degree of deference owed to costs awards on appeal, Mr. Bun has not demonstrated a good arguable case of sufficient merit and the first step of the test has not been satisfied. While the issue may be important to Mr. Bun, he has not demonstrated any general importance. Nor would this costs appeal have any practical utility because Mr. Bun has not raised any issues that would allow this Court to provide direction on the law with respect to costs. Although there are no concerns about delay in the proceedings below if this costs appeal were allowed to proceed, Mr. Bun has failed to satisfy the other steps of the test and permission to appeal is denied.

[7] Both parties spoke to costs at the hearing before me. I award costs of $600 inclusive of disbursements to the respondent.

Application heard on May 12, 2015

Reasons filed at Edmonton, Alberta
this 15th day of May, 2015

Picard J.A.

2015 ABCA 165 (CanLII)

Appearances:

K.C. Ng
for the Respondent (Respondent)

Applicant (Appellant) Heang Bun in Person

2015 ABCA 165 (CanLII)

Tab 2

Director of Criminal and Penal Prosecutions *Appellant*

v.

Robert Jodoin *Respondent*

and

Director of Public Prosecutions, Criminal Lawyers' Association (Ontario), Association des avocats de la défense de Montréal, Trial Lawyers Association of British Columbia and Canadian Civil Liberties Association *Interveners*

Indexed as: Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin

2017 SCC 26

File No.: 36539.

2016: December 5; 2017: May 12.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Criminal law — Costs — Lawyers — Courts — Jurisdiction — Superior Court dismissing motions of defence lawyer for writs of prohibition and awarding costs against lawyer personally — Court of Appeal setting award aside — Criteria and process applicable to exercise by courts of their power to impose such sanction on lawyer — Whether awarding costs against lawyer personally was justified in this case — Whether Court of Appeal erred in substituting its own opinion for that of Superior Court.

J, an experienced criminal lawyer, was representing 10 clients charged with impaired driving. On the morning of a scheduled hearing in the Court of Québec on a motion for disclosure of evidence in his clients' cases, before it even began, J had the office of the Superior Court stamp a series of motions for writs of prohibition in which he challenged the jurisdiction of the Court of

Directeur des poursuites criminelles et pénales *Appelant*

c.

Robert Jodoin *Intimé*

et

Directeur des poursuites pénales, Criminal Lawyers' Association (Ontario), Association des avocats de la défense de Montréal, Association des avocats plaideurs de la Colombie-Britannique et Association canadienne des libertés civiles *Intervenants*

Répertorié : Québec (Directeur des poursuites criminelles et pénales) c. Jodoin

2017 CSC 26

Nº du greffe : 36539.

2016 : 5 décembre; 2017 : 12 mai.

Présents : La juge en chef McLachlin et les juges Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown et Rowe.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit criminel — Dépens — Avocats — Tribunaux — Compétence — Cour supérieure rejetant les requêtes d'un avocat de la défense sollicitant la délivrance de brefs de prohibition et condamnant celui-ci personnellement au paiement des dépens — Condamnation annulée en appel — Critères et processus régissant l'exercice par les tribunaux de leur pouvoir d'infliger une telle sanction à un avocat — La condamnation personnelle aux dépens était-elle justifiée en l'espèce? — La Cour d'appel a-t-elle erré en substituant son opinion à celle de la Cour supérieure?

J, avocat criminaliste d'expérience, représente 10 clients accusés de conduite avec facultés affaiblies. Le matin d'une audience prévue en Cour du Québec sur une requête en communication de la preuve dans les dossiers de ses clients, avant qu'elle ne débute, J fait timbrer au greffe de la Cour supérieure une série de requêtes sollicitant la délivrance de brefs de prohibition contestant

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Québec judge who was to preside over the hearing, alleging bias on the judge's part. However, before the motions were served, the parties learned that another judge would be presiding instead. The motions were therefore put aside, and the hearing on the motion for disclosure of evidence began. At the hearing, J objected to the testimony of an expert witness called by the Crown on the ground that he had not received the required notice. The judge decided to authorize the examination in chief of the expert after the lunch break. During the break, J drew up a new series of motions for writs of prohibition, this time challenging that judge's jurisdiction and alleging, once again, bias on the judge's part. After the break, he informed the judge of this and the hearing was adjourned, as the service of such motions suspends proceedings until the Superior Court has ruled on them. The Superior Court dismissed the motions and, at the Crown's request, awarded costs against J personally. The Court of Appeal affirmed the Superior Court's judgment on the disposition of the motions, but allowed the appeal solely to set aside the award of costs against J personally.

Held (Abella and Côté JJ. dissenting): The appeal should be allowed and the award of costs restored.

Per McLachlin C.J. and Moldaver, Karakatsanis, Wagner, Gascon, Brown and Rowe JJ.: The courts have the power to maintain respect for their authority. This includes the power to manage and control the proceedings conducted before them. A court therefore has an inherent power to control abuse in this regard and to prevent the use of procedure in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. This is a discretion that must be exercised in a deferential manner, but it allows a court to ensure the integrity of the justice system.

The awarding of costs against lawyers personally flows from the right and duty of the courts to supervise the conduct of the lawyers who appear before them and to note, and sometimes penalize, any conduct of such a nature as to frustrate or interfere with the administration of justice. As officers of the court, lawyers have a duty to respect the court's authority. If they fail to act in a manner consistent with their status, the court may be required to deal with them by punishing their misconduct. This power of the courts to award costs against a lawyer personally is not limited to civil proceedings, but can also be exercised in criminal cases, which means that it may be

la compétence du juge de la Cour du Québec appelé à présider et alléguant sa partialité. Toutefois, avant la signification des requêtes, les parties apprennent que ce sera plutôt un autre juge qui présidera l'audience. Les requêtes sont donc mises de côté et l'audience sur la requête en communication de la preuve débute. En cours d'audience, J s'oppose au témoignage d'un expert du ministère public, au motif qu'il n'a pas reçu le préavis requis. Le juge décide d'autoriser l'interrogatoire principal de l'expert après la pause du midi. Pendant la pause, J rédige une nouvelle série de requêtes sollicitant la délivrance de brefs de prohibition contestant la compétence de ce juge et alléguant, pour lui également, sa partialité. Au retour de la pause, il en informe le juge et l'audience est ajournée, car la signification de telles requêtes opère sursis des procédures jusqu'à ce que la Cour supérieure se soit prononcée sur celles-ci. La Cour supérieure rejette les requêtes et, à la demande du ministère public, condamne personnellement J au paiement des dépens. La Cour d'appel confirme le jugement de la Cour supérieure sur le sort des requêtes mais accueille l'appel, à seule fin d'annuler la condamnation personnelle de J aux dépens.

Arrêt (les juges Abella et Côté sont dissidentes) : Le pourvoi est accueilli et la condamnation aux dépens est rétablie.

La juge en chef McLachlin et les juges Moldaver, Karakatsanis, Wagner, Gascon, Brown et Rowe : Les tribunaux ont le pouvoir de veiller au respect de leur autorité. Cela inclut le pouvoir de gérer, contrôler et maîtriser les procédures qui se déroulent devant eux. Ils possèdent ainsi le pouvoir inhérent de réprimer les abus à cet égard et d'empêcher que la procédure ne soit utilisée d'une manière qui serait manifestement injuste envers une partie au litige, ou qui aurait autrement pour effet de discréditer l'administration de la justice. Il s'agit d'un pouvoir discrétionnaire qui doit s'exercer avec retenue, mais qui permet à un tribunal d'assurer l'intégrité du système judiciaire.

La condamnation personnelle d'un avocat aux dépens découle du droit et du devoir des tribunaux de superviser la conduite des avocats présents devant eux et de signaler, et parfois sanctionner, toute conduite de nature à mettre en échec l'administration de la justice ou y porter atteinte. En tant qu'officiers de la cour, les avocats ont le devoir de respecter l'autorité des tribunaux. Le défaut des avocats d'agir en conformité avec leur statut peut obliger les tribunaux à sévir à leur endroit en sanctionnant leur inconduite. L'exercice par les tribunaux de ce pouvoir de condamner personnellement un avocat au paiement des dépens ne se limite pas aux instances civiles; il s'étend

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exercised against defence lawyers. This power applies in parallel with the power of the courts to punish by way of convictions for contempt of court and that of law societies to sanction unethical conduct by their members.

The threshold for exercising the courts' discretion to award costs against a lawyer personally is a high one. An award of costs against a lawyer personally can be justified only on an exceptional basis where the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice. This high threshold is met where a court has before it an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer, or dishonest or malicious misconduct on his or her part, that is deliberate.

There are two important guideposts that apply to the exercise of this discretion. The first guidepost relates to the specific context of criminal proceedings, in which the courts must show a certain flexibility toward the actions of defence lawyers, whose role is not comparable in every respect to that of a lawyer in a civil case. If costs are awarded against a lawyer personally, the purpose must not be to discourage the lawyer from defending his or her client's rights and interests, and in particular the client's right to make full answer and defence. Thus, the considerations to be taken into account in assessing the conduct of defence lawyers can be different from those that apply in the case of lawyers in civil proceedings. The second guidepost requires a court to confine itself to the facts of the case before it and to refrain from indirectly putting the lawyer's disciplinary record, or indeed his or her career, on trial. To consider facts external to the case before the court can be justified only for the limited purpose of determining, first, the intention behind the lawyer's actions and whether he or she was acting in bad faith, and, second, whether the lawyer knew, on bringing the impugned proceeding, that the courts do not approve of such proceedings and that this one was unfounded.

A court cannot award costs against a lawyer personally without following a certain process and observing certain procedural safeguards. A lawyer upon whom such a sanction may be imposed should be given prior notice of the allegations against him or her and the possible consequences. The notice should contain sufficient information about the alleged facts and the nature of the evidence in support of those facts, and should be sent far enough in advance to enable the lawyer to prepare adequately. The lawyer should have an opportunity to make separate

aussi aux instances criminelles et peut donc viser les avocats de la défense. Ce pouvoir s'exerce parallèlement à celui des tribunaux de sévir par une condamnation pour outrage au tribunal et à celui des barreaux de sanctionner l'inconduite de leurs membres sur le plan déontologique.

L'application du pouvoir discrétionnaire des tribunaux de condamner personnellement un avocat au paiement des dépens est circonscrite par des critères d'exercice élevés. Une condamnation personnelle de l'avocat aux dépens ne peut se justifier que de manière exceptionnelle, en présence d'une atteinte sérieuse à l'autorité des tribunaux ou d'une entrave grave à l'administration de la justice. Ce critère élevé est respecté lorsqu'un tribunal est en présence d'une procédure mal fondée, frivole, dilatoire ou vexatoire, qui dénote un abus grave du système judiciaire ou une inconduite malhonnête ou malveillante, commis de propos délibéré par l'avocat.

Deux balises importantes encadrent l'exercice de ce pouvoir discrétionnaire. La première balise découle du contexte particulier des procédures en matière criminelle, lequel requiert une certaine souplesse de la part des tribunaux à l'égard des actions entreprises par les avocats de la défense, dont le rôle n'est pas comparable en tous points à celui de l'avocat en matière civile. La condamnation personnelle aux dépens ne doit pas viser à décourager l'avocat dans la défense des droits et intérêts de son client, notamment son droit à une défense pleine et entière. Ainsi, l'évaluation de la conduite de l'avocat de la défense doit tenir compte de considérations parfois différentes de celles de l'avocat en matière civile. La seconde balise exige que les tribunaux s'en tiennent aux faits propres à l'affaire dont ils sont saisis et qu'ils s'abstiennent de faire indirectement le procès du dossier disciplinaire de l'avocat, voire de sa carrière. Recourir à des faits externes à l'instance concernée ne peut se justifier que dans l'objectif limité de déterminer, d'une part, l'intention et la mauvaise foi derrière les actions de l'avocat et, d'autre part, la connaissance par ce dernier, au moment où il a entrepris les procédures qu'on lui reproche, de la désapprobation de celles-ci par les tribunaux et de leur caractère mal fondé.

Un tribunal ne peut condamner personnellement un avocat aux dépens sans respecter un certain processus et certaines garanties procédurales. L'avocat passible d'une telle sanction devrait recevoir un avis préalable l'informant des allégations formulées à son endroit et des conséquences qui pourraient en découler. Cet avis devrait contenir des informations suffisantes sur les faits reprochés et sur la teneur de la preuve à l'appui, et être transmis suffisamment à l'avance pour permettre à l'avocat de se préparer adéquatement. Ce dernier devrait avoir

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submissions on costs and to adduce any relevant evidence in this regard. The applicable standard of proof is the balance of probabilities. In criminal proceedings, the Crown's role on this issue must be limited to objectively presenting the evidence and the relevant arguments.

The circumstances of this case were exceptional and justified an award of costs against J personally. The Superior Court correctly identified the applicable criteria and properly exercised its discretion. As the court noted, J's conduct in the cases in question was particularly reprehensible. The purpose of that conduct was unrelated to the motions he brought. J was motivated by a desire to have the hearing postponed rather than by a sincere belief that the judges targeted by his motions were hostile. J thus used the extraordinary remedies for a purely dilatory purpose with the sole objective of obstructing the orderly conduct of the judicial process in a calculated manner. It was therefore reasonable for the court to conclude that J had acted in bad faith and in a way that amounted to abuse of process, thereby seriously interfering with the administration of justice. The Court of Appeal should not have intervened in the absence of an error of law, a palpable and overriding error of fact or an unreasonable exercise of discretion by the Superior Court.

Per Abella and Côté JJ. (dissenting): Personal costs orders are of an exceptional nature. In the criminal context, such orders could have a chilling effect on criminal defence counsel's ability to properly defend their client. Accordingly, they should only be issued in the most exceptional of circumstances and the Crown should be very hesitant about pursuing them.

In the instant case, J's behaviour did not warrant the exceptional remedy of a personal costs order. It appears that his conduct was not unique and that he was being punished as a warning to other lawyers engaged in similar tactics. The desire to make an example of J's behaviour does not justify straying from the legal requirement that his conduct be rare and exceptional before costs are ordered personally against him.

l'occasion de présenter des observations distinctes au sujet des dépens, et, le cas échéant, des éléments de preuve pertinents à cet égard. La norme de preuve qui s'impose est celle de la preuve prépondérante. Dans les instances criminelles, le rôle du ministère public sur cette question doit se limiter à présenter objectivement la preuve et les arguments pertinents.

La situation en l'espèce était exceptionnelle et autorisait la condamnation personnelle de J au paiement des dépens. La Cour supérieure a bien dégagé les critères applicables et correctement exercé son pouvoir discrétionnaire. Comme elle l'a souligné, la conduite de J dans ces dossiers était particulièrement répréhensible. Elle visait un but étranger aux requêtes entreprises. J était animé par une volonté d'obtenir une remise de l'audience plutôt que par une croyance sincère dans l'inimitié des juges qui étaient la cible de ses requêtes. J a ainsi utilisé les recours extraordinaires à une fin purement dilatoire dans le seul but d'entraver de manière calculée le bon déroulement du processus judiciaire. Devant cela, la cour pouvait raisonnablement conclure que J a fait preuve de mauvaise foi et a abusé des procédures, portant ainsi sérieusement atteinte à l'administration de la justice. La Cour d'appel ne devait pas intervenir en l'absence d'erreur de droit, d'erreur manifeste et déterminante en faits ou d'exercice déraisonnable par la Cour supérieure de son pouvoir discrétionnaire.

Les juges Abella et Côté (dissidentes) : Les ordonnances condamnant personnellement un avocat aux dépens sont des mesures de nature exceptionnelle. Dans le contexte de procédures criminelles, de telles ordonnances pourraient avoir un effet paralysant sur la capacité des avocats de la défense à défendre adéquatement leurs clients. En conséquence, une telle sanction ne devrait être infligée que dans les circonstances les plus exceptionnelles et le ministère public devrait faire montre de beaucoup de circonspection avant de demander qu'elle le soit.

En l'espèce, la conduite de J ne justifiait pas l'imposition de la sanction exceptionnelle que représente la condamnation personnelle d'un avocat aux dépens. Il semble que sa conduite ne présentait pas un caractère exceptionnel et que la sanction qui lui était infligée se voulait un avertissement aux autres avocats ayant recours à des tactiques similaires. Le désir de faire un exemple de J en sanctionnant sa conduite ne saurait justifier de déroger à la règle de droit exigeant que la conduite qu'on lui reproche présente un caractère rare et exceptionnel afin que le tribunal puisse le condamner personnellement aux dépens.

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Moreover, J's motions for writs of prohibition were not unfounded to a sufficient degree to attract a personal costs order. The Crown had not provided J with the notice required for an expert witness testimony under s. 657.3(3) of the *Criminal Code*. J was, as a result, entitled to an adjournment under s. 657.3(4). The judge presiding in the Court of Québec only granted him a brief one over the lunch break and mistakenly said that J had already cross-examined the Crown's expert in other matters. In the circumstances, J's filing of motions for writs of prohibition for the purpose of suspending the proceedings can easily be seen as an error of judgment, but hardly one justifying a personal costs order. For these reasons, the appeal should be dismissed.

De plus, les requêtes sollicitant la délivrance de brefs de prohibition n'étaient pas mal fondées au point de commander une condamnation personnelle aux dépens. Le ministère public n'avait pas donné à J, comme le requiert le par. 657.3(3) du *Code criminel*, de préavis de son intention de faire témoigner un expert. Par conséquent, J avait droit à un ajournement en vertu du par. 657.3(4). Le juge de la Cour du Québec qui présidait l'audience ne lui a accordé qu'une brève suspension pendant la pause du midi et a affirmé à tort que J avait déjà contre-interrogé le témoin expert du ministère public dans d'autres instances. Dans les circonstances, le dépôt par J des requêtes sollicitant la délivrance de brefs de prohibition en vue d'obtenir la suspension des procédures peut aisément être considéré comme une erreur de jugement, mais difficilement comme une erreur justifiant une condamnation personnelle aux dépens. Pour ces motifs, le pourvoi devrait être rejeté.

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By Abella and Côté JJ. (dissenting)

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Daniel Royer and *Catherine Dumais*, for the appellant.

Catherine Cantin-Dussault, for the respondent.

2004 CSC 9, [2004] 1 R.C.S. 303; *Galganov c. Russell (Township)*, 2012 ONCA 410, 294 O.A.C. 13; *Trackcom Systems International Inc. c. Trackcom Systems Inc.*, 2014 QCCA 1136; *Québec (Procureur général) c. Bélanger*, 2012 QCCA 1669, 4 M.P.L.R. (5th) 21; *R. c. Jordan*, 2016 CSC 27, [2016] 1 R.C.S. 631.

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Daniel Royer et *Catherine Dumais*, pour l'appelant.

Catherine Cantin-Dussault, pour l'intimé.

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Gilles Villeneuve and *Mathieu Stanton*, for the intervener the Director of Public Prosecutions.

Maxime Hébrard and *Marlys A. Edwardh*, for the intervener the Criminal Lawyers' Association (Ontario).

Walid Hijazi, *Lida Sara Nouraie* and *Nicholas St-Jacques*, for the intervener Association des avocats de la défense de Montréal.

Mathew P. Good and *Ariane Bisaillon*, for the intervener the Trial Lawyers Association of British Columbia.

Frank Addario and *Stephen Aylward*, for the intervener the Canadian Civil Liberties Association.

English version of the judgment of McLachlin C.J. and Moldaver, Karakatsanis, Wagner, Gascon, Brown and Rowe JJ. delivered by

GASCON J. —

I. Overview

[1] This appeal concerns the scope of the courts' power to award costs[1] against a lawyer personally in a criminal proceeding. Although the courts have the power to maintain respect for their authority and to preserve the integrity of the administration of justice, the appropriateness of imposing such a sanction in a criminal proceeding must be assessed in light of the special role played by defence lawyers and the rights of the accused persons they represent. In such cases, the courts must be cautious in exercising this discretion.

[1] The Superior Court and the Court of Appeal used the French term "*dépens*" in their reasons and in their conclusions. The appellant and the respondent have referred sometimes to the concept of "*dépens*" and sometimes to that of "*frais*". For consistency, I will use the term used by the courts below in the French version of these reasons.

Gilles Villeneuve et *Mathieu Stanton*, pour l'intervenant le directeur des poursuites pénales.

Maxime Hébrard et *Marlys A. Edwardh*, pour l'intervenante Criminal Lawyers' Association (Ontario).

Walid Hijazi, *Lida Sara Nouraie* et *Nicholas St-Jacques*, pour l'intervenante l'Association des avocats de la défense de Montréal.

Mathew P. Good et *Ariane Bisaillon*, pour l'intervenante l'Association des avocats plaideurs de la Colombie-Britannique.

Frank Addario et *Stephen Aylward*, pour l'intervenante l'Association canadienne des libertés civiles.

Le jugement de la juge en chef McLachlin et des juges Moldaver, Karakatsanis, Wagner, Gascon, Brown et Rowe a été rendu par

LE JUGE GASCON —

I. Aperçu

[1] Ce pourvoi porte sur l'étendue du pouvoir des tribunaux de condamner personnellement un avocat au paiement des dépens[1] en matière criminelle. Si les tribunaux ont le pouvoir de veiller au respect de leur autorité et au maintien de l'intégrité de l'administration de la justice, l'opportunité d'imposer une telle sanction dans une instance criminelle doit être soupesée au regard du rôle particulier de l'avocat de la défense et des droits de l'accusé qu'il représente. Dans de tels cas, les tribunaux doivent faire preuve de prudence dans l'exercice de ce pouvoir discrétionnaire.

[1] La Cour supérieure et la Cour d'appel utilisent le terme « dépens » dans leurs motifs et leurs dispositifs. L'appelant et l'intimé se réfèrent tantôt à la notion de « dépens », tantôt à celle de « frais ». Aux fins d'uniformité, je m'en tiendrai au terme utilisé dans les décisions inférieures.

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[2] The respondent is an experienced criminal lawyer and a member of the Barreau du Québec. In several impaired driving cases joined for hearing on a single motion for disclosure of evidence, he filed two series of motions on the same day for writs of prohibition against two judges of the Court of Québec, each time on questionable grounds of bias, apparently in order to obtain a postponement of the scheduled hearing. A first judge had initially been assigned to preside over that hearing, but a second one replaced the first unexpectedly at the last minute. In response to that unprecedented strategy, which resulted in the postponement of the hearing in the Court of Québec, the appellant, the Crown, asked not only that the motions be dismissed, but also that the costs of the motions be awarded against the respondent personally.

[3] The Superior Court held that awarding costs against a lawyer personally can be justified in the case of a frivolous proceeding that denotes a serious and deliberate abuse of the judicial system. The judge expressed the opinion that the respondent's intentional acts were indicative of such abuse and constituted exceptional conduct that justified making an award against him personally. The Court of Appeal acknowledged that the motions for writs of prohibition should be dismissed, but nonetheless set aside the award of costs against the respondent personally, finding that his conduct did not satisfy the strict criteria developed by the courts in this regard.

[4] In my opinion, the appeal should be allowed. The Superior Court correctly identified the applicable criteria and properly exercised the discretion it has in such matters. The Court of Appeal should not have intervened in the absence of an error of law, a palpable and overriding error of fact or an unreasonable exercise of his discretion by the motion judge. Although the exercise of this discretion will be warranted only in rare cases, the circumstances of the instant case were exceptional and justified an award of costs against the respondent personally.

[2] L'intimé est un avocat criminaliste d'expérience, membre du Barreau du Québec. Dans le cadre de plusieurs dossiers de conduite avec facultés affaiblies réunis pour une même audience sur une même requête en communication de la preuve, il a déposé le même jour deux séries de requêtes sollicitant la délivrance de brefs de prohibition contre deux juges de la Cour du Québec, chaque fois pour des motifs de partialité douteux, vraisemblablement afin d'obtenir une remise de l'audience prévue. Un premier juge devait initialement présider cette audience, mais un second l'a remplacé à la dernière minute, contre toute attente. Devant cette démarche inédite qui a entraîné le report de l'audience devant la Cour du Québec, l'appelant, le ministère public, a demandé non seulement le rejet des requêtes, mais aussi la condamnation personnelle de l'intimé au paiement des dépens en découlant.

[3] La Cour supérieure a conclu que la condamnation personnelle de l'avocat aux dépens pouvait se justifier en présence d'une procédure frivole qui dénote un abus grave du système judiciaire commis de propos délibéré. Le juge a estimé que les gestes intentionnels de l'intimé révélaient un tel abus et constituaient une conduite exceptionnelle justifiant sa condamnation personnelle. Tout en reconnaissant qu'il y avait lieu de rejeter les requêtes sollicitant la délivrance de brefs de prohibition, la Cour d'appel a néanmoins infirmé la condamnation personnelle de l'intimé aux dépens, exprimant l'avis que sa conduite ne répondait pas aux critères stricts élaborés par la jurisprudence.

[4] J'estime qu'il y a lieu d'accueillir l'appel. La Cour supérieure a bien dégagé les critères applicables et correctement exercé son pouvoir discrétionnaire en la matière. La Cour d'appel ne devait pas intervenir en l'absence d'erreur de droit, d'erreur manifeste et déterminante en faits ou d'exercice déraisonnable par le premier juge de son pouvoir discrétionnaire. Bien que les cas justifiant cet exercice demeurent rares, la situation en l'espèce était exceptionnelle et autorisait la condamnation personnelle de l'intimé au paiement des dépens.

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II. Context

[5] The relevant context of this case can be summarized briefly. In April 2013, the respondent was representing 10 clients charged with driving while impaired by alcohol or while their blood alcohol level exceeded the legal limit. There were 12 cases, and they were joined for a hearing scheduled in the Court of Québec on a motion for disclosure of evidence, because the accused were all represented by the respondent. On the morning of the hearing, before it even began, the respondent had the office of the Superior Court stamp a series of motions for writs of prohibition in which he challenged the jurisdiction of the Court of Québec judge who was to preside over the hearing, alleging bias on the judge's part. As an experienced criminal lawyer, the respondent was well aware that the filing of such motions results in the immediate postponement of the hearing then under way until the Superior Court has ruled on them.

[6] However, the same morning, before the motions were served, the parties learned that another judge would be presiding over the hearing instead. The motions were therefore put aside, and the hearing on the motion for disclosure of evidence began. At the hearing, the Crown stated that it wished to call its expert witness. The respondent objected on the ground that he had not received the notice required by s. 657.3(3) of the *Criminal Code*, R.S.C. 1985, c. C-46, and that he had been unable to consult the expert's resumé. He requested a postponement. The judge heard the parties on this subject and decided to authorize the examination in chief of the expert after the lunch break. In his view, the respondent would have an opportunity to examine the expert's resumé before the hearing resumed.

[7] During the break, the respondent chose instead to draw up a new series of motions for writs of prohibition, this time challenging the second judge's jurisdiction and alleging, once again, bias on the judge's part. After the break, he informed the judge of this. As a result of s. 25 of the *Rules of Practice of the Superior Court of the Province of Quebec, Criminal Division, 2002*, SI/2002-46, which provides that

II. Contexte

[5] Le contexte pertinent dans le cadre du litige se résume succinctement. En avril 2013, l'intimé représente 10 clients accusés de conduite d'un véhicule alors que leurs facultés étaient affaiblies par l'alcool ou que leur alcoolémie dépassait la limite permise. Douze dossiers sont concernés, et ils sont réunis pour les besoins d'une audience fixée en Cour du Québec sur une requête en communication de la preuve car les accusés sont tous représentés par l'intimé. Le matin de l'audience prévue, et ce, avant même qu'elle ne débute, l'intimé fait timbrer au greffe de la Cour supérieure une série de requêtes sollicitant la délivrance de brefs de prohibition contestant la compétence du juge de la Cour du Québec appelé à présider et alléguant sa partialité. Avocat expérimenté en droit criminel, l'intimé est alors bien au fait que le dépôt de telles requêtes entraîne la remise immédiate de l'audience en cours jusqu'à ce que la Cour supérieure se soit prononcée sur celles-ci.

[6] Toutefois, le même matin, avant la signification de ces requêtes, les parties apprennent que ce sera plutôt un autre juge qui présidera l'audience. Les requêtes sont donc mises de côté, et l'audience sur la requête en communication de la preuve débute. En cours d'audience, le ministère public indique qu'il souhaite faire témoigner son expert. L'intimé s'y oppose, au motif qu'il n'a pas reçu le préavis requis par le par. 657.3(3) du *Code criminel*, L.R.C. 1985, c. C-46, et qu'il n'a pu consulter le curriculum vitae de l'expert. Il exige une remise. Le juge saisi entend les parties sur le sujet et décide d'autoriser l'interrogatoire principal de l'expert après la pause du midi. Il estime que l'intimé aura eu, dans l'intervalle, l'occasion d'étudier le curriculum vitae de l'expert.

[7] Pendant la pause, l'intimé choisit plutôt de rédiger une nouvelle série de requêtes sollicitant la délivrance de brefs de prohibition contestant cette fois la compétence de ce deuxième juge et alléguant, une fois de plus, la partialité du juge. Au retour de la pause, il en informe le juge saisi. Vu l'article 25 des *Règles de procédure de la Cour supérieure du Québec, chambre criminelle (2002)*, TR/2002-46, qui

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the service of such motions suspends proceedings, the judge had no choice but to adjourn the hearing.

prévoit que la signification de telles requêtes opère sursis des procédures, le juge n'a d'autre choix que d'ajourner l'audience.

[8] The appellant, believing that the sole purpose of these successive extraordinary remedies was to obtain a postponement for an ulterior motive, objected to the respondent's tactic. He told the respondent that he intended to seek an award of costs against the respondent personally because of the latter's dilatory motions and abuse of process. The Superior Court thus heard the motions for writs of prohibition both on the merits and on the award of costs being sought against the respondent personally.

[8] Estimant que ces recours extraordinaires successifs n'ont comme seul objectif que l'obtention d'une remise sur la base d'un motif oblique, l'appelant s'oppose à la démarche. Il annonce à l'intimé son intention de demander sa condamnation personnelle aux dépens en raison de ces requêtes dilatoires et de cet abus de procédures. Les requêtes sollicitant la délivrance de brefs de prohibition sont donc entendues par la Cour supérieure tant sur le fond que sur le volet de la condamnation aux dépens recherchée personnellement contre l'intimé.

III. Judicial History

A. *Quebec Superior Court (2013 QCCS 4661)*

III. Historique judiciaire

A. *Cour supérieure du Québec (2013 QCCS 4661)*

[9] The Superior Court judge began by rejecting the arguments on the merits of the motions for writs of prohibition against the Court of Québec judge. He found that the motions were unfounded and frivolous and that they were of questionable legal value for an experienced lawyer such as the respondent.

[9] Le juge de la Cour supérieure écarte d'abord les arguments sur le fond des requêtes visant à obtenir la délivrance des brefs de prohibition à l'encontre du juge de la Cour du Québec. Il constate que ces requêtes sont mal fondées, frivoles et d'une valeur juridique douteuse pour un avocat d'expérience comme l'intimé.

[10] The judge then dealt with the costs award being sought against the respondent. Indeed, he devoted the bulk of his reasons to that issue, as it was clear, to say the least, that the proceeding was frivolous, given that there was nothing in the words of the Court of Québec judge to indicate an excess of jurisdiction.

[10] Le juge traite ensuite de la question de la condamnation aux dépens réclamée contre l'intimé. Il y consacre du reste l'essentiel de ses motifs, le caractère frivole de la procédure étant pour le moins manifeste, alors qu'il n'y avait dans les propos du juge de la Cour du Québec aucun indice d'excès de compétence.

[11] On the law applicable to the issue of costs in criminal proceedings, the Superior Court judge cited *Quebec (Attorney-General) v. Cronier* (1981), 63 C.C.C. (2d) 437 (Que. C.A.). He noted that L'Heureux-Dubé J.A., as she then was, had emphasized [TRANSLATION] "the inherent power of the Superior Court to manage cases within its jurisdiction and to award costs not provided for by statute" (para. 115 (CanLII)). On the basis of the principles enunciated in *Cronier*, the judge found that the issue was whether what was before him was "a frivolous proceeding that denotes a serious abuse of the

[11] Sur le droit applicable à la question des dépens en matière criminelle, le juge de la Cour supérieure s'en remet à l'arrêt *Québec (Procureur général) c. Cronier* (1981), 23 C.R. (3d) 97 (C.A. Qc). Il en retient que dans ses motifs, la juge L'Heureux-Dubé, alors à la Cour d'appel du Québec, met en lumière « le pouvoir inhérent de la Cour supérieure de gérer les dossiers de sa juridiction et d'accorder des dépens non prévus par une loi » (par. 115 (CanLII)). Sur la foi des enseignements de cet arrêt, le juge estime que la question consiste à déterminer s'il est en présence d'« une procédure frivole qui dénote un abus grave

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judicial system", an abuse that was "deliberate" (para. 117).

[12] On the facts of the case before him, the judge found that the [TRANSLATION] "preparation, at lunchtime on April 23, 2013, of a series of motions for writs of prohibition in a legal situation that did not call for such a proceeding, and the continued presentation of those proceedings," constituted abuse of "section 25 of the *Rules of Practice* and the suspension order it entails" (para. 118). In his analysis, the judge took the respondent's conduct in other cases into account in determining whether he had had culpable intent to file, as a calculated act, proceedings that he knew to be frivolous and abusive.

[13] The judge concluded that the respondent's conduct satisfied the applicable criteria and that it had [TRANSLATION] "led, in a manner that well-informed Canadians would not approve of, to paralysis of the legitimate work of the Court of Québec sitting in a criminal proceeding and to disruption of its local judges' case management work" (para. 119). He dismissed the motions for writs of prohibition and awarded costs against the respondent personally, setting them at $3,000 for all the cases combined, or $250 per case.

B. *Quebec Court of Appeal (2015 QCCA 847)*

[14] The Court of Appeal affirmed the Superior Court's judgment on the disposition of the motions for writs of prohibition, but allowed the appeal solely to set aside the award of costs against the respondent personally. It noted that, in criminal cases, [TRANSLATION] "costs have no longer been systematically awarded since the 1954 reform of the criminal justice system" (para. 5 (CanLII)). However, it acknowledged that, "in circumstances that are quite rare and exceptional", the Superior Court can, "in the exercise of its inherent superintending and reforming powers, award costs" (para. 6). In the case at bar, the Court of Appeal was of the view that the Superior Court should not have exercised those inherent powers to sanction conduct that had occurred in another court

du système judiciaire » commis « de propos délibéré » (par. 117).

[12] Sur les faits propres à l'espèce dont il est saisi, le juge note que la « préparation, sur l'heure du dîner du 23 avril 2013, d'une série de requêtes en émission d'un bref de prohibition, dans une situation juridique qui ne commandait nullement une telle procédure, tout autant que le maintien de la présentation de ces procédures, » constitue un abus « de l'utilisation de l'article 25 des *Règles de procédure* et de son ordonnance de sursis » (par. 118). Dans son analyse, le juge fait état du comportement de l'intimé dans des dossiers distincts afin d'apprécier son intention coupable de déposer, par des gestes réfléchis, des actes de procédure qu'il sait frivoles et abusifs.

[13] Le juge conclut que la conduite de l'intimé satisfait aux critères applicables et qu'elle a « entraîné, d'une manière que le justiciable canadien bien informé n'approuverait pas, la paralysie des travaux légitimes de la Cour du Québec siégeant en matière criminelle et la perturbation du travail de gestion de ses juges locaux » (par. 119). Il rejette les requêtes demandant la délivrance de brefs de prohibition et condamne personnellement l'intimé au paiement des dépens, qu'il fixe à 3 000 $ pour l'ensemble des dossiers concernés, soit 250 $ par dossier.

B. *Cour d'appel du Québec (2015 QCCA 847)*

[14] La Cour d'appel confirme le jugement de la Cour supérieure sur le sort des requêtes sollicitant la délivrance de brefs de prohibition, mais accueille l'appel, à seule fin d'annuler la condamnation personnelle de l'intimé aux dépens. Elle souligne qu'en matière criminelle, « l'octroi systématique de frais n'existe plus depuis la refonte du système de justice criminelle en 1954 » (par. 5 (CanLII)). Elle reconnaît que, « dans des circonstances plutôt rares et de nature exceptionnelle », la Cour supérieure peut toutefois, « en vertu de ses pouvoirs inhérents de surveillance et de contrôle, adjuger des dépens » (par. 6). Or, en l'espèce, la Cour d'appel estime que la Cour supérieure ne devait pas exercer ces pouvoirs inhérents à l'endroit de comportements

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that itself had the power to punish for contempt of court. It concluded that, on the facts, the situation "does not have the exceptional and rare quality of an act that seriously undermines the authority of that court or that seriously interferes with the administration of justice" (para. 11).

IV. Issue

[15] The only issue in this appeal is whether the Superior Court was justified in awarding costs against the respondent personally. What must be done to resolve it is, first, to determine the scope of the courts' power to impose such a sanction, the applicable criteria and the process to be followed, next, to ascertain whether the criteria were properly applied by the Superior Court judge and, finally, to determine whether the intervention of the Court of Appeal was necessary.

V. Analysis

A. *Awarding of Costs Against a Lawyer Personally*

(1) Power of the Courts

[16] The courts have the power to maintain respect for their authority. This includes the power to manage and control the proceedings conducted before them (*R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 58). A court therefore has an inherent power to control abuse in this regard (*Young v. Young*, [1993] 4 S.C.R. 3, at p. 136) and to prevent the use of procedure "in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute": *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting, reasons approved in 2002 SCC 63, [2002] 3 S.C.R. 307. This is a discretion that must, of course, be exercised in a deferential manner (*Anderson*, at para. 59), but it allows a court to "ensure the integrity of the justice system" (*Morel v. Canada*, 2008 FCA 53, [2009] 1 F.C.R. 629, at para. 35).

survenus devant une autre juridiction possédant elle-même le pouvoir de condamner l'outrage au tribunal. Elle en conclut que, dans les faits, la situation « ne révèle pas le caractère exceptionnel et rare que sont une atteinte sérieuse à l'autorité de ce tribunal ou une atteinte grave à l'administration de la justice » (par. 11).

IV. Question en litige

[15] La seule question que soulève le pourvoi est celle de savoir si la Cour supérieure était justifiée de condamner personnellement l'intimé au paiement des dépens. Pour y répondre, il faut d'abord cerner l'étendue du pouvoir des tribunaux d'infliger une telle sanction, les critères applicables et le processus à suivre, ensuite, vérifier si l'application des critères par le juge de la Cour supérieure était légitime et, enfin, déterminer si une intervention de la Cour d'appel s'imposait.

V. Analyse

A. *La condamnation personnelle de l'avocat aux dépens*

(1) Le pouvoir des tribunaux

[16] Les tribunaux ont le pouvoir de veiller au respect de leur autorité. Cela inclut le pouvoir de gérer, contrôler et maîtriser les procédures qui se déroulent devant eux (*R. c. Anderson*, 2014 CSC 41, [2014] 2 R.C.S. 167, par. 58). Ils possèdent ainsi le pouvoir inhérent de réprimer les abus à cet égard (*Young c. Young*, [1993] 4 R.C.S. 3, p. 136) et d'empêcher que la procédure ne soit utilisée [TRADUCTION] « d'une manière qui serait manifestement injuste envers une partie au litige, ou qui aurait autrement pour effet de discréditer l'administration de la justice » : *Canam Enterprises Inc. c. Coles* (2000), 51 O.R. (3d) 481 (C.A.), par. 55, le juge Goudge, dissident, opinion approuvée par 2002 CSC 63, [2002] 3 R.C.S. 307. Il s'agit d'un pouvoir discrétionnaire qui doit certes s'exercer avec retenue (*Anderson*, par. 59), mais qui permet à un tribunal « d'assurer l'intégrité du système judiciaire » (*Morel c. Canada*, 2008 CAF 53, [2009] 1 R.C.F. 629, par. 35).

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[17] It is settled law that this power is possessed both by courts with inherent jurisdiction and by statutory courts (*Anderson*, at para. 58). It is therefore not reserved to superior courts but, rather, has its basis in the common law: *Myers v. Elman*, [1940] A.C. 282 (H.L.), at p. 319; M. Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007), 11 *Can. Crim. L.R.* 97, at p. 126.

[17] Il est acquis que ce pouvoir appartient tant aux tribunaux jouissant d'une compétence inhérente qu'aux tribunaux d'origine législative (*Anderson*, par. 58). Il n'est donc pas réservé aux cours supérieures et tire plutôt son fondement de la common law : *Myers c. Elman*, [1940] A.C. 282 (H.L.), p. 319; M. Code, « Counsel's Duty of Civility : An Essential Component of Fair Trials and an Effective Justice System » (2007), 11 *Rev. can. D.P.* 97, p. 126.

[18] There is an established line of cases in which courts have recognized that the awarding of costs against lawyers personally flows from the right and duty of the courts to supervise the conduct of the lawyers who appear before them and to note, and sometimes penalize, any conduct of such a nature as to frustrate or interfere with the administration of justice: *Myers*, at p. 319; *Pacific Mobile Corporation v. Hunter Douglas Canada Ltd.*, [1979] 1 S.C.R. 842, at p. 845; *Cronier*, at p. 448; *Pearl v. Gentra Canada Investments Inc.*, [1998] R.L. 581 (Que. C.A.), at p. 587. As officers of the court, lawyers have a duty to respect the court's authority. If they fail to act in a manner consistent with their status, the court may be required to deal with them by punishing their misconduct (M. Code, at p. 121).

[18] Une jurisprudence bien établie reconnaît que la condamnation personnelle d'un avocat aux dépens découle du droit et du devoir des tribunaux de superviser la conduite des avocats présents devant eux et de signaler, et parfois de sanctionner, toute conduite de nature à mettre en échec l'administration de la justice ou y porter atteinte : *Myers*, p. 319; *Pacific Mobile Corporation c. Hunter Douglas Canada Ltd.*, [1979] 1 R.C.S. 842, p. 845; *Cronier*, p. 110; *Pearl c. Gentra Canada Investments Inc.*, [1998] R.L. 581 (C.A. Qc), p. 587. En tant qu'officiers de la cour, les avocats ont le devoir de respecter l'autorité des tribunaux. Le défaut des avocats d'agir en conformité avec leur statut peut obliger les tribunaux à sévir à leur endroit en sanctionnant leur inconduite (M. Code, p. 121).

[19] This power of the courts to award costs against a lawyer personally is not limited to civil proceedings, but can also be exercised in criminal cases (*Cronier*). This means that it may sometimes be exercised against defence lawyers in criminal proceedings, although such situations are rare: *R. v. Liberatore*, 2010 NSCA 26, 292 N.S.R. (2d) 69; *R. v. Smith* (1999), 133 Man. R. (2d) 89 (Q.B.), at para. 43; *Canada (Procureur général) v. Bisson*, [1995] R.J.Q. 2409 (Sup. Ct.); M. Code, at p. 122.

[19] L'exercice par les tribunaux de ce pouvoir de condamner personnellement un avocat au paiement des dépens ne se limite pas aux instances civiles; il s'étend aussi aux instances criminelles (*Cronier*). Bien qu'une telle situation soit rare, ce pouvoir peut donc viser parfois les avocats de la défense en matière criminelle : *R. c. Liberatore*, 2010 NSCA 26, 292 N.S.R. (2d) 69; *R. c. Smith* (1999), 133 Man. R. (2d) 89 (B.R.), par. 43; *Canada (Procureur général) c. Bisson*, [1995] R.J.Q. 2409 (C.S.); M. Code, p. 122.

[20] The power to control abuse of process and the judicial process by awarding costs against a lawyer personally applies in parallel with the power of the courts to punish by way of convictions for contempt of court and that of law societies to sanction unethical conduct by their members. Punishment for contempt is thus based on the same power the courts have "to enforce their process and maintain

[20] Ce pouvoir de contrôler les abus de procédure et le processus judiciaire en condamnant personnellement un avocat au paiement des dépens s'exerce parallèlement à celui des tribunaux de sévir par une condamnation pour outrage au tribunal et à celui des barreaux de sanctionner l'inconduite de leurs membres sur le plan déontologique. Ainsi, la sanction de l'outrage repose sur ce même pouvoir qu'ont

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their dignity and respect" (*United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, at p. 931). These sanctions are not mutually exclusive, however. If need be, they can even be imposed concurrently in relation to the same conduct.

les tribunaux « de faire observer leur procédure et de maintenir leur dignité et le respect qui leur est dû » (*United Nurses of Alberta c. Alberta (Procureur général)*, [1992] 1 R.C.S. 901, p. 931). Ces sanctions ne sont par contre pas mutuellement exclusives. Elles peuvent même, à la rigueur, être appliquées concurremment pour une même conduite.

[21] This being said, although the criteria for an award of costs against a lawyer personally are comparable to those that apply to contempt of court (*Cronier*, at p. 449), the consequences are by no means identical. Contempt of court is strictly a matter of law and can result in harsh sanctions, including imprisonment. In addition, the rules of evidence that apply in a contempt proceeding are more exacting than those that apply to an award of costs against a lawyer personally, as contempt of court must be proved beyond a reasonable doubt. Because of the special status of lawyers as officers of the court, a court may therefore opt in a given situation to award costs against a lawyer personally rather than citing him or her for contempt (I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Leg. Probl.* 23, at pp. 46-48).

[21] Cela dit, même si les critères qui permettent une condamnation personnelle de l'avocat aux dépens se comparent à ceux applicables à l'égard de l'outrage au tribunal (*Cronier*, p. 111), les conséquences qui en découlent sont loin d'être identiques. L'outrage au tribunal est de droit strict et peut entraîner des sanctions sévères, dont l'emprisonnement. Les règles de preuve y afférentes sont du reste plus exigeantes que pour une condamnation personnelle de l'avocat aux dépens, l'outrage au tribunal devant être prouvé hors de tout doute raisonnable. Parce que les avocats ont le statut particulier d'officiers de la cour, un tribunal peut ainsi, dans une situation donnée, opter pour une condamnation personnelle aux dépens plutôt que pour une citation à comparaître pour outrage au tribunal (I. H. Jacob, « The Inherent Jurisdiction of the Court » (1970), 23 *Curr. Leg. Probl.* 23, p. 46-48).

[22] As for law societies, the role they play in this regard is different from, but sometimes complementary to, that of the courts. They have, of course, an important responsibility in overseeing and sanctioning lawyers' conduct, which derives from their primary mission of protecting the public (s. 23 of the *Professional Code*, CQLR, c. C-26). However, the judicial powers of the courts and the disciplinary powers of law societies in this area can be distinguished, as this Court has explained as follows:

> The court's authority is preventative — to protect the administration of justice and ensure trial fairness. The disciplinary role of the law society is reactive. Both roles are necessary to ensure effective regulation of the profession and protect the process of the court. [Emphasis deleted.]

(*R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 35)

[22] Quant aux barreaux, ils jouent à ce chapitre un rôle différent, mais parfois complémentaire, de celui des tribunaux. Ils ont bien sûr une responsabilité importante dans la surveillance et la sanction des comportements des avocats, responsabilité qui découle de leur mission première de protection du public (art. 23 du *Code des professions*, RLRQ, c. C-26). Cependant, les pouvoirs judiciaires des tribunaux et disciplinaires des barreaux en la matière se distinguent, comme l'a expliqué notre Cour dans les termes suivants :

> Le pouvoir judiciaire se veut préventif. Il vise à protéger l'administration de la justice et à assurer un procès équitable. Le rôle disciplinaire du barreau a un caractère réactif. Les deux sont nécessaires pour bien encadrer l'exercice de la profession d'avocat et protéger la procédure de la cour. [Italiques omis.]

(*R. c. Cunningham*, 2010 CSC 10, [2010] 1 R.C.S. 331, par. 35)

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[23] The courts therefore do not have to rely on law societies to oversee and sanction any conduct they may witness. It is up to the courts to determine whether, in a given case, to exercise the power they have to award costs against a lawyer personally in response to the lawyer's conduct before them. However, there is nothing to prevent the law society from exercising in parallel its power to assess its members' conduct and impose appropriate sanctions.

[23] Aussi, les tribunaux n'ont pas à s'en remettre aux ordres professionnels pour encadrer et sanctionner les conduites dont ils peuvent être témoins. Il appartient aux tribunaux de déterminer s'ils doivent, dans un cas précis, recourir au pouvoir dont ils disposent de condamner personnellement un avocat aux dépens pour la conduite qu'il a eue devant eux. Néanmoins, rien n'empêche que s'exerce en parallèle le pouvoir de l'ordre professionnel d'évaluer la conduite de ses membres et de déterminer les sanctions appropriées.

[24] In most cases, of course, the implications for a lawyer of being ordered personally to pay costs are less serious than those of the other two alternatives. A conviction for contempt of court or an entry in a lawyer's disciplinary record generally has more significant and more lasting consequences than a one-time order to pay costs. Moreover, as this appeal shows, an order to pay costs personally will normally involve relatively small amounts, given that the proceedings will inevitably be dismissed summarily on the basis that they are unfounded, frivolous, dilatory or vexatious.

[24] Dans la plupart des cas, il faut bien réaliser que la condamnation personnelle de l'avocat aux dépens comporte pour le professionnel des implications moins fâcheuses que les deux autres possibilités. Contrairement à une condamnation ponctuelle au paiement de dépens, une condamnation pour outrage au tribunal ou une inscription au dossier disciplinaire de l'avocat ont généralement des conséquences plus importantes et plus durables. En outre, ce pourvoi en témoigne, une condamnation personnelle aux dépens implique normalement des sommes relativement peu élevées, puisque les procédures seront forcément écartées sommairement en raison de leur nature mal fondée, frivole, dilatoire ou vexatoire.

(2) Applicable Criteria

(2) Les critères applicables

[25] While the courts do have the power to award costs against a lawyer personally, the threshold for exercising it is a high one. It is in fact rarely exercised, and the question whether it should be arises only infrequently: *Cronier*; *Young*; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575, at para. 85; *R. v. Trang*, 2002 ABQB 744, 323 A.R. 297, at para. 481; *Fearn v. Canada Customs*, 2014 ABQB 114, 586 A.R. 23, at para. 121; *Smith*, at para. 43. Only serious misconduct can justify such a sanction against a lawyer. Moreover, the courts must be cautious in imposing it in light of the duties owed by lawyers to their clients:

[25] Si le pouvoir des tribunaux de condamner personnellement un avocat au paiement de dépens existe, son application est par contre circonscrite par des critères d'exercice élevés. Son exercice reste en effet exceptionnel et la décision d'y recourir ou non ne se présente que dans de rares cas : *Cronier*; *Young*; *R. c. 974649 Ontario Inc.*, 2001 CSC 81, [2001] 3 R.C.S. 575, par. 85; *R. c. Trang*, 2002 ABQB 744, 323 A.R. 297, par. 481; *Fearn c. Canada Customs*, 2014 ABQB 114, 586 A.R. 23, par. 121; *Smith*, par. 43. Seules les conduites graves justifient la condamnation d'un avocat à une telle sanction. Il importe d'ailleurs que les tribunaux demeurent prudents en la matière en raison des devoirs de l'avocat envers ses clients :

> Moreover, courts must be extremely cautious in awarding costs personally against a lawyer, given the duties

> De plus, les tribunaux doivent faire montre de la plus grande prudence en condamnant personnellement un

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upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.

(*Young*, at p. 136)

[26] The type of conduct that can be sanctioned in this way was analyzed in depth in *Cronier*. L'Heureux-Dubé J.A. concluded after reviewing the case law that the courts are justified in exercising such a discretion in cases involving abuse of process, frivolous proceedings, misconduct or dishonesty, or actions taken for ulterior motives, where the effect is to seriously undermine the authority of the courts or to seriously interfere with the administration of justice. She noted, however, that this power must not be exercised in an arbitrary and unlimited manner, but rather with restraint and caution. The motion judge in the case at bar properly relied on *Cronier*, and the Court of Appeal also endorsed the principles stated in it.

[27] Several courts across the country have adopted the requirement of conduct that represents a marked and unacceptable departure from the standard of reasonable conduct expected of a player in the judicial system: *Bisson*; *R. v. Ciarniello* (2006), 81 O.R. (3d) 561 (C.A.), at para. 31; *Leyshon-Hughes v. Ontario Review Board*, 2009 ONCA 16, 240 C.C.C. (3d) 181, at para. 62; *Fearn*, at para. 119; *Smith*, at para. 58. Also, as the House of Lords stated in a case that has been cited by Canadian courts, including in *Cronier*, a mere mistake or error of judgment will not be sufficient to justify awarding costs against a lawyer personally; there must at the very least be gross neglect or inaccuracy (*Myers*, at p. 319).

[28] There are in this Court's jurisprudence examples of conduct that has led to awards of costs being made against lawyers personally. In *Young*, the Court held that such a sanction is justified if "repetitive and irrelevant material, and excessive motions and applications, characterized" the conduct in question and if this was the result of a lawyer's acting

avocat aux dépens, vu l'obligation qui lui incombe de préserver la confidentialité de son mandat et de défendre avec courage même des causes impopulaires. Un avocat ne devrait pas être placé dans une situation où la peur d'être condamné aux dépens pourrait l'empêcher de remplir les devoirs fondamentaux de sa charge.

(*Young*, p. 136)

[26] Le type de conduites susceptibles d'entraîner une telle sanction a fait l'objet d'une analyse approfondie dans *Cronier*. Sur la foi de sa revue de la jurisprudence, la juge L'Heureux-Dubé conclut que les tribunaux sont justifiés d'exercer un tel pouvoir discrétionnaire en présence d'abus de procédures, de procédures frivoles, d'inconduites ou de malhonnêtetés, ou encore de mesures prises pour des motifs obliques, et ce, lorsqu'il en résulte une atteinte sérieuse à l'autorité des tribunaux ou une entrave grave à l'administration de la justice. Elle note que ce pouvoir ne doit pas, par contre, être exercé arbitrairement et de façon illimitée, mais plutôt avec retenue et circonspection. En l'espèce, le premier juge s'est appuyé avec raison sur cet arrêt. La Cour d'appel en a aussi retenu les enseignements.

[27] Plusieurs tribunaux à travers le pays ont par ailleurs retenu la nécessité d'une conduite dérogeant d'une manière marquée et inacceptable à la norme de conduite raisonnable et attendue d'un acteur du système judiciaire : *Bisson*; *R. c. Ciarniello* (2006), 81 O.R. (3d) 561 (C.A.), par. 31; *Leyshon-Hughes c. Ontario Review Board*, 2009 ONCA 16, 240 C.C.C. (3d) 181, par. 62; *Fearn*, par. 119; *Smith*, par. 58. Dans un arrêt repris par des décisions canadiennes, dont *Cronier*, la Chambre des lords mentionne elle aussi qu'une simple erreur de jugement ne suffit pas mais qu'il faut à tout le moins une négligence grave ou une erreur grossière pour justifier la condamnation personnelle de l'avocat aux dépens (*Myers*, p. 319).

[28] Notre jurisprudence offre des exemples de conduites qui ont mené à une condamnation personnelle de l'avocat au paiement de dépens. Dans *Young*, notre Cour reconnaît qu'une conduite « marqué[e] par la production de documents répétitifs et non pertinents, de requêtes et de motions excessives », et qui est le fruit d'un avocat agissant « de mauvaise

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"in bad faith in encouraging this abuse and delay" (pp. 135-36). In *Pacific Mobile*, the Court awarded costs against a company's solicitors personally in a bankruptcy case. The solicitors had been granted a number of adjournments and had instituted proceedings that were inconsistent with directions given by the trial judge. On the issue of costs, Pigeon J. stressed that he did "not consider it fair to make the debtor's creditors bear the cost of proceedings which were not instituted in their interest: quite the contrary". He added that such an award of costs, "far from appropriately discouraging unnecessary appeals occasioning costly delays, tends on the contrary to favour them" (p. 844). In the circumstances, he determined that "the Court should [therefore] make use of its power to order costs payable by solicitors personally" (p. 845).

foi en encourageant ces abus et ces délais », justifie une telle sanction (p. 135-136). Dans *Pacific Mobile*, notre Cour condamne personnellement les procureurs d'une société au paiement des dépens dans une affaire de faillite. Ces avocats avaient obtenu plusieurs ajournements et entamé des procédures allant à l'encontre des directives données par le juge de première instance. Appelé à statuer sur les dépens, le juge Pigeon souligne qu'il ne lui « paraît pas juste de faire supporter par les créanciers de la débitrice les [dépens] de procédures qui ne sont pas formées dans leur intérêt mais plutôt à leur encontre », et qu'une telle adjudication des dépens, « loin de décourager comme il convient les appels futiles source de retards préjudiciables, tend au contraire à les favoriser » (p. 844). Dans les circonstances, il décide qu'il y a donc « lieu pour la Cour d'user de son pouvoir de mettre les dépens à la charge des procureurs personnellement » (p. 845).

[29] In my opinion, therefore, an award of costs against a lawyer personally can be justified only on an exceptional basis where the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice. This high threshold is met where a court has before it an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer, or dishonest or malicious misconduct on his or her part, that is deliberate. Thus, a lawyer may not knowingly use judicial resources for a purely dilatory purpose with the sole objective of obstructing the orderly conduct of the judicial process in a calculated manner.

[29] Il s'ensuit, à mon avis, qu'une condamnation personnelle de l'avocat aux dépens ne peut se justifier que de manière exceptionnelle, en présence d'une atteinte sérieuse à l'autorité des tribunaux ou d'une entrave grave à l'administration de la justice. Ce critère élevé est respecté lorsqu'un tribunal est en présence d'une procédure mal fondée, frivole, dilatoire ou vexatoire, qui dénote un abus grave du système judiciaire ou une inconduite malhonnête ou malveillante, commis de propos délibéré par l'avocat. Ainsi, un avocat ne peut sciemment utiliser les ressources judiciaires à une fin purement dilatoire, dans le seul but de faire obstruction de manière calculée au bon déroulement du processus judiciaire.

[30] This being said, however, it should be noted that there are two important guideposts that apply to the exercise of this discretion in a situation like the one in this appeal.

[30] Cela dit, il convient toutefois de rappeler que deux balises importantes encadrent l'exercice de ce pouvoir discrétionnaire dans une situation analogue à celle du présent pourvoi.

[31] The first guidepost relates to the specific context of criminal proceedings, in which the courts must show a certain flexibility toward the actions of defence lawyers. In considering the circumstances, the courts must bear in mind that the context of criminal proceedings differs from that of civil proceedings. In criminal cases, the rule is that costs are

[31] La première balise découle du contexte particulier des procédures en matière criminelle, lequel requiert une certaine souplesse de la part des tribunaux à l'égard des actions entreprises par les avocats de la défense. Dans l'analyse des circonstances, les tribunaux doivent en effet retenir que le contexte particulier des procédures criminelles diffère de celui

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not awarded; no provision is made, for example, for awards of costs where extraordinary remedies are sought (*Cronier*, at p. 447). Awards of costs made against lawyers personally are therefore purely punitive and do not include the compensatory aspect costs have in civil cases.

des procédures civiles. En matière criminelle, la règle est l'absence de dépens; par exemple, rien n'en prévoit l'octroi dans le cadre de l'exercice de recours extraordinaires (*Cronier*, p. 108). La condamnation personnelle de l'avocat au paiement des dépens a donc un caractère purement punitif et ne comprend pas la composante compensatrice qu'ont les dépens en matière civile.

[32] As well, the role of a defence lawyer is not comparable in every respect to that of a lawyer in a civil case. For example, the latter has an ethical duty to encourage compromise and agreement as much as possible. In contrast, a defence lawyer has no obligation to help the Crown in the conduct of its case. It is the very essence of the role of a defence lawyer to challenge, sometimes forcefully, the decisions and arguments of other players in the judicial system in light of the serious consequences they may have for the lawyer's client: *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, at paras. 64-66, citing *Histed v. Law Society of Manitoba*, 2007 MBCA 150, 225 Man. R. (2d) 74, at para. 71. Indeed, committed and zealous advocacy for clients' rights and interests and a strong and independent defence bar are essential in an adversarial system of justice: *Groia v. Law Society of Upper Canada*, 2016 ONCA 471, 131 O.R. (3d) 1, at para. 129; P. J. Monahan, "The Independence of the Bar as a Constitutional Principle in Canada", in Law Society of Upper Canada, ed., *In the Public Interest: The Report and Research Papers of the Law Society of Upper Canada's Task Force on the Rule of Law & the Independence of the Bar* (2007), 117. If these conditions are not met, the reliability of the process and the fairness of the trial will suffer: *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520, at para. 25, quoting *R. v. Joanisse* (1995), 102 C.C.C. (3d) 35 (Ont. C.A.), at p. 57. In short, if costs are awarded against a lawyer personally in criminal proceedings, the purpose must not be to discourage the lawyer from defending his or her client's rights and interests, and in particular the client's right to make full answer and defence. From this point of view, the considerations to be taken into account in assessing the conduct of defence lawyers can be different from those that apply in the case of lawyers in civil proceedings.

[32] En outre, le rôle de l'avocat de la défense n'est pas comparable en tous points à celui de l'avocat en matière civile. Ce dernier a par exemple le devoir éthique de favoriser les compromis et les ententes dans la mesure du possible. À l'opposé, l'avocat de la défense n'a aucune obligation d'aider le ministère public dans la conduite de son dossier. Il est de l'essence même du rôle de l'avocat de la défense de remettre en cause, de manière parfois vigoureuse, les décisions et prétentions des autres acteurs du système judiciaire, vu les conséquences graves qu'elles peuvent avoir sur son client : *Doré c. Barreau du Québec*, 2012 CSC 12, [2012] 1 R.C.S. 395, par. 64-66, citant *Histed c. Law Society of Manitoba*, 2007 MBCA 150, 225 Man. R. (2d) 74, par. 71. Une défense dévouée et passionnée des droits et des intérêts des clients ainsi qu'une section de la défense forte et indépendante au sein du barreau sont d'ailleurs essentiels dans un système de justice contradictoire : *Groia c. Law Society of Upper Canada*, 2016 ONCA 471, 131 O.R. (3d) 1, par. 129; P. J. Monahan, « L'indépendance du barreau en tant que principe constitutionnel au Canada », dans Barreau du Haut-Canada, dir., *Dans l'intérêt public : rapport et articles du groupe d'étude du barreau du Haut-Canada sur la règle de droit et l'indépendance du barreau* (2007), 127. Si ces conditions ne sont pas présentes, la fiabilité du processus et l'équité du procès en souffrent : *R. c. G.D.B.*, 2000 CSC 22, [2000] 1 R.C.S. 520, par. 25, citant *R. c. Joanisse* (1995), 102 C.C.C. (3d) 35 (C.A. Ont.), p. 57. Bref, en matière criminelle, la condamnation personnelle aux dépens ne doit pas viser à décourager l'avocat dans la défense des droits et intérêts de son client, notamment son droit à une défense pleine et entière. De ce point de vue, l'évaluation de la conduite de l'avocat de la défense doit tenir compte de considérations parfois différentes de celles de l'avocat en matière civile.

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[33] The second guidepost requires a court to confine itself to the facts of the case before it and to refrain from indirectly putting the lawyer's disciplinary record, or indeed his or her career, on trial. The facts that can be considered in awarding costs against a lawyer personally must generally be limited to those of the case before the court. In its analysis, the court must not conduct an ethics investigation or seek to assess the whole of the lawyer's practice. It is not a matter of punishing the lawyer "for his or her entire body of work". To consider facts external to the case before the court can be justified only for the limited purpose of determining, first, the intention behind the lawyer's actions and whether he or she was acting in bad faith, and, second, whether the lawyer knew, on bringing the impugned proceeding, that the courts do not approve of such proceedings and that this one was unfounded.

[33] Par ailleurs, la seconde balise exige que les tribunaux s'en tiennent aux faits propres à l'affaire dont ils sont saisis et qu'ils s'abstiennent de faire indirectement le procès du dossier disciplinaire de l'avocat, voire de sa carrière. Les faits qui peuvent être pris en compte dans la condamnation personnelle d'un avocat au paiement des dépens doivent généralement se limiter à ceux de l'affaire dont est saisi le juge. L'analyse menée par le tribunal ne doit pas se substituer à une enquête déontologique ni chercher à évaluer l'ensemble de la pratique de l'avocat visé. Il ne s'agit pas de sanctionner l'avocat « pour l'ensemble de son œuvre ». Recourir à des faits externes à l'instance concernée ne peut se justifier que dans l'objectif limité de déterminer, d'une part, l'intention et la mauvaise foi derrière les actions de l'avocat et, d'autre part, la connaissance par ce dernier, au moment où il a entrepris les procédures qu'on lui reproche, de la désapprobation de celles-ci par les tribunaux et de leur caractère mal fondé.

[34] In this regard, certain evidence that is external to the case before the court may sometimes be considered, because it is of high probative value and has a strong similarity to the alleged facts, in order to establish, for example, wilful intent and knowledge on the lawyer's part. However, it must be limited to the specific issue before the court, that is, the lawyer's conduct. It may not serve more broadly as proof of a general propensity or bad character (*R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908, at paras. 71-72 and 82).

[34] Sous ce rapport, certains éléments étrangers à l'affaire devant le juge peuvent à l'occasion être pris en compte en raison de leur forte valeur probante et de leur grande similitude avec les faits reprochés, afin par exemple d'établir l'intention délibérée et la connaissance de l'avocat. Ils doivent par contre se rapporter uniquement à la question précise en jeu, à savoir la conduite de l'avocat. Ils ne peuvent viser, plus largement, à prouver une propension générale ou la mauvaise moralité (*R. c. Handy*, 2002 CSC 56, [2002] 2 R.C.S. 908, par. 71-72 et 82).

(3) Process to Be Followed

(3) Le processus à suivre

[35] This being said, a court obviously cannot award costs against a lawyer personally without following a certain process and observing certain procedural safeguards (Y.-M. Morissette, "L'initiative judiciaire vouée à l'échec et la responsabilité de l'avocat ou de son mandant" (1984), 44 *R. du B.* 397, at p. 425). However, it is important that this process be flexible and that it enable the courts to adapt to the circumstances of each case.

[35] Cela dit, il va de soi qu'un tribunal ne peut condamner personnellement un avocat aux dépens sans respecter un certain processus et certaines garanties procédurales (Y.-M. Morissette, « L'initiative judiciaire vouée à l'échec et la responsabilité de l'avocat ou de son mandant » (1984), 44 *R. du B.* 397, p. 425). Il importe toutefois que ce processus demeure flexible et permette au tribunal de s'adapter aux circonstances de chaque affaire.

[36] Thus, a lawyer upon whom such a sanction may be imposed should be given prior notice of

[36] Ainsi, l'avocat passible d'une telle sanction devrait recevoir un avis préalable l'informant des

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the allegations against him or her and the possible consequences. The notice should contain sufficient information about the alleged facts and the nature of the evidence in support of those facts. The notice should be sent far enough in advance to enable the lawyer to prepare adequately. The lawyer should, of course, have an opportunity to make separate submissions on costs and to adduce any relevant evidence in this regard. Ideally, the issue of awarding costs against the lawyer personally should be argued only after the proceeding has been resolved on its merits.

allégations formulées à son endroit et des conséquences qui pourraient en découler. Cet avis devrait contenir des informations suffisantes sur les faits reprochés et sur la teneur de la preuve à leur appui. L'avis devrait être transmis suffisamment à l'avance pour permettre à l'avocat de se préparer adéquatement. Ce dernier devrait bien sûr avoir l'occasion de présenter des observations distinctes au sujet des dépens, et, le cas échéant, des éléments de preuve pertinents à cet égard. Idéalement, le débat relatif à la condamnation personnelle de l'avocat aux dépens ne devrait avoir lieu qu'une fois la procédure visée tranchée sur le fond.

[37] However, these protections differ from the ones conferred by ss. 7 and 11 of the *Canadian Charter of Rights and Freedoms*. Where an award of costs is sought against a lawyer personally, the lawyer is not a "person charged with an offence" and the proceeding is not a criminal one *per se*. Although the applicable criteria are strict, the standard of proof is the balance of probabilities.

[37] Ces protections se distinguent cependant de celles conférées par la *Charte canadienne des droits et libertés* à ses art. 7 et 11. En ce qui touche la condamnation personnelle aux dépens recherchée contre lui, l'avocat n'est pas un « inculpé » et il ne s'agit pas d'une matière criminelle comme telle. Quoique les critères applicables soient exigeants, la norme de preuve qui s'impose reste la preuve prépondérante.

[38] In closing, I note that the Crown's role on this specific issue must be limited in criminal proceedings. In such a situation, it is of course up to the parties as well as the court to raise a problem posed by a lawyer's conduct. However, the Crown's role is to objectively present the evidence and the relevant arguments on this point. It is the court that is responsible for determining whether a sanction should be imposed, and that has the power to impose one, in its role as guardian of the integrity of the administration of justice. The Crown must confine itself to its role as prosecutor of the accused. It must not also become the prosecutor of the defence lawyer.

[38] En terminant, je note que dans les instances criminelles, le rôle du ministère public sur cette question précise doit demeurer limité. Certes, dans une telle situation, il appartient autant aux parties qu'au tribunal de soulever le problème que pose la conduite d'un avocat. Toutefois, le rôle du ministère public est de présenter objectivement la preuve et les arguments pertinents sur ce point. L'opportunité et le pouvoir d'imposer une sanction appartiennent au tribunal en vertu de son rôle de gardien de l'intégrité de l'administration de la justice. Le ministère public doit se confiner à son rôle de poursuivant de l'accusé. Il ne doit pas devenir en plus le poursuivant de l'avocat de la défense.

B. *Application to the Facts of the Instant Case*

(1) Judgment of the Superior Court

[39] In light of the foregoing, I am of the view that the motion judge properly exercised his discretion in awarding costs against the respondent personally.

B. *L'application aux faits de l'espèce*

(1) Le jugement de la Cour supérieure

[39] À la lumière de ce qui précède, je considère que le juge de première instance a bien exercé la discrétion qui est la sienne en condamnant personnellement l'intimé au paiement des dépens.

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[40] The motion judge first correctly identified the standard of conduct on which such an award is based and correctly summed up the law in requiring that there be a [TRANSLATION] "frivolous proceeding that denotes a serious abuse of the judicial system" and a "deliberate strategy" (para. 117).

[41] Next, he properly analyzed the facts to find that the respondent's acts constituted abusive conduct that was designed to indirectly obtain a postponement and had led to [TRANSLATION] "paralysis of the legitimate work of the Court of Québec" and "disruption of its local judges' case management work" (para. 119). He correctly distinguished an "unintended result" from a "deliberate strategy" (para. 117). The judge cannot be faulted for choosing to exercise his discretion in respect of a defence lawyer here.

[42] As the judge noted, the respondent's conduct in the cases in question was particularly reprehensible. Its purpose was unrelated to the motions he brought. The respondent was motivated by a desire to have the hearing postponed rather than by a sincere belief that the judges targeted by his motions were hostile. His subsequent conduct was consistent with this finding. It is quite odd, if not unprecedented, for a lawyer to file, on the same day and in the same cases, two series of motions for writs of prohibition against two different judges on the same ground of bias. The respondent thus used the extraordinary remedies for a purely dilatory purpose with the sole objective of obstructing the orderly conduct of the judicial process in a calculated manner. It was therefore reasonable for the judge to conclude that the respondent had acted in bad faith and in a way that amounted to abuse of process, thereby seriously interfering with the administration of justice.

[43] Finally, the procedural safeguards were observed in this case. The Crown sent the respondent two prior notices of its intention to seek an award of costs against him personally. The respondent had more than three months to prepare. The prosecution's role was limited to notifying the respondent of its intention to seek an award of costs against him personally and presenting the relevant evidence to the

[40] Le premier juge a d'abord correctement identifié la norme de conduite donnant ouverture à une telle condamnation et bien résumé le droit en exigeant la présence d'une « procédure frivole qui dénote un abus grave du système judiciaire » et d'une « stratégie de propos délibéré » (par. 117).

[41] Il a ensuite bien analysé les faits en reconnaissant dans les actes de l'intimé une conduite abusive visant à obtenir de manière détournée une remise, ayant entraîné « la paralysie des travaux légitimes de la Cour du Québec » ainsi que « la perturbation du travail de gestion de ses juges locaux » (par. 119). Il a bien su distinguer l'« accident de parcours » de la « stratégie de propos délibéré » (par. 117). On ne peut reprocher au juge d'avoir choisi d'user ici de ce pouvoir discrétionnaire envers un avocat de la défense.

[42] En effet, comme le souligne le juge, la conduite de l'intimé dans ces dossiers était particulièrement répréhensible. Elle visait un but étranger aux requêtes entreprises. L'intimé était animé par une volonté d'obtenir une remise de l'audience plutôt que par une croyance sincère dans l'inimitié des juges qui étaient la cible de ses requêtes. Son comportement subséquent est compatible avec cette conclusion. Il est assez incongru, sinon inédit, de voir un avocat déposer le même jour, dans les mêmes dossiers, deux séries de requêtes sollicitant la délivrance de brefs de prohibition, alléguant un même motif de partialité, à l'encontre de deux juges différents. L'intimé a ainsi utilisé les recours extraordinaires à une fin purement dilatoire dans le seul but d'entraver de manière calculée le bon déroulement du processus judiciaire. Devant cela, le juge pouvait raisonnablement conclure que l'intimé a fait preuve de mauvaise foi et a abusé des procédures, portant ainsi sérieusement atteinte à l'administration de la justice.

[43] Finalement, les garanties procédurales ont été respectées en l'espèce. Le ministère public a fait parvenir à l'intimé deux avis préalables de son intention de demander sa condamnation personnelle aux dépens. Ce dernier a pu bénéficier de plus de trois mois de préparation. Le rôle du poursuivant s'est limité à aviser l'intimé de son intention de demander sa condamnation personnelle aux dépens et

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judge. The respondent had an opportunity to make submissions to the judge in this regard. Moreover, he raised no objection to the process or to the evidence adduced on the issue of costs. Nor did he insist on being represented by counsel or ask that the issue of costs be dealt with separately from the merits of the motions.

[44] That being the case, I do not accept the respondent's criticisms to the effect that the judge improperly relied on inadmissible similar fact evidence. On the contrary, I note that the judge's findings were based on admissible evidence that supported his analysis on the respondent's intention and knowledge:

> [TRANSLATION] His preparation, at lunchtime on April 23, 2013, of a series of motions for writs of prohibition in a legal situation that did not call for such a proceeding, and the continued presentation of those proceedings, <u>were two calculated acts that did not result from ignorance of the law on the part of Mr. Jodoin, an able tactician who defends his clients forcefully when he is before the Court</u>. [Emphasis added; para. 118.]

[45] For this purpose, the judge focused primarily on evidence specific to the cases before him. He discussed the specific circumstances that led to the preparation of the motions for writs of prohibition. He reviewed in detail the transcript of the hearing that had culminated in the postponement being granted by the Court of Québec judge. And he considered the respondent's conduct in the broader context of the motions for which he was ordered to pay costs personally.

[46] It is true that the judge took note of certain facts from other cases in which the respondent had been involved, as the Crown had invited him to do with no objection from the respondent. However, the judge considered those facts to be [TRANSLATION] "relevant to the determination of whether [the respondent's] motions are frivolous and dilatory and whether an award of costs must be made against him personally, and in what amount" (para. 109). He found that this evidence was relevant to his analysis on whether the respondent had had culpable intent to

à présenter la preuve pertinente au juge. L'intimé a eu l'occasion de présenter des observations sur ce sujet devant le juge. Il n'a d'ailleurs soulevé aucune objection quant au processus ou quant à la preuve offerte sur la question des dépens. Il n'a pas davantage exigé d'être représenté par avocat, ni demandé que le sujet des dépens soit traité séparément du fond des requêtes.

[44] Cela étant, je ne retiens pas les critiques que soulève l'intimé sur le recours prétendument inopportun du juge à une preuve inadmissible de faits similaires. Je note au contraire que les conclusions du juge se basent sur des faits admissibles, qui appuient son analyse de l'intention et de la connaissance de l'intimé :

> Sa préparation, sur l'heure du dîner du 23 avril 2013, d'une série de requêtes en émission d'un bref de prohibition, dans une situation juridique qui ne commandait nullement une telle procédure, tout autant que le maintien de la présentation de ces procédures, <u>constituent deux gestes réfléchis et ne résultent pas de l'ignorance des règles de droit par Me Jodoin, un habile stratège qui défend ses clients avec vigueur, quand il est présent à la Cour</u>. [Je souligne; par. 118.]

[45] À cette fin, le juge s'est principalement concentré sur les éléments propres aux affaires dont il était saisi. Il s'est attardé au contexte même qui a mené à la préparation des requêtes sollicitant la délivrance de brefs de prohibition. Il a revu en détails la transcription de l'audience qui a culminé dans la remise octroyée par le juge de la Cour du Québec. Il a examiné le comportement de l'intimé dans le cadre plus global des requêtes qui ont fait l'objet de la condamnation personnelle de celui-ci aux dépens.

[46] Il est vrai que le juge a fait état de certains faits qui se sont produits dans des dossiers distincts dans lesquels avait agi l'intimé, comme l'avait invité à le faire le ministère public sans objection de ce dernier. Le juge a toutefois considéré ces faits « pertinent[s] pour décider si les requêtes de [l'intimé] sont frivoles et dilatoires et s'il doit être condamné personnellement aux dépens et pour quel montant » (par. 109). Il a estimé cette preuve pertinente pour son analyse de l'intention coupable de l'intimé de déposer et de présenter une procédure qu'il savait

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file and present a proceeding that he knew to be frivolous and abusive. The judge referred to it in determining, among other things, that the impugned conduct was a deliberate strategy on the respondent's part and not an unintended result.

frivole et abusive. Il s'y est référé pour déterminer notamment que la conduite reprochée se voulait une stratégie délibérée de l'intimé, et non un simple accident de parcours.

[47] In this regard, the judge was justified in referring to motions for writs of prohibition that had been filed in 2011 against one of the two Court of Québec judges concerned in the 2013 motions. The motions from 2011 were all dismissed in a judgment that was subsequently affirmed by the Court of Appeal (*R. v. Carrier*, 2012 QCCA 594). In that case, the respondent had sought writs of prohibition in relation to a refusal by the judge in question to allow the withdrawal of a motion for the disclosure of evidence. In its judgment, the Court of Appeal mentioned that a court can review a party's decision to withdraw a proceeding, especially where the goal is to obtain a postponement. It concluded that the alleged apprehension of bias on the judge's part was without merit, because [TRANSLATION] "although the judge was overly interventionist, the fact remains that there is no reason to doubt his impartiality" (para. 4 (CanLII)).

[47] À ce chapitre, le juge était justifié de mentionner les requêtes sollicitant la délivrance de brefs de prohibition déposées en 2011 contre l'un des deux juges de la Cour du Québec visés par les requêtes déposées en 2013. Les requêtes de 2011 furent toutes rejetées par un jugement confirmé en appel (*R. c. Carrier*, 2012 QCCA 594). L'intimé avait alors procédé au moyen de brefs de prohibition, sur la base du refus du juge visé d'accepter le désistement d'une requête en communication de la preuve. Dans son arrêt, la Cour d'appel mentionne qu'un tribunal peut contrôler la décision d'une partie de retirer une procédure, notamment lorsque c'est l'obtention d'une remise qui est recherchée. Elle conclut que l'allégation de crainte de partialité du juge était non fondée puisque, « si la conduite du juge a été trop dirigiste, il demeure que rien ne laisse craindre quant à son impartialité » (par. 4 (CanLII)).

[48] As the motion judge observed, there is a strong similarity between those motions from 2011 and the 2013 motions in terms of the facts, the decisions being challenged, the procedures that were chosen and the nature of the exchanges between the respondent and the judge in question. This could support findings that the respondent's actions were calculated and intentional and that he had knowledge of the applicable legal rules and had deliberately ignored them. It could be concluded from this relevant evidence that the respondent was well aware of the invalidity of the extraordinary remedy he had chosen to seek and of the foreseeable consequences of his actions, the *modus operandi* of which was similar to that of 2011. This was not improper evidence of a general propensity or bad character, but admissible evidence of the respondent's state of mind when he filed the proceedings.

[48] Comme l'a constaté le juge de première instance, une grande similitude existait entre ces requêtes de 2011 et celles de 2013 quant aux faits, quant aux décisions contestées, quant aux procédures choisies et quant à la teneur des échanges entre l'intimé et le juge visé. Le caractère réfléchi et intentionnel des gestes, ainsi que la connaissance des règles de droit applicables dont l'intimé a sciemment fait fi, pouvaient y prendre appui. Cette preuve pertinente permettait de conclure que l'intimé était bien au fait du caractère mal fondé du recours extraordinaire choisi et des conséquences prévisibles de ses gestes qui suivaient le même *modus operandi* qu'en 2011. Il ne s'agissait pas là d'une preuve inappropriée de propension générale ou de mauvaise moralité, mais bien d'une preuve admissible de l'état d'esprit de l'intimé au moment où il a déposé les procédures.

[49] As regards the respondent's argument that the judge wanted to make an example of his case in the district in question, I am of the view that there is not really any support for it. That is certainly not what

[49] Quant à la thèse de l'intimé selon laquelle le juge visait à faire de lui un cas exemplaire dans le district concerné, je suis d'avis qu'elle rime en définitive à peu de choses. Ce n'est certes pas ce que le

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the judge said at para. 11 of his reasons. Moreover, it is clear from his reasons as a whole that he did not rely either on that factor or on the specific context of the district to support his conclusions. As can be seen from his analysis, he objectively had enough evidence to justify awarding costs against the respondent personally on the basis of the specific facts of the case before him.

juge affirme au par. 11 de ses motifs. La lecture de l'ensemble de ces motifs montre d'ailleurs bien que ce n'est ni cet élément ni le contexte particulier de ce district qu'il a retenu pour étayer ses conclusions. Comme son analyse en témoigne, il disposait objectivement de suffisamment d'éléments pour justifier la condamnation personnelle de l'intimé aux dépens eu égard aux faits particuliers de l'affaire devant lui.

(2) Judgment of the Court of Appeal

(2) L'arrêt de la Cour d'appel

[50] In this context, the Court of Appeal was in my view wrong to choose to substitute its own opinion for that of the Superior Court on this issue. In fact, the Court of Appeal reassessed the facts before concluding that the situation before the Superior Court did not have the exceptional character required in the case law. And it did so despite having acknowledged that the motion judge had, after thoroughly analyzing the facts, been right to dismiss the motions for writs of prohibition he had found to be frivolous, unfounded and abusive.

[50] Dans ce contexte, la Cour d'appel a selon moi erronément choisi de substituer son opinion à celle de la Cour supérieure sur cette question. La Cour d'appel a en réalité procédé à une nouvelle évaluation des faits, avant de conclure que, à ses yeux, la situation qui prévalait devant la Cour supérieure ne révélait pas le caractère exceptionnel requis par la jurisprudence. Elle l'a fait après avoir pourtant convenu qu'à la suite de son analyse fouillée des faits, le premier juge avait eu raison de rejeter les requêtes sollicitant la délivrance de brefs de prohibition qu'il estimait frivoles, mal fondées et abusives.

[51] It was not open to the Court of Appeal to intervene without first identifying an error of law, a palpable and overriding error in the motion judge's analysis of the facts, or an unreasonable or clearly wrong exercise of his discretion. It did not identify such an error. This Court, too, is subject to this standard for intervention (*St-Jean v. Mercier*, 2002 SCC 15, [2002] 1 S.C.R. 491, at para. 46). Furthermore, given its position at the second level of appeal, this Court's role is not to reassess the findings of fact of a judge at the trial level that an appellate court has not questioned: ". . . the principle of non-intervention 'is all the stronger in the face of concurrent findings of both courts below' . . ." (*ibid.*, at para. 45, quoting *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570, at p. 574 (emphasis deleted)).

[51] La Cour d'appel ne pouvait intervenir sans d'abord identifier soit une erreur de droit, soit une erreur manifeste et déterminante dans l'analyse des faits par le premier juge, soit un exercice déraisonnable ou manifestement erroné par celui-ci de sa discrétion. Elle ne l'a pas fait. Notre Cour est elle aussi assujettie à cette norme d'intervention (*St-Jean c. Mercier*, 2002 CSC 15, [2002] 1 R.C.S. 491, par. 46). En outre, comme deuxième palier d'appel, son rôle n'est pas de réévaluer les constats de faits des juges d'instance que les cours d'appel n'ont pas remis en question : « . . . le principe de non-intervention "a d'autant plus de force en présence de conclusions concourantes des deux cours d'instance inférieure" . . . » (*ibid.*, par. 45, citant *Ontario (Procureur général) c. Bear Island Foundation*, [1991] 2 R.C.S. 570, p. 574-575 (soulignement omis)).

[52] It is well established that costs are awarded on a discretionary basis: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at

[52] Il est acquis que l'octroi des dépens reste une décision discrétionnaire : *Hamilton c. Open Window Bakery Ltd.*, 2004 CSC 9, [2004] 1 R.C.S.

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para. 27; *Galganov v. Russell (Township)*, 2012 ONCA 410, 294 O.A.C. 13, at paras. 23-25. In a case involving an exercise of discretion, an appellate court must show great deference and must be cautious in intervening, doing so only where it is established that the discretion was exercised in an abusive, unreasonable or non-judicial manner: *Trackcom Systems International Inc. v. Trackcom Systems Inc.*, 2014 QCCA 1136, at para. 36 (CanLII); *Québec (Procureur général) v. Bélanger*, 2012 QCCA 1669, 4 M.P.L.R. (5th) 21. In its brief judgment, the Court of Appeal did not specify an error of any kind whatsoever in the motion judge's reasons that would justify its intervention.

303, par. 27; *Galganov c. Russell (Township)*, 2012 ONCA 410, 294 O.A.C. 13, par. 23-25. Dans une affaire portant sur l'exercice d'un pouvoir discrétionnaire, les cours d'appel doivent faire preuve d'un haut degré de déférence et n'intervenir qu'avec circonspection, lorsqu'il est établi que le pouvoir a été exercé de manière abusive, déraisonnable ou non judiciaire : *Trackcom Systems International Inc. c. Trackcom Systems Inc.*, 2014 QCCA 1136, par. 36 (CanLII); *Québec (Procureur général) c. Bélanger*, 2012 QCCA 1669, 4 M.P.L.R. (5th) 21. Dans son court arrêt, la Cour d'appel n'expose aucune erreur de quelque nature que ce soit dans les motifs du premier juge pour justifier son intervention.

[53] As for the comment that the Superior Court should not have exercised its jurisdiction in relation to facts or conduct that had occurred in a court that itself had the power to punish the respondent for contempt of court, I believe that it reflects a misunderstanding of the situation. Costs are in order in this case because of the frivolous and abusive nature of the motions for writs of prohibition that were heard and dismissed by the Superior Court. It was the Superior Court that had the discretion to determine whether the costs of those motions should be awarded against the respondent.

[53] Quant au commentaire voulant que la Cour supérieure n'aurait pas dû exercer sa compétence à l'égard de faits ou de comportements survenus devant une juridiction qui jouissait elle-même du pouvoir de condamner l'intimé pour outrage au tribunal, je considère que cette affirmation témoigne d'une compréhension erronée de la situation. Les dépens s'imposent en l'espèce au regard du caractère frivole et abusif des requêtes sollicitant la délivrance de brefs de prohibition que la Cour supérieure a entendues et rejetées. C'est à elle qu'appartenait la discrétion de décider de l'opportunité de condamner ou non l'intimé au paiement des dépens qui s'y rattachent.

VI. Conclusion

VI. Conclusion

[54] In the final analysis, the Superior Court judge addressed the valid concerns voiced by the Crown, which he summarized as follows:

> [TRANSLATION] Take a more rigorous approach to the criminal law, fight tooth and nail for your clients, be demanding of the prosecution so that it makes its entire case competently, but face the music so that, in an overburdened judicial system in which each person's time must be used sparingly and efficiently, cases move forward. [Emphasis deleted; para. 11.]

[54] En définitive, le juge de la Cour supérieure a répondu aux préoccupations valables exprimées par le ministère public, qu'il a résumées en ces termes :

> Abordez le droit criminel avec plus de rigueur, défendez vos clients bec et ongles, soyez exigeant envers la poursuite pour qu'elle fasse toute sa preuve avec compétence, mais faites face à la musique pour que, dans un système judiciaire surchargé où le temps de tous et chacun doit être utilisé avec économie et efficacité, les dossiers avancent. [Soulignement omis; par. 11.]

[55] The judge sent a clear message to the players in the judicial system, in terms that were once again unequivocal, by denouncing actions and decisions that had led to an unjustified paralysis of the legitimate work of courts sitting in criminal proceedings

[55] Le juge a envoyé un message clair aux acteurs du système judiciaire, en des termes une fois de plus non équivoques, en dénonçant les gestes et décisions qui entraînent la paralysie injustifiée des travaux légitimes des tribunaux siégeant en matière

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and to the disruption of the management of cases by their judges, and by sanctioning an abuse of process whose sole purpose had been to obtain a postponement and delay cases.

[56] The judge's comments were consistent with the principles recently enunciated by this Court in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, in which the majority denounced, among other things, the culture of complacency toward delay that impairs the efficiency of the criminal justice system. In *Jordan*, the Court emphasized the importance of timely justice and noted that all participants in the criminal justice system must co-operate in achieving reasonably prompt justice. From this perspective, it is essential to allow the courts to play their role as guardians of the integrity of the administration of justice by controlling proceedings and eliminating unnecessary delay. That is what the Superior Court did here.

[57] I would therefore allow the appeal and restore the award of costs against the respondent.

The following are the reasons delivered by

[58] ABELLA AND CÔTÉ JJ. (dissenting) — We agree that superior courts have, in theory, the power to award costs personally against counsel in the criminal context in exceptional circumstances. Justice Gascon, drawing on caselaw from both the civil and criminal context, has set out an excellent summary of the relevant principles. In our respectful view, however, the test was not met in this case. As noted by the Quebec Court of Appeal:

> [TRANSLATION] The situation in the Quebec Superior Court . . ., as regards the conduct of the appellant . . ., *does not have the exceptional and rare quality of an act that seriously undermines the authority of that court or that seriously interferes with the administration of justice.* [Emphasis added; footnote omitted.]

(2015 QCCA 847, at para. 11 (CanLII))

criminelle et la perturbation du travail de gestion de leurs juges, et en sanctionnant un abus de procédure fait uniquement pour obtenir une remise et retarder les dossiers.

[56] Les propos du juge s'accordent avec les enseignements récents de notre Cour dans l'arrêt *R. c. Jordan*, 2016 CSC 27, [2016] 1 R.C.S. 631, où la majorité dénonce notamment la culture de complaisance vis-à-vis des délais qui nuit à l'efficacité du système de justice criminelle. Dans *Jordan*, la Cour insiste sur l'importance de rendre justice en temps utile et rappelle que tous les participants au système de justice criminelle doivent collaborer pour que l'administration de la justice soit raisonnablement prompte. Dans cette perspective, il est essentiel de permettre aux tribunaux de jouer leur rôle de gardien de l'intégrité de l'administration de la justice en contrôlant les procédures et en éradiquant les délais inutiles. C'est ce que la Cour supérieure a fait ici.

[57] Je suis donc d'avis d'accueillir le pourvoi et de rétablir la condamnation de l'intimé aux dépens.

Version française des motifs rendus par

[58] LES JUGES ABELLA ET CÔTÉ (dissidentes) — Nous sommes d'accord pour dire que les cours supérieures possèdent, en théorie, le pouvoir de condamner personnellement un avocat aux dépens dans des circonstances exceptionnelles lors de procédures criminelles. Se fondant sur la jurisprudence à cet égard, tant en matière civile qu'en matière criminelle, le juge Gascon a dressé un excellent résumé des principes pertinents. À notre avis cependant, les critères applicables ne sont pas réunis en l'espèce. Comme l'a indiqué la Cour d'appel du Québec :

> La situation qui a prévalu devant la Cour supérieure [. . .], en regard du comportement de l'appelant [. . .], *ne révèle pas le caractère exceptionnel et rare que sont une atteinte sérieuse à l'autorité de ce tribunal ou une atteinte grave à l'administration de la justice.* [Italiques ajoutés; note en bas de page omise.]

(2015 QCCA 847, par. 11 (CanLII))

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[59] The exceptional nature of personal costs orders was emphasized by this Court in *Young v. Young*, [1993] 4 S.C.R. 3:

. . . courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling. [p. 136]

[60] These concerns are magnified in the criminal context. In *R. v. Gunn*, 2003 ABQB 314, 335 A.R. 137, the Court of Queen's Bench of Alberta highlighted the chilling effect that personal costs orders could have on criminal defence counsel, where Langston J. observed:

. . . to sanction defence counsel in the course of their duties of protecting the criminally accused could have a chilling effect on counsel's ability to properly and zealously defend their client against all the powers that a state has to wield against them. [para. 50]

[61] The more appropriate response, if any, is to seek a remedy from the law society in question. As Michael Code observed, disciplinary processes present advantages over awards of costs:

A useful intermediate remedy, when repeated injunctions and reprimands have failed to put an end to counsel's "incivility," is for the trial judge to report the offending counsel to the Law Society. This is the remedy that was adopted by the B.C. Court of Appeal in *R. v. Dunbar et al.* and it was only exercised at the end of the hearing, when the Court delivered its Judgment. *The great value of this remedy, before resorting to more punitive sanctions such as costs orders and contempt citations, is that it does not disrupt the trial and it does not cause prejudice to the client of the offending counsel.* When the misconduct escalates to the point that costs and contempt remedies are under consideration, the

[59] Dans l'arrêt *Young c. Young*, [1993] 4 R.C.S. 3, notre Cour a insisté sur la nature exceptionnelle des ordonnances condamnant personnellement un avocat aux dépens :

. . . les tribunaux doivent faire montre de la plus grande prudence en condamnant personnellement un avocat aux dépens, vu l'obligation qui lui incombe de préserver la confidentialité de son mandat et de défendre avec courage même des causes impopulaires. Un avocat ne devrait pas être placé dans une situation où la peur d'être condamné aux dépens pourrait l'empêcher de remplir les devoirs fondamentaux de sa charge. [p. 136]

[60] L'importance de ces considérations est amplifiée dans le contexte de procédures criminelles. Dans *R. c. Gunn*, 2003 ABQB 314, 335 A.R. 137, la Cour du Banc de la Reine de l'Alberta soulignait l'effet paralysant que sont susceptibles d'avoir sur les avocats de la défense au criminel des condamnations personnelles aux dépens, le juge Langston faisant observer ce qui suit à cet égard :

[TRADUCTION] . . . le fait de sanctionner des avocats de la défense pendant qu'ils s'acquittent de leur devoir — à savoir la protection des intérêts des personnes visée par des accusations criminelles — pourrait avoir un effet paralysant sur leur capacité à défendre adéquatement et avec zèle leurs clients contre tous les pouvoirs que l'État est à même d'exercer contre ceux-ci. [par. 50]

[61] La mesure la plus appropriée, le cas échéant, est de solliciter l'intervention du barreau concerné. Comme l'explique Michael Code, le recours au processus disciplinaire présente des avantages par rapport à une condamnation aux dépens :

[TRADUCTION] Lorsque des injonctions et réprimandes répétées ne parviennent pas à mettre fin à l'« incivilité » d'un avocat, une solution intermédiaire utile dont dispose le juge du procès consiste à signaler l'avocat fautif au barreau concerné. C'est la solution qu'a adoptée la Cour d'appel de la C.-B. dans *R. c. Dunbar et autres*, et qu'elle n'a mise à exécution qu'à la toute fin de l'audience, au moment où elle a rendu jugement. *L'avantage considérable que présente l'utilisation de cette mesure, préalablement au recours à des sanctions plus punitives comme la condamnation aux dépens et la citation à comparaître pour répondre à une accusation d'outrage au tribunal, est que cette mesure ne perturbe*

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lawyer is entitled to a hearing and the trial will inevitably be disrupted. By simply reporting the lawyer's misconduct to the Law Society, the court is able to escalate the available remedies without the need to conduct its own hearing into the alleged "incivility." Furthermore, the client may not be complicit in the lawyer's "incivility" and should not bear the cost or the prejudice of a hearing to consider sanctions against the lawyer. [Footnote omitted; emphasis added.]

(Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007), 11 *Can. Crim. L.R.* 97, at p. 119)

[62] This forms the policy basis for why the threshold is so high before ordering costs against criminal defence counsel. Only in the most exceptional of circumstances should they be ordered. Given the policy concerns and the exceptional nature of costs orders against defence counsel, it is worth emphasizing that the Crown should be very hesitant about pursuing them.

[63] We do not challenge the motion judge's finding that the writs of prohibition were requested for the purpose of postponing the proceedings and that the motions seeking the writs may not have had a solid legal foundation. Like the Court of Appeal, however, we are of the view that Mr. Jodoin's behaviour did not warrant the exceptional remedy of a personal costs order.

[64] It appears that Mr. Jodoin's conduct in this case was not unique in the district of Bedford, as reflected in the motion judge's comment that: [TRANSLATION] "In seeking a personal costs order against

pas le déroulement du procès et ne cause aucun préjudice au client de l'avocat fautif. Lorsque la conduite répréhensible s'aggrave au point où le tribunal envisage la condamnation aux dépens et l'outrage au tribunal, l'avocat a droit à une audience, ce qui perturbera inévitablement le procès. En signalant simplement au barreau la conduite répréhensible de l'avocat, le tribunal est ainsi en mesure de graduer l'intensité des procédures possibles sans devoir tenir sa propre audience sur l'« incivilité » reprochée. De plus, il est possible que le client de l'avocat ne soit pas complice de l'« incivilité » de ce dernier, et il ne devrait pas avoir à assumer les coûts ou inconvénients d'une audience visant l'examen de sanctions susceptibles d'être infligées à ce dernier. [Note en bas de page omise; italiques ajoutés.]

(Michael Code, « Counsel's Duty of Civility : An Essential Component of Fair Trials and an Effective Justice System » (2007), 11 *Rev. can. D.P.* 97, p. 119)

[62] Ces considérations constituent la justification pour laquelle le critère à respecter pour qu'un avocat de la défense au criminel puisse être condamné aux dépens est si exigeant. Une telle sanction ne devrait en effet être infligée que dans les circonstances les plus exceptionnelles. Compte tenu de ces considérations de principe et de la nature exceptionnelle d'une condamnation aux dépens prononcée contre un avocat de la défense, il importe de souligner que le ministère public devrait faire montre de beaucoup de circonspection avant de demander une telle sanction.

[63] Nous ne contestons pas la conclusion du juge des requêtes portant que les brefs de prohibition avaient été demandés en vue d'obtenir la suspension des procédures et que les requêtes les sollicitant ne reposaient pas sur les assises les plus solides en droit. Toutefois, à l'instar de la Cour d'appel, nous estimons que la conduite de Me Jodoin ne justifiait pas l'imposition de la sanction exceptionnelle que représente la condamnation personnelle d'un avocat aux dépens.

[64] Il semble que la conduite de Me Jodoin dans la présente affaire ne présentait pas un caractère exceptionnel dans le district de Bedford, comme en témoigne la remarque suivante du juge des requêtes :

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Mr. Jodoin, the prosecution wants to send a message to certain defence lawyers" (2013 QCCS 4661, at para. 11 (CanLII)). This suggests that Mr. Jodoin was being punished as a warning to other lawyers engaged in similar tactics. The court ordered costs against Mr. Jodoin personally for a total of $3,000.

[65] The desire to make an "example" of Mr. Jodoin's behaviour does not justify straying from the legal requirement that his conduct be "rare and exceptional" before costs are ordered personally against him.

[66] Logically, the idea that costs should only be ordered against a lawyer personally in rare and exceptional circumstances cannot be reconciled with the fact that other defence counsel appear to have engaged in similar conduct.

[67] Mr. Jodoin has certainly not engaged in conduct we would commend. But to the extent that his behaviour was not unique in the district of Bedford, it is hard to see how it would amount to "dishonest or malicious misconduct" that would justify awarding costs personally against him (reasons of Gascon J., at para. 29).

[68] Moreover, we are not persuaded that Mr. Jodoin's motions for writs of prohibition were unfounded to a sufficient degree to attract a personal costs order. The Superior Court concluded that Mr. Jodoin had filed those motions only for the purpose of obtaining an adjournment. This, however, does not take full account of the context of the proceedings, where one of the grounds raised involved the application of s. 657.3(3) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[69] This provision states that "a party who intends to call a person as an expert witness shall, at least thirty days before the commencement of the trial or within any other period fixed by the justice or

« En demandant la condamnation personnelle de Me Jodoin, la poursuite veut envoyer un message à certains procureurs de la défense » (2013 QCCS 4661, par. 11 (CanLII)). Cela tend à indiquer que la sanction qui lui était infligée se voulait un avertissement aux autres avocats ayant recours à des tactiques similaires. Le tribunal a condamné personnellement Me Jodoin à verser des dépens de 3 000 $.

[65] Le désir de faire un « exemple » de Me Jodoin en sanctionnant sa conduite ne saurait justifier de déroger à la règle de droit exigeant que la conduite qu'on lui reproche présente un caractère « rare et exceptionnel » afin que le tribunal puisse le condamner personnellement aux dépens.

[66] Logiquement, l'idée qu'un avocat ne devrait être condamné personnellement aux dépens que dans des circonstances rares et exceptionnelles est inconciliable avec le fait que d'autres avocats de la défense semblent avoir eu une conduite similaire.

[67] Maître Jodoin n'a certes pas eu une conduite méritant nos éloges. Toutefois, dans la mesure où cette conduite ne présentait pas un caractère exceptionnel dans le district de Bedford, il est difficile de voir comment elle pourrait constituer « une inconduite malhonnête ou malveillante » justifiant de le condamner personnellement aux dépens (motifs du juge Gascon, par. 29).

[68] De plus, nous ne sommes pas persuadées que les requêtes sollicitant la délivrance de brefs de prohibition présentées par Me Jodoin étaient mal fondées au point de commander une condamnation personnelle aux dépens. La Cour supérieure a conclu que Me Jodoin avait déposé ces requêtes uniquement afin d'obtenir un ajournement. Cependant, cette conclusion ne tient pas entièrement compte du contexte des procédures en question, dans le cadre desquelles un des moyens soulevés concernait l'application du par. 657.3(3) du *Code criminel*, L.R.C. 1985, c. C-46.

[69] Aux termes de cette disposition, « la partie qui veut appeler un témoin expert donne à toute autre partie, au moins trente jours avant le début du procès ou dans le délai que fixe le juge de paix ou

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judge, give notice to the other party or parties of his or her intention to do so". Crown counsel intending to call an expert witness also has to provide a copy of the expert witness's report or a summary of the opinion anticipated to be given by the expert witness to the other party within a reasonable period before trial (s. 657.3(3)(b)).

[70] If notice is not given, s. 657.3(4) states that

(4) . . . the court shall, at the request of any other party,

(a) grant an adjournment of the proceedings to the party who requests it to allow him or her to prepare for cross-examination of the expert witness;

(b) order the party who called the expert witness to provide that other party and any other party with the material referred to in paragraph (3)(b); and

(c) order the calling or recalling of any witness for the purpose of giving testimony on matters related to those raised in the expert witness's testimony, unless the court considers it inappropriate to do so.

[71] The Crown had not provided Mr. Jodoin with the required notice. When Mr. Jodoin sought the adjournment to which he was entitled under s. 657.3(4), the judge presiding in the Court of Québec granted him a brief one over the lunch break. And, in refusing the requested adjournment, the judge mistakenly said that Mr. Jodoin had already cross-examined the Crown's expert witness in other matters.

[72] This is the context in which Mr. Jodoin filed his motions for writs of prohibition after the lunch hour.

[73] Mr. Jodoin now concedes, based on other decisions rendered subsequently in similar matters, that he ought not to have used motions for writs of prohibition in response to the court's refusal to grant the requested adjournment. But it is also undisputed that the Crown did not in fact give proper notice and that Mr. Jodoin was, as a result, entitled to an adjournment.

le juge, un préavis de son intention ». Le procureur de la Couronne qui entend appeler un témoin expert doit également fournir à l'autre partie, dans un délai raisonnable avant le procès, une copie du rapport rédigé par cet expert ou un sommaire énonçant la nature de son témoignage (al. 657.3(3)b)).

[70] Suivant le par. 657.3(4), en l'absence de préavis :

(4) . . . le tribunal, sur demande d'une autre partie :

a) ajourne la procédure afin de permettre à celle-ci de se préparer en vue du contre-interrogatoire de l'expert;

b) ordonne à la partie qui a appelé le témoin de fournir aux autres parties les documents visés à l'alinéa (3)b);

c) ordonne la convocation ou la reconvocation de tout témoin pour qu'il témoigne sur des questions relatives à celles traitées par l'expert, sauf s'il ne l'estime pas indiqué.

[71] Le ministère public n'a pas donné à Me Jodoin le préavis requis. Lorsque ce dernier a sollicité l'ajournement auquel il avait droit en vertu du par. 657.3(4), la Cour du Québec lui a accordé une brève suspension pendant la pause du midi. De plus, lorsqu'elle lui a refusé l'ajournement qu'il demandait, la Cour du Québec a affirmé, à tort, que Me Jodoin avait déjà contre-interrogé le témoin expert du ministère public dans d'autres instances.

[72] C'est dans ce contexte que Me Jodoin a déposé ses requêtes sollicitant la délivrance de brefs de prohibition après la pause du midi.

[73] Maître Jodoin concède maintenant, à la lumière d'autres décisions rendues subséquemment dans des affaires analogues, qu'il n'aurait pas dû recourir à des requêtes sollicitant la délivrance de brefs de prohibition à la suite du refus du tribunal de lui accorder l'ajournement qu'il demandait. Toutefois, il est également incontesté que le ministère public n'a pas donné à Me Jodoin le préavis requis, et qu'en conséquence celui-ci avait droit à l'ajournement des procédures.

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[74] In the circumstances, Mr. Jodoin's filing of motions for writs of prohibition for the purpose of suspending the proceedings can easily be seen as an error of judgment, but hardly one justifying a personal costs order.

[74] Dans les circonstances, le dépôt par Me Jodoin des requêtes sollicitant la délivrance de brefs de prohibition en vue d'obtenir la suspension des procédures peut aisément être considéré comme une erreur de jugement, mais difficilement comme une erreur justifiant une condamnation personnelle aux dépens.

[75] For these reasons, we would dismiss the appeal.

[75] Pour ces motifs, nous rejetterions le pourvoi.

Appeal allowed, ABELLA *and* CÔTÉ JJ. *dissenting.*

Pourvoi accueilli, les juges ABELLA *et* CÔTÉ *sont dissidentes.*

Solicitor for the appellant: Director of Criminal and Penal Prosecutions, Québec.

Procureur de l'appelant : Directeur des poursuites criminelles et pénales, Québec.

Solicitors for the respondent: Jodoin & Associés, Granby.

Procureurs de l'intimé : Jodoin & Associés, Granby.

Solicitor for the intervener the Director of Public Prosecutions: Public Prosecution Service of Canada, Montréal.

Procureur de l'intervenant le directeur des poursuites pénales : Service des poursuites pénales du Canada, Montréal.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Schurman Longo Grenier, Montréal; Goldblatt Partners, Toronto.

Procureurs de l'intervenante Criminal Lawyers' Association (Ontario) : Schurman Longo Grenier, Montréal; Goldblatt Partners, Toronto.

Solicitors for the intervener Association des avocats de la défense de Montréal: Walid Hijazi, Montréal; Desrosiers, Joncas, Nouraie, Massicotte, Montréal.

Procureurs de l'intervenante l'Association des avocats de la défense de Montréal : Walid Hijazi, Montréal; Desrosiers, Joncas, Nouraie, Massicotte, Montréal.

Solicitors for the intervener the Trial Lawyers Association of British Columbia: Blake, Cassels & Graydon, Vancouver.

Procureurs de l'intervenante l'Association des avocats plaideurs de la Colombie-Britannique : Blake, Cassels & Graydon, Vancouver.

Solicitors for the intervener the Canadian Civil Liberties Association: Addario Law Group, Toronto; Stockwoods, Toronto.

Procureurs de l'intervenante l'Association canadienne des libertés civiles : Addario Law Group, Toronto; Stockwoods, Toronto.

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Tab 3

Province of Alberta

JUDICATURE ACT

ALBERTA RULES OF COURT

Alberta Regulation 124/2010

With amendments up to and including Alberta Regulation 85/2016

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(3) The person on whom the notice to disclose is served must comply with it within 10 days after the date the notice is served.

Representative actions

2.6(1) If numerous persons have a common interest in the subject of an intended claim, one or more of those persons may make or be the subject of a claim or may be authorized by the Court to defend on behalf of or for the benefit of all.

(2) If a certification order is obtained under the *Class Proceedings Act*, an action referred to in subrule (1) may be continued under that Act.

Amendments to pleadings in class proceedings

2.7 After a certification order is made under the *Class Proceedings Act*, a party may amend a pleading only with the Court's permission.

Questioning of class and subclass members

2.8(1) If under section 18(2) of the *Class Proceedings Act* the Court requires a class member or subclass member to file and serve an affidavit of records, the Court may do either or both of the following:

(a) limit the purpose and scope of the records to be produced and of questioning;

(b) determine how the evidence obtained may be used.

(2) If a class member or subclass member is questioned under section 18(2) of the *Class Proceedings Act*, the Court may do either or both of the following:

(a) limit the purpose and scope of the questioning;

(b) determine how the evidence obtained may be used.

Class proceedings practice and procedure

2.9 Despite any other provision of these rules, the Court may order any practice and procedure it considers appropriate for a class proceeding under the *Class Proceedings Act* to achieve the objects of that Act.

Costs imposed on lawyer

10.50 If a lawyer for a party engages in serious misconduct, the Court may order the lawyer to pay a costs award with respect to a person named in the order.

Subdivision 2
Civil Contempt of Court

Order to appear

10.51 The Court may grant an order in Form 47 that requires a person to appear before it, or may order a peace officer to take a person into custody and to bring the person before the Court, to show cause why that person should not be declared to be in civil contempt of Court.

Declaration of civil contempt

10.52(1) Except when a person is before the Court as described in subrule (3)(a)(ii) or (v), before an order declaring a person in civil contempt of Court is made, notice of the application in Form 27 for a declaration of civil contempt must be served on the person in the same manner as a commencement document.

(2) If a lawyer accepts service of a notice of an application seeking an order declaring the lawyer's client to be in civil contempt of Court, the lawyer must notify the client of the notice as soon as practicable after being served.

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

(a) the person, without reasonable excuse,

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

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

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

(iv) does not comply with an order served on the person, or an order of which the person has actual knowledge, to attend for questioning under these

17 Sale of lands under order or judgment (including attendance at sale, whether aborted or not)	200	300	400	500	600
Appeals					
18 All steps taken to file Notice of Appeal and speak to the list	200	300	400	500	600
19 Preparation for appeal					
Preparation of factum	1000	2000	4000	6000	8000
All other preparation	500	1000	2000	3000	4000
20 Appearance to argue before Appeal Court for first 1/2 day or part of it.					
First counsel	1000	1500	2000	2500	3000
Second counsel (when allowed by the Court)	500	750	1000	1250	1500
21 Appearance to argue before Appeal Court for each full 1/2 day occupied after the first 1/2 day.					
First counsel	500	750	1100	1300	1600
Second counsel (when allowed by the Court)		375	500	650	800
22 Appearance on contested application before Appeal Court, including brief.	750	1250	1750	2000	2500

AR 124/2010 Sched. B;41/2014

APPENDIX

DEFINITIONS

In these rules,

"abandoned goods" in rule 9.28 means personal property left on land or at premises by a person who has

(a) been evicted from the land or premises by a civil enforcement agency, or

(b) vacated the land or premises as a result of a judgment or order of possession;

"Act" in Part 9, Division 7 means Part 3 of the *International Conventions Implementation Act* and includes the Convention;

"action for unjust enrichment" in Part 12 means an action that is based on the equitable doctrine of unjust enrichment between 2 parties who have lived together in a relationship of interdependence;

"applicant" in Part 6, Division 9 means an applicant for an interpleader order, whether an originating applicant or applicant, as the context requires;

"application for an interpleader order" in Part 6, Division 9 means an application filed under rule 6.56, whether an originating application or an application;

"assessment officer" means the court clerk for the judicial centre in which the action is located;

"certificate" in rule 13.36 means a Legal Aid Certificate issued by the Legal Aid Society of Alberta;

"certified copy" in Part 9, Division 7 means the original document or a copy of the document certified as being a true copy by the original or facsimile signature of a proper officer of the foreign court;

"Chief Justice" means

(a) the Chief Justice of the Court of Queen's Bench of Alberta,

(b) the Associate Chief Justice of the Court of Queen's Bench of Alberta, or

(c) a judge designated to act on behalf of the Chief Justice by the Chief Justice or by the Associate Chief Justice;

"civil enforcement agency" has the same meaning as "agency" in the *Civil Enforcement Act*, and where the context permits, includes a bailiff appointed under the *Civil Enforcement Act*;

"civil enforcement proceedings" includes

(a) writ proceedings,

(b) distress proceedings authorized under the *Civil Enforcement Act* or any other law that is in force in Alberta, and

(c) evictions authorized pursuant to a law in force in Alberta or an order of a court;

"claim" means a claim in respect of a matter in which a plaintiff, originating applicant, plaintiff-by-counterclaim or third party plaintiff seeks a remedy;

"claimant" in Part 6, Division 9 means a person who files or is expected to file an adverse claim against personal property;

"client" includes a former client and

(a) any person to whom a lawyer has rendered an account for lawyer's charges, or

(b) a person who is or may be liable to pay or who has paid lawyer's charges or part of them;

"commencement document" means

(a) a statement of claim,

(b) an originating application,

(c) a counterclaim,

(d) a third party claim, and

(e) a claim under the *Family Law Act*,

and includes an amended commencement document;

"contingency fee agreement" means an agreement under rule 10.7;

"Convention" in Part 9, Division 7 means the Convention in Schedule 3 to the Act;

"convention judgment", "convention judgment creditor", "convention judgment debtor" and "original court" in Part 9, Division 7 have the same meanings respectively as "judgment", "judgment creditor", "judgment debtor", and "original court" have in the Convention;

"corporate representative" means a person appointed as the representative of a corporation under rule 5.4;

"corporate witness" means

(a) an employee or former employee of a corporation,

(b) an officer or former officer of a corporation, other than the corporate representative, and

(c) a person questioned under rule 5.18 who is called as a witness;

"costs award" means the amount payable by one party to another in accordance with either or both of

(a) an order under rule 10.31, and

(b) a certificate under rule 10.43;

"Court" means the Court of Queen's Bench of Alberta acting by a judge or master except

(a) when the context refers to the Court as an institution, and

(b) in a form set out in Division 2 of Schedule A, where it means either the Court of Queen's Bench of Alberta or the Provincial Court of Alberta, as the circumstances require;

"court clerk" means the clerk, deputy clerk or acting clerk of the Court at a judicial centre, and includes a person authorized by the clerk;

"defendant" means a person against whom a remedy is sought in a statement of claim;

"document" in rule 13.36 means any document that may be filed for which a fee is payable under any of items 1 to 4, Schedule B;

"electronic hearing" in rule 6.10(1) means an application, proceeding, summary trial or trial conducted, in whole or part, by electronic means in which all the participants in the hearing and the Court can hear each other, whether or not all or some of the participants and the Court can see each other or are in each other's presence;

"enactment" means an Act or a regulation or any portion of an Act or regulation of Alberta or Canada, but does not include these rules;

"encumbrance" means a registered charge on secured property securing payment of money or performance of an obligation;

"examination" in rule 10.54 means a medical examination conducted for the purpose of determining a person's mental state;

"existing proceeding" in rule 15.1 means a court proceeding commenced but not concluded under the former rules;

"expert" means a person who is proposed to give expert opinion evidence;

"facility" in rule 10.54 means

(a) a facility as defined in the *Mental Health Act*, or

(b) a correctional institution as defined in the *Corrections Act*;

"file" means to present the correct document and obtain an acknowledgment

(a) by the court clerk that a commencement document, pleading, affidavit or other document is part of the court file, or

(b) in the case of an appeal or an application under Part 14, by the Registrar of the Court of Appeal that the document is part of the Court of Appeal Record;

"foreclosure order" includes an order cancelling or determining an agreement for sale;

"former rules" in rule 15.1 means the *Alberta Rules of Court* in effect immediately before these rules come into force;

"health care professional" means

(a) a person entitled to practise a profession as

(i) a member of the College of Physicians and Surgeons of Alberta under the *Health Professions Act*,

(ii) a chiropractor under the *Health Professions Act*,

(iii) a dentist under the *Health Professions Act*,

(iv) an occupational therapist under the *Health Professions Act*,

(v) a physical therapist under the *Physical Therapy Profession Act*,

(vi) a psychologist under the *Health Professions Act*, or

(vii) a registered nurse under the *Health Professions Act*,

(b) a health care professional who is a medical practitioner, chiropractor, dentist, occupational therapist, physical therapist, registered nurse or psychologist who is regulated, registered or certified in that capacity in another

jurisdiction and who is agreed to by the parties or approved by the Court, or

(c) a person appointed by the Court who is qualified to conduct a medical examination;

"instructing creditor" in Part 6, Division 9 has the same meaning as it has in the *Civil Enforcement Act*;

"judge" means a judge of the Court and includes a supernumerary judge of the Court;

"judgment" means a judgment of the Court;

"judgment creditor" means a person who has a judgment or order requiring a person who is the subject of the judgment or order or part of it to pay money;

"judgment debtor" means a person who is the subject of a judgment or order or part of it requiring the person to pay money;

"judgment holder" in rule 9.28 means a person who has a judgment or order of possession;

"judicial centre" means the office of the Court in

(a) Calgary,

(b) Drumheller,

(c) Edmonton,

(d) Fort McMurray,

(e) Grande Prairie,

(f) Lethbridge,

(g) Medicine Hat,

(h) Peace River,

(i) Red Deer,

(j) St. Paul, or

(k) Wetaskiwin;

"land" means real property;

"lawyer" means a person entitled to practise law in Alberta;

"lawyer's charges" means

(a) the fees charged by a lawyer for services performed,

(b) any disbursements paid or payable by the lawyer in the performance of services, and

(c) other charges, if any, by a lawyer;

"liquidated demand" in rule 3.39 means

(a) a claim for a specific sum payable under an express or implied contract for the payment of money, including interest, not being in the nature of a penalty or unliquidated damages, where the amount of money claimed can be determined by

(i) the terms of the contract,

(ii) calculation only, or

(iii) taking an account between the plaintiff and the defendant,

or

(b) a claim for a specific sum of money, whether or not in the nature of a penalty or damages, recoverable under an enactment that contains an express provision that the sum that is the subject of the claim may be recovered as a liquidated demand or as liquidated damages;

"litigation representative" includes but is not limited to a guardian ad litem and next friend;

"master" means a master in chambers as defined in the *Court of Queen's Bench Act*;

"medical examination" means an examination or assessment of an individual's mental or physical condition;

"Minister" means the Minister of Justice and Solicitor General for Alberta;

"official court reporter" means

(a) a person appointed as an official court reporter under the *Recording of Evidence Act*,

(b) a certified shorthand reporter under the *Alberta Shorthand Reporters Regulation* (AR 197/96), or

(c) a person appointed as an official court reporter under the *Alberta Rules of Court* (AR 390/68) whose appointment has not expired;

"order" means an order of the Court;

"outside Alberta" means outside Alberta and Canada except

(a) in the expressions "outside Alberta but within Canada", "outside Alberta but in Canada" and "outside Alberta and in Canada", and

(b) in rules 12.14, 12.26(1) and (5), 12.46(1)(b) and 12.52;

"partnership" means a partnership to which the *Partnership Act* applies;

"party" means a party to an action; in Part 10, Division 2 the word "party" has an extended meaning that includes a person filing or participating in an application or proceeding who is or may be entitled to or subject to a costs award; in Part 12, in respect of a proceeding under the *Family Law Act*, "party" includes a public official, including the Director acting under Part 5 of the *Income and Employment Supports Act*, who, pursuant to any enactment, has the right to commence, defend, intervene in or take any step in respect of the application and exercises that right; in Part 14, "party" means a party to an appeal or an application under Part 14, and includes an intervenor where the context requires;

"peace officer" in rule 13.35 means a peace officer as defined in the *Provincial Offences Procedures Act*;

"personal property" in Part 6, Division 9 includes a debt;

"personal representative" has the same meaning as it has in section 1(l) of the *Surrogate Rules* (AR 130/95);

"plaintiff" means a person who is named as plaintiff in a statement of claim;

"pleading" means

(a) a statement of claim,

(b) a statement of defence,

(c) a counterclaim,

(d) a defence to a counterclaim,

(e) a reply to a statement of defence,

(f) a reply to a statement of defence to a counterclaim,

(g) a third party claim,

(h) a defence to a third party claim,

(i) a reply to a third party's statement of defence, or

(j) a response to a request for particulars or a response to an order for particulars;

"prescribed form" means the appropriate form in Schedule A, completed and modified as circumstances require;

"procedural order" means an order relating to practice or procedure under rule 1.4 or any other rule respecting practice or procedure;

"property" includes land and personal property;

"provisional order" means a provisional order under the *Divorce Act* (Canada);

"record" includes the representation of or a record of any information, data or other thing that is or is capable of being represented or reproduced visually or by sound, or both;

"recorded mail" means a form of document delivery by mail or courier in which receipt of the document must be acknowledged in writing as specified in Part 11;

"redemption order" includes an order nisi and an order for specific performance;

"referee" means a person who is a referee under rule 6.44;

"related writ" in Part 6, Division 9 has the same meaning as it has in the *Civil Enforcement Act*;

"relevant and material" is defined in rule 5.2 for the purposes of Part 5;

"remedy" means relief or a remedy described or referred to in rule 1.3(1);

"restraining order" in rule 13.37 means a restraining order in respect of an interpersonal matter between individuals or a protection order under the *Protection Against Family Violence Act* and includes the costs associated with respect to that restraining order or protection order;

"retainer agreement" means an express or implied agreement between a lawyer and a client with respect to the payment by the client of lawyer's charges, and includes a contingency fee agreement;

"review officer" means an assessment officer who, in the opinion of the clerk of the Court, has for the purpose of reviewing contingency fee or retainer agreements and lawyers' charges

(a) an acceptable degree in law, and

(b) sufficient experience in the practice of law,

and who is designated as a review officer by

(c) the clerk of the Court for the judicial centre in which the action is located, or

(d) if there is no clerk of the Court for the judicial centre in which the action is located, the Minister;

"rules" includes the Schedules and this Appendix to these rules but does not include any information notes and other informational guides that may appear in an annotated version of these rules;

"secured land" means all or part of the secured land about which a claim is made in a foreclosure action;

"secured property" means the secured land and all secured personal property about which a claim is made in a foreclosure action, or any part of either or both;

"third party defendant" means the person named as defendant in a third party claim;

"third party plaintiff" means

(a) a defendant who files a third party claim against another person, or

(b) any third party defendant who files a third party claim against another person;

"trustee" means

(a) an executor, an administrator, or a trustee of the estate of a person,

(b) a person expressly appointed as trustee,

(c) a person who is or becomes a trustee at law, either expressly or by implication,

(d) a person who is appointed as a trustee under an enactment or who becomes a trustee by virtue of an enactment,

(e) several joint trustees, or

(f) a person appointed as a trustee by the Court;

"writ proceedings" means any action, step or measure authorized by the *Civil Enforcement Act* to be taken for the purpose of enforcing a money judgment.

AR 124/2010 Appendix;170/2012;140/2013;41/2014;71/2015

Tab 4

Irene Helen Young *Appellant*

v.

James Kam Chen Young *Respondent*

and

W. Glen How *Respondent*

and

Watch Tower Bible and Tract Society of Canada *Respondent*

and

The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General of Manitoba, the Attorney General of British Columbia, the Law Society of British Columbia and the Seventh-day Adventist Church in Canada *Interveners*

INDEXED AS: YOUNG *v.* YOUNG

File No.: 22227.

1993: January 25, 26; 1993: October 21.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Family law — Custody — Access — Best interests of the child — Access parent insisting on instructing children on religion — Custodial parent and children objecting to religious instruction — Court ordering that access parent discontinue religious activities with children — Scope of "best interests of the child" — Whether or not "best interests of the child" equivalent of absence of harm — Whether or not restriction on access in best interests of the children.

Family law — Children — Best interests of the child — Access parent insisting on instructing children on religion — Custodial parent and children objecting to

Irene Helen Young *Appelante*

c.

James Kam Chen Young *Intimé*

et

W. Glen How *Intimé*

et

Watch Tower Bible and Tract Society of Canada *Intimée*

et

Le procureur général du Canada, le procureur général de l'Ontario, le procureur général du Québec, le procureur général du Manitoba, le procureur général de la Colombie-Britannique, la Law Society of British Columbia et l'Église adventiste du septième jour au Canada *Intervenants*

RÉPERTORIÉ: YOUNG *c.* YOUNG

Nº du greffe: 22227.

1993: 25, 26 janvier; 1993: 21 octobre.

Présents: Les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin et Iacobucci.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit de la famille — Garde — Droit d'accès — Intérêt de l'enfant — Parent ayant le droit d'accès insistant pour donner un enseignement religieux aux enfants — Parent ayant la garde et enfants s'opposant à l'enseignement religieux — Ordonnance de la cour interdisant au parent ayant le droit d'accès de faire participer ses enfants à ses activités religieuses — Portée du critère de l'«intérêt de l'enfant» — L'«intérêt de l'enfant» équivaut-il à l'absence de préjudice? — La restriction du droit d'accès est-elle dans l'intérêt de l'enfant?

Droit de la famille — Enfants — Intérêt de l'enfant — Parent ayant le droit d'accès insistant pour donner un enseignement religieux aux enfants — Parent ayant la

1993 CanLII 34 (SCC)

religious instruction — Court ordering that access parent discontinue religious activities with children — Scope of "best interests of the child" — Whether or not "best interests of the child" equivalent of absence of harm — Whether or not restriction on access in best interests of the children.

Family law — Property and financial awards — Lump sum payment — Family debts — Principles governing reallocation of property.

Constitutional law — Charter of Rights — Freedom of religion — Freedom of expression — Divorce Act requiring that orders concerning children only take into account "the best interests of the child" — Access parent insisting on instructing children on religion — Custodial parent and children objecting to religious instruction — Court ordering that access parent discontinue religious activities with children — Whether or not access restriction infringing freedom of religion — Whether or not access restriction infringing freedom of expression — Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.), ss. 16(8), 17(5) — Canadian Charter of Rights and Freedoms, s. 2(a), (b).

Courts — Costs — Principles governing awards of costs on solicitor-client basis.

Torts — Maintenance — Religious society carrying cost of action — Common religious action — Whether or not tort of maintenance.

Appellant's and respondent's separation was marked by a protracted series of court battles. Appellant was awarded custody of the couple's three daughters and respondent was granted access subject to court imposed restrictions arising from appellant's objection to his religious activity with the children. Respondent was ordered not to discuss the Jehovah's Witness religion with the children, take them to any religious services, canvassing or meetings, or expose them to religious discussions with third parties without appellant's prior consent. Organized religion was not important to appellant although she wanted the children to be raised within the United Church.

The two older daughters liked their father but came to dislike his religious instruction to the extent that it was

garde et enfants s'opposant à l'enseignement religieux — Ordonnance de la cour interdisant au parent ayant le droit d'accès de faire participer ses enfants à ses activités religieuses — Portée du critère de l'«intérêt de l'enfant» — L'«intérêt de l'enfant» équivaut-il à l'absence de préjudice? — La restriction du droit d'accès est-elle dans l'intérêt de l'enfant?

Droit de la famille — Prestation sous forme de biens et d'argent — Prestation sous forme de capital — Dettes familiales — Principes régissant une nouvelle répartition des biens.

Droit constitutionnel — Charte des droits — Liberté de religion — Liberté d'expression — La Loi sur le divorce prévoit que les ordonnances concernant les enfants ne doivent tenir compte que de «l'intérêt de l'enfant» — Parent ayant le droit d'accès insistant pour donner un enseignement religieux aux enfants — Parent ayant la garde et enfants s'opposant à l'enseignement religieux — Ordonnance de la cour interdisant au parent ayant le droit d'accès de faire participer ses enfants à ses activités religieuses — La restriction du droit d'accès viole-t-elle la liberté de religion? — La restriction du droit d'accès viole-t-elle la liberté d'expression? — Loi sur le divorce, L.R.C. (1985), ch. 3 (2e suppl.), art. 16(8), 17(5) — Charte canadienne des droits et libertés, art. 2a), b).

Tribunaux — Dépens — Principes régissant l'attribution des dépens comme entre procureur et client.

Responsabilité délictuelle — Pension alimentaire — Société religieuse supportant les frais de l'action — Action religieuse commune — Y a-t-il eu soutien délictueux?

La séparation de l'appelante et de l'intimé a été marquée par une longue série de batailles judiciaires. La garde des trois filles du couple a été confiée à l'appelante et un droit d'accès a été accordé à l'intimé, sous réserve de certaines restrictions imposées par la cour en raison de l'opposition de l'appelante aux activités religieuses de l'intimé avec les enfants. Celui-ci devait s'abstenir de discuter de la religion des Témoins de Jéhovah avec les enfants, de les amener à des offices religieux, à des visites de sollicitation ou à des réunions, ou de les mêler à des débats religieux avec des tierces personnes sans le consentement préalable de l'appelante. La religion organisée n'était pas importante pour l'appelante, même si elle voulait que ses enfants soient élevées dans la foi de l'Église unie.

Les deux aînées aimaient leur père mais elles se sont mises à détester son enseignement religieux au point

damaging his relationship with them and was contributing to the stress the children were experiencing in adjusting to their parents' separation.

The trial judge also made orders for the distribution of property and for costs. The respondent's interest in the matrimonial home was ordered transferred to the appellant because any remaining interest in the house, after respondent paid what was already owing to appellant, was to be transferred in the form of lump sum maintenance. Respondent was found responsible for debts incurred by the appellant for the support of herself and the children pending maintenance and for a debt made to a family corporation. Costs were awarded on a solicitor-client basis against respondent, his lawyer and a religious society not a party to the proceedings.

Respondent appealed. The Court of Appeal set aside the limitations on religious discussion and attendance, on the ground that it was in the best interests of the children that they come to know their non-custodial parent fully, including his religious beliefs, unless the evidence established the existence of or the potential for real harm or the child did not consent to being subject to the access parent's views or practices. The Court of Appeal also altered the division of property and the awards of costs made by the trial judge. Appellant appealed these rulings to this Court.

Four constitutional questions queried (1) whether ss. 16(8) and 17(5) of the *Divorce Act* (requiring that judicial decisions regarding custody and access be made "in the best interests of the child") denied the *Charter* guarantees of freedom of religion, of expression and of association (s. 2(*a*), (*b*), and (*d*)), and if so, (2) were they justified under s. 1; (3) whether ss. 16(8) and 17(5) violated the equality guarantee of the *Canadian Charter of Rights and Freedoms* (s. 15(1)), and (4) if so, were they justified under s. 1. The Court considered the requirements of the "best interests of the child" and whether this standard infringed the guarantees of freedom of religion and expression under the *Charter*. A main consideration was unrestricted access by a non-custodial parent and the conditions necessary to curtail that access.

que cela a altéré les relations qu'il avait avec elles et a contribué au stress que l'adaptation à la séparation de leurs parents leur a fait subir.

Le juge de première instance a également rendu des ordonnances relatives à la répartition des biens et aux dépens. Elle a ordonné que les droits de l'intimé sur le foyer conjugal soient transférés à l'appelante parce que tous les droits résiduaires sur la maison, après paiement par l'intimé de ce qu'il devait déjà à l'appelante, devaient être transférés sous forme de capital. L'intimé a été tenu responsable des dettes contractées par l'appelante pour subvenir à ses besoins et à ceux de ses enfants en attendant le versement d'une pension alimentaire et d'une dette contractée envers une société familiale. Les dépens comme entre procureur et client ont été accordés contre l'intimé, son avocat et une société religieuse qui n'avait pas été constituée partie à l'instance.

L'intimé a interjeté appel. La Cour d'appel a annulé les restrictions visant les discussions religieuses et la participation à des activités religieuses pour le motif qu'il est dans l'intérêt des enfants d'apprendre à connaître pleinement celui de leurs parents qui n'en a pas la garde, ce qui comprend ses croyances religieuses, à moins que la preuve n'établisse l'existence ou la possibilité d'un préjudice réel pour l'enfant ou le non-consentement de celui-ci à être ainsi exposé aux opinions et aux pratiques du parent ayant le droit d'accès. La Cour d'appel a également modifié le partage des biens et les dépens ordonnés par le juge de première instance. L'appelante s'est pourvue de ces décisions devant notre Cour.

Quatre questions constitutionnelles ont été soulevées, à savoir (1) si les par. 16(8) et 17(5) de la *Loi sur le divorce* (qui prévoient que les décisions judiciaires en matière de garde et de droit d'accès doivent «tenir compte de l'intérêt de l'enfant») portent atteinte aux libertés de religion, d'expression et d'association garanties par la *Charte* (al. 2*a*), *b*) et *d*)), et, dans l'affirmative, (2) s'ils sont justifiés par l'article premier; (3) si les par. 16(8) et 17(5) violent les garanties d'égalité énoncées dans la *Charte canadienne des droits et libertés* (par. 15(1)), et, dans l'affirmative, (4) s'ils sont justifiés par l'article premier. La Cour a examiné les exigences du critère de «l'intérêt de l'enfant» ainsi que la question de savoir si ce critère viole les libertés de religion et d'expression garanties par la *Charte*. Elle a aussi étudié l'élément important que constitue le droit d'accès sans restriction du parent qui n'a pas la garde et les conditions nécessaires pour restreindre ce droit d'accès.

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Held (L'Heureux-Dubé J. dissenting in the result): The appeal should be allowed in part.

The issues should be decided as follows:

1. The test regarding access is the best interests of the child (L'Heureux-Dubé J., La Forest and Gonthier JJ., and Iacobucci and Cory JJ.). McLachlin J. suggests that in cases such as this harm is usually an important element in determining the best interests of the child. Sopinka J. would recognize a threshold element of harm.

2. Sections 16(8) and 17(5) of the *Divorce Act* do not violate ss. 2(*a*), (*b*), (*d*) or 15(1) of the *Charter*. L'Heureux-Dubé J. (and La Forest and Gonthier JJ.) found the *Charter* to be inapplicable. McLachlin J. found the impugned legislation did not violate the *Charter*. Cory and Iacobucci JJ. agreed that there was no *Charter* violation. Sopinka J. found that the *Charter* applied and could only be overridden in limited circumstances.

3. The restrictions on access should be removed (L'Heureux-Dubé J. and La Forest and Gonthier JJ. dissenting).

4. The judgment dealing with property and financial matters and the award of costs should be varied (L'Heureux-Dubé J. dissenting).

Best Interest of the Child, *Charter* Considerations and Access

Per L'Heureux-Dubé J.: The power of the custodial parent is not a "right" with independent value granted by courts for the benefit of the parent. Rather, the child has a right to a parent who will look after his or her best interests and the custodial parent a duty to ensure, protect and promote the child's best interests. That duty includes the sole and primary responsibility to oversee all aspects of day-to-day life and long-term well-being, as well as major decisions with respect to education, religion, health and well-being. The non-custodial parent retains certain residual rights over the child as one of his or her two natural guardians.

Child placement decisions should safeguard the child's need for continuity of relationships, reflect the

Arrêt (Le juge L'Heureux-Dubé est dissidente quant au résultat): Le pourvoi est accueilli en partie.

Les questions sont tranchées de la façon suivante:

1. Le critère relatif à l'accès est l'intérêt de l'enfant (le juge L'Heureux-Dubé, les juges La Forest et Gonthier et les juges Iacobucci et Cory). Selon le juge McLachlin, dans les cas comme la présente affaire, le préjudice est habituellement un élément important pour déterminer l'intérêt de l'enfant. Le juge Sopinka est d'avis de reconnaître un élément préliminaire de préjudice.

2. Les paragraphes 16(8) et 17(5) de la *Loi sur le divorce* ne portent pas atteinte aux al. 2*a*), *b*) ou *d*) ni au par. 15(1) de la *Charte*. Selon le juge L'Heureux-Dubé (et les juges La Forest et Gonthier) la *Charte* ne s'applique pas. Le juge McLachlin est d'avis que les dispositions législatives contestées ne violent pas la *Charte*. Les juges Cory et Iacobucci sont d'accord pour dire qu'il n'y a pas eu de violation de la *Charte*. Le juge Sopinka conclut que la *Charte* s'applique et que l'on ne peut y passer outre que dans des circonstances restreintes.

3. Il y a lieu d'abolir les restrictions à l'accès (le juge L'Heureux-Dubé et les juges La Forest et Gonthier sont dissidents).

4. Le jugement relatif aux biens et aux questions financières et à l'attribution des dépens doit être modifié (le juge L'Heureux-Dubé est dissidente).

L'intérêt de l'enfant, les considérations relatives à la *Charte* et le droit d'accès

Le juge L'Heureux-Dubé: Le pouvoir du parent gardien n'est pas un «droit» qui a une valeur intrinsèque et que le tribunal accorde au parent pour son avantage. En fait, l'enfant a le droit d'avoir un parent qui voit à son intérêt et le parent gardien a l'obligation de garantir, de protéger et de favoriser le meilleur intérêt de l'enfant. Cette obligation suppose qu'il lui incombe, exclusivement et principalement, de surveiller tous les aspects de la vie quotidienne et du bien-être à long terme de l'enfant, et de prendre les décisions importantes relatives à son éducation, à sa religion, à sa santé et à son bien-être. Le parent qui n'a pas la garde conserve certains droits résiduels sur l'enfant, en tant que l'un de ses deux tuteurs naturels.

Les décisions relatives au placement de l'enfant doivent voir à satisfaire le besoin de continuité de la rela-

that only partial solicitor-client costs were justified.

Finding no error in the reasoning or conclusion of the Court of Appeal on this question, I conclude that its order for costs should remain, save to the extent different conclusions on the merits in this Court require that an adjustment be made. As I have made clear, the only respect in which I would vary the order of the Court of Appeal is that instead of ordering lump sum maintenance and a moratorium on the sale of the matrimonial home, I would restore the trial judge's order that the entire interest in the home be conferred on the wife. In my view, this difference does not warrant altering the award of costs against the respondent made below.

2. *Costs Against the Respondent's Counsel*

The trial judge ordered solicitor-client costs against counsel for the husband, Mr. How. For the reasons recited above in connection with costs against the respondent, she concluded that the proceedings had been unnecessarily lengthened. She also referred, at p. 216, to the fact that "[c]ounsel for the respondent had a forum and a cause to pursue. Unfortunately, what was in the best interests of the children, their welfare, was totally lost by the respondent and his counsel in these protracted proceedings. . . . The court was subjected to unwarranted abuse, criticism and insult." She made no finding, however, that Mr. How had been in contempt of court.

The Court of Appeal held that no order for costs should have been made against Mr. How. There is no need to repeat that entirely satisfactory analysis. The basic principle on which costs are awarded is as compensation for the successful party, not in order to punish a barrister. Any member of the legal profession might be subject to a compensatory order for costs if it is shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which they were involved, and that the lawyer acted in bad faith in encouraging this abuse and

clusion que seule une partie des dépens comme entre procureur et client était justifiée.

Comme je ne puis déceler aucune erreur dans le raisonnement ou la conclusion de la Cour d'appel sur ce point, je conclus qu'il y a lieu de maintenir son ordonnance relative aux dépens, sous réserve des ajustements que pourront nécessiter les conclusions différentes de notre Cour quant au fond du litige. Comme je l'ai précisé, je n'apporterais à l'ordonnance de la Cour d'appel qu'une seule modification: au lieu d'ordonner le versement d'une prestation sous forme de capital et un moratoire sur la vente du domicile conjugal, je rétablirais la décision du juge de première instance de conférer à l'épouse la pleine propriété de la maison. À mon avis, cette différence ne justifie pas de modifier les dépens imposés à l'intimé.

2. *Les dépens imposés à l'avocat de l'intimé*

Le juge de première instance a condamné Me How, l'avocat du mari, aux dépens comme entre procureur et client. Pour les motifs exposés précédemment en ce qui concerne les dépens imposés à l'intimé, elle a conclu qu'il y avait eu prolongation inutile des procédures. Elle a également évoqué, à la p. 216, le fait que [TRADUCTION] «[l]'avocat de l'intimé disposait d'une tribune et avait une cause à promouvoir. Malheureusement, l'intimé et son avocat ont, à la faveur de ces interminables procédures, complètement perdu de vue l'intérêt des enfants et leur bien-être. [. . .] La cour a été, sans justification, l'objet d'abus, de critiques et d'insultes». Le juge n'a toutefois pas déclaré Me How coupable d'outrage au tribunal.

La Cour d'appel a jugé que Me How n'aurait pas dû être condamné aux dépens. Point n'est besoin de reprendre son analyse, qui est entièrement satisfaisante. Le principe fondamental en matière de dépens est l'indemnisation de la partie ayant gain de cause, et non la punition d'un avocat. Certes, tout membre de la profession juridique peut faire l'objet d'une ordonnance compensatoire pour les dépens s'il est établi que les procédures dans lesquelles il a agi ont été marquées par la production de documents répétitifs et non pertinents, de requêtes et de motions excessives, et que l'avocat a

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delay. It is clear that the courts possess jurisdiction to make such an award, often under statute and, in any event, as part of their inherent jurisdiction to control abuse of process and contempt of court. But the fault that might give rise to a costs award against Mr. How does not characterize these proceedings, despite their great length and acrimonious progress. Moreover, courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.

agi de mauvaise foi en encourageant ces abus et ces délais. Il est évident que les tribunaux ont compétence en la matière, souvent en vertu d'une loi et, en tout état de cause, en vertu de leur pouvoir inhérent de réprimer l'abus de procédures et l'outrage au tribunal. Cependant, en dépit de sa longueur et de son climat acrimonieux, la présente instance n'a pas été marquée par la faute qui pourrait donner lieu à l'imposition de dépens à Me How. De plus, les tribunaux doivent faire montre de la plus grande prudence en condamnant personnellement un avocat aux dépens, vu l'obligation qui lui incombe de préserver la confidentialité de son mandat et de défendre avec courage même des causes impopulaires. Un avocat ne devrait pas être placé dans une situation où la peur d'être condamné aux dépens pourrait l'empêcher de remplir les devoirs fondamentaux de sa charge.

The Court of Appeal found that the trial judge's criticism of Mr. How related to his conduct in bringing the action. Assuming that costs might, in certain circumstances, be imposed for contempt of court, none was found. Accordingly, no order for costs should have been made against Mr. How. I see no error in the conclusion of the Court of Appeal in this regard.

La Cour d'appel a estimé que la critique qu'avait formulée le juge de première instance à l'endroit de Me How avait trait à sa conduite eu égard à l'engagement de l'action. Si l'on tient pour acquis qu'il est possible, en certaines circonstances, d'imposer des dépens pour outrage au tribunal, aucune conclusion n'a été tirée dans ce sens. Par conséquent, il n'y avait pas lieu de condamner Me How aux dépens. Je ne vois aucune erreur dans la conclusion de la Cour d'appel à cet égard.

3. *Costs Against Burnaby Unit (Watch Tower Bible and Tract Society)*

3. *Les dépens imposés à la section de Burnaby (Watch Tower Bible and Tract Society)*

Since the Watch Tower Bible and Tract Society (the Society) did not appear as a party, the costs awarded against it must be taken to have been premised on the fact that it supported the litigation financially. In effect, this was equivalent to an award for the tort of maintenance: see *Re Sturmer and Town of Beaverton* (1912), 25 O.L.R. 566 (Div. Ct.), at pp. 568-69. To be liable for maintenance, a person must intervene "officiously or improperly": *Goodman v. The King*, [1939] S.C.R. 446. Provision of financial assistance to a litigant by a non-party will not always constitute maintenance. Funding by a relative or out of charity must be distinguished from cases where a person wilfully and improperly stirs up litigation and

La Watch Tower Bible and Tract Society (la Société) n'ayant pas été constituée partie, il faut présumer que les dépens qui lui ont été imposés l'ont été en raison de l'appui financier qu'elle a apporté à l'instance. C'est, en fait, l'équivalent d'une indemnité accordée pour soutien délictueux: voir *Re Sturmer and Town of Beaverton* (1912), 25 O.L.R. 566 (C. div.), aux pp. 568 et 569. Pour qu'il y ait soutien délictueux, il faut qu'il y ait intervention [TRADUCTION] «officieuse ou illégitime»: *Goodman c. The King*, [1939] R.C.S. 446. L'aide financière que fournit un justiciable sans être l'une des parties ne constituera pas toujours un soutien délictueux. On doit distinguer, à cet égard, les cas du parent qui apporte des fonds ou de celui qui agit

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Tab 5

> litigants is supported, another question might arise. It may be that the right to assist without facing an award of costs cannot itself be used by the rich and powerful, no matter how great their interest in the issue, as an instrument of the oppression of those who must fight their battles alone.

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V. SUMMARY

The appeal of Mr. Young is allowed in part, the appeal of Mr. How is allowed, and the appeal of the Watch Tower Bible & Tract Society is allowed.

VI. COSTS OF THE APPEALS

I agree with the disposition of the costs of these appeals proposed by Mr. Justice Cumming.

"The Honourable Madam Justice Southin"

Judgment released: October 25, 1990

CA011864
CA011867
CA011865

Court of Appeal for British Columbia

BETWEEN:)
)
IRENE HELEN YOUNG)
)
PETITIONER)
(RESPONDENT))
) REASONS FOR JUDGMENT
AND:)

JAMES KAM CHEN YOUNG	)	OF THE HONOURABLE
RESPONDENT (APPELLANT)	)	MR. JUSTICE CUMMING
AND:	)	
W. GLEN HOW APPELLANT	)	
AND:	)	
BURNABY UNIT OF THE NEW WESTMINSTER CONGREGATION OF JEHOVAH'S WITNESSES APPELLANT	)	

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Before: The Honourable Madam Justice Southin
The Honourable Mr. Justice Cumming
The Honourable Mr. Justice Wood

Counsel for the Appellant (J.K.C. Young) — W. Glen How, Esq.
Miss Joyce L. Dassonville
Miss Sarah E. Mott-Trille

for the Appellants (W.G. How and the "Congregation") — Gordon Turriff, Esq.
M. Ian Giroday, Esq.

Counsel for the Respondent (I.H. Young) — Lorne N. MacLean, Esq.
David G.M. Nicol, Esq., Miss Linda A. Wong

Counsel for the Intervenor (Law Society) in appeal CA011865 — Robert H. Guile, Q.C.
Miss Joanne R. Lysyk

Place and Dates of Hearing: August 13, 14, 15, 16 and 17, 1990
Vancouver, British Columbia

Place and Date of Judgment: October 25, 1990
Vancouver, British Columbia

financial in nature, raised by Mrs. Young. In these circumstances I think it inappropriate and wrong in principle to saddle Mr. Young with solicitor-and-client costs for the entire action.

Counsel for the appellants presented an analysis of the time at trial devoted to the various issues which were litigated from which it appears that the evidence and argument devoted to financial issues occupied about 30% of the time at trial which took 12 days. Accordingly, it is my view that the appropriate order to make is to direct that Mr. Young pay costs on a solicitor-and-client basis for 4 days of the trial itself and for the interlocutory proceedings referred to as items 1, 3, 4 and 5 of Appendix A, the proceedings before Mr. Justice Davies referred to in item 7 of Appendix B and the proceedings before Mr. Justice Dohm referred to in item 9 of that Appendix.

With respect to the balance of the costs in the court below each party will bear his or her own.

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THE APPEAL OF MR. HOW

1. General Principles

Historically, English solicitors were subject to discipline by the courts whereas barristers constituted a self-governing profession. While, in 1888, the Council of the Law Society in England was empowered to investigate complaints against solicitors, the disciplinary jurisdiction of the courts was, and continues to be, maintained (see: Solicitors Act, 1974 (Eng.) c.47, s.50(2)). The nature of this jurisdiction and the basis upon which it may be invoked was explained by Lord Wright in Myers v. Elman, [1940] A.C. 282 (H.L.), a case in which a solicitor whose managing clerk was guilty of misconduct, unbeknownst to the solicitor, in the preparation and filing of inadequate and false affidavits of documents was ordered to pay the costs of the proceedings. Lord Wright said, at 317-319:

> A solicitor (or in former days a solicitor or an attorney) was long ago held to be an officer of the Court on the Roll of which he was entered and as such to be subject to the discipline of that Court. The Court might strike him off the Roll or suspend him; for instance, the Court of Chancery might strike a solicitor off the Roll of the Court, and order a communication of that order to be made to the Courts in Westminster Hall. There are many such instances in the books. By the Solicitors Act, 1888, there was established the Disciplinary Committee appointed by the Master of the Rolls from members or past members of the Council of the Law Society. This Committee was charged with the duty of investigating complaints against solicitors and reporting their decision to the Court, which could then, if so minded, strike the solicitor off the Roll or suspend him. It was not until 1919 that by the Solicitors Act of that year, the Disciplinary Committee was itself given power to strike off the Roll or to suspend or to order payment of costs by the solicitor subject to an appeal to the Court. But the jurisdiction of the Master of the Rolls and any judge of the High Court over solicitors was expressly preserved, as it now is by s.5, sub-s. I, of the

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Solicitors Act, 1932. Whether the Court would now entertain an application to strike a solicitor off the Roll or to suspend him instead of leaving the matter to the Disciplinary Committee may be doubted. But alongside the jurisdiction to strike off the Roll or to suspend, there existed in the Court the jurisdiction to punish a solicitor or attorney by ordering him to pay costs, sometimes the costs of his own client, sometimes those of the opposite party, sometimes, it may be, of both. The ground of such an order was that the solicitor had been guilty of professional misconduct (as it is generally called) not, however, of so serious a character as to justify striking him off the Roll or suspending him. This was a summary jurisdiction exercised by the Court which had tried the case in the course of which the misconduct was committed. It was clearly preserved to the Court by s.5, sub-s. I, quoted above. It was a summary jurisdiction, in which the intervention of the judge was invoked at the conclusion of the case either by motion in the Chancery court or by a motion or application for a rule in the Courts of Common Law. Though the proceedings were penal, no stereotyped forms were followed. Hence now the complaint is not treated like a charge in an indictment or even as requiring the particularity of a pleading in a civil action. All that is necessary is that the judge should see that the solicitor has full and sufficient notice of what is the complaint made against him and full and sufficient opportunity of answering it. Thus, formal amendments of the complaint are not necessary, so long as the variations of the charge are sufficiently defined and the solicitor is given sufficient liberty to make his answer. The summary jurisdiction thus involves a discretion both as to procedure and as to substantive relief, though there was and is an appeal.

The cases of the exercise of this jurisdiction to be found in the reports are numerous and show how the courts were guided by their opinion as to the character of the conduct complained of. The underlying principle is that the Court has a right and a duty to supervise the conduct of its solicitors, and visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally, as was said by Abinger C.B. in Stephens v. Hill. (I) The matter complained of need not be criminal. It

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> need not involve peculation or dishonesty. A mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice. Thus, a solicitor may be held bound in certain events to satisfy himself that he has a retainer to act, or as to the accuracy of an affidavit which his client swears. It is impossible to enumerate the various contingencies which may call into operation the exercise of this jurisdiction. It need not involve personal obliquity. The term professional misconduct has often been used to describe the ground on which the Court acts. It would perhaps be more accurate to describe it as conduct which involves a failure on the part of a solicitor to fulfil his duty to the Court and to realize his duty to aid in promoting in his own sphere the cause of justice. This summary procedure may often be invoked to save the expense of an action. Thus it may in proper cases take the place of an action for negligence, or an action for breach of warranty of authority brought by the person named as defendant in the writ. The jurisdiction is not merely punitive but compensatory. The order is for payment of costs thrown away or lost because of the conduct complained of. It is frequently, as in this case, exercised in order to compensate the opposite party in the action.

The Myers case was referred to with approval by the Supreme Court of Canada in Pacific Mobile Corporation v. Hunter Douglas Canada Limited et al., [1979] 1 S.C.R. 842 at 845.

Orders requiring solicitors to pay costs personally are sparingly made. The jurisdiction to make such orders must be exercised with care and discretion and only in clear cases. That this is so is made clear in the judgment of Sachs J. in Edwards v. Edwards, [1958] P. 235 at 248 where, after referring to the speeches of Viscount Maugham, Lord Atkin and Lord Wright

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in Myers v. Elman (supra), he said:

The jurisdiction is exercised not to punish the solicitor but to protect and compensate the opposite party.

It is of course, axiomatic, but none the less something which in the present case should be mentioned, that the mere fact that the litigation fails is no reason for invoking the jurisdiction: nor is an error judgment: nor even is the mere fact that an error is of an order which constitutes or is equivalent to negligence. There must be something that amounts, in the words of Lord Maugham, to "a serious dereliction of duty," something which justifies, according to other speeches in that case, the use of the word "gross." It is not, however, normally necessary to establish mala fides or other obliquity on the part of the solicitors; though it may be that if mala fides is established that might turn the scale in a particular case: and it is right at this stage to make it clear that no imputation whatever is made against the solicitor's honesty.

No definition or list of the classes of improper acts which attract the jurisdiction can, of course, be made; but they certainly include anything which can be termed an abuse of the process of the court and oppressive conduct generally. It is also from the authorities clear, and no submission to the contrary has been here made, that unreasonably to initiate or continue an action when it has no or substantially no chance of success may constitute conduct attracting an exercise of the above jurisdiction.

Mr. Latey submitted in the course of his most helpful address that once a sufficient degree of dereliction of duty is established, the exercise of the above jurisdiction was a matter of discretion, and I accept that view. I also agree with his submission that the jurisdiction is one to be exercised sparingly and that the court can to some extent bear in mind the repercussions of making an order. On the other hand, that cannot affect the duty of the court to protect litigants from being improperly damnified. Suffice it to say that any application made to the court in relation to this jurisdiction is naturally one which causes anxious scrutiny of all the circumstances.

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A solicitor may be required to pay costs personally where it is established that he has failed to advise his client that the opponent's claim is "irresistible", that the client's case is "doomed to failure", "impossible to prove" or "hopeless", and where counsel has caused a proceeding to be launched without a bona fide expectation of a favourable result. The following are some examples:

Cook v. The Earl of Rosslyn (1861), 66 E.R. 371; 3 Giff. 175, at E.R. 374, per Sir John Stuart, V.C. (opponent's claim "irresistible")

Cockel v. Whiting (1829), 39 E.R. 17; 1 Russ. + M. 42, at E.R. 18, per Sir John Leach, M.R. ("no bona fide expectation")

Edwards v. Edwards (supra), at 248, and 254 per Sachs J. ("no or substantially no chance of success"; "doomed to failure")

Wilkinson v. Wilkinson, [1963] P. 1 (C.A.), at 10 per Ormerod L.J. ("impossible to prove")

Holmes v. National Benzole Co. Ltd. (1965), 109 So. Jo. 971 (Q.B.), at 971, per Lyell J. ("hopeless")

Davy-Chiesman v. Davy-Chiesman, [1984] 1 All E.R. 321 (C.A.), at 334, per Dillon L.J. ("no or substantially no chance of success")

Worldwide Treasure Adventures Inc. v. Trivia Games Inc. (1987), 16 B.C.L.R. (2d) 135 (S.C.), at 138, per Gibbs J. (case "so hopelessly deficient that the defendants should not have been brought into court to answer for it")

Special care must be exercised in a case where it is sought to hold a solicitor personally liable to pay costs on the ground that the proceedings which had been initiated or continued had no or substantially no chance of success as the

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solicitor, because of the duty of confidentially he owes his client, may be hampered in defending the allegations made against him. These considerations were outlined in Orchard v. South Eastern Electricity Board, [1987] 1 All E.R. 95 (C.A.) at 100 by Sir John Donaldson, M.R., who said:

> The jurisdiction could only be invoked in the case of serious misconduct, and the initiation or continuance of an action when it had no or substantially no chance of success might constitute such misconduct (see [1984] 1 All E.R. 321 at 334. [1984] Fam 48 at 67 per Dillon L.J.).
>
> That said, this is a jurisdiction which falls to be exercised with care and discretion and only in clear cases. In the context of a complaint that litigation was initiated or continued in circumstances in which to do so constituted serious misconduct, it must never be forgotten that it is not for solicitors or counsel to impose a pre-trial screen through which a litigant must pass before he can put his complaint or defence before the court. On the other hand, no solicitor or counsel should lend his assistance to a litigant if he is satisfied that the initiation or further prosecution of a claim is mala fide or for an ulterior purpose or, to put it more broadly, if the proceedings would be, or have become, an abuse of the process of the court or unjustifiably oppressive.
>
> There is one other aspect of which sight must not be lost. Justice requires that the solicitor shall have full opportunity of rebutting the complaint, but circumstances can arise in which he is hampered by his duty of confidentiality to his client, from which he can only be released by his client or by overriding authority, such as that contained in reg 74 of the Legal Aid (General) Regulations 1980, S1 1980/1894. In such circumstances justice requires that the solicitor be given the benefit of any doubt.

A solicitor has a duty to take any point which he

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honestly believes to be fairly arguable on behalf of his client, and it is the duty of the court to hear the point. As to the first branch of this proposition Lord Denning M.R. in Abraham v. Jutson, [1963] 2 All E.R. 402 (C.A.) said, at 404.

> Appearing, as the appellant was, on behalf of an accused person, it was, as I understand it, his duty to take any point which he believed to be fairly arguable on behalf of his client. An advocate is not to usurp the province of the judge. He is not to determine what shall be the effect of legal argument. He is not guilty of misconduct simply because he takes a point which the tribunal holds to be bad. He only becomes guilty of misconduct if he is dishonest. That is, if he knowingly takes a bad point and thereby deceives the court. Nothing of that kind appears here.

and, as to the second branch, Taggart J.A. in Geller v. Brisseau, [1979] 6 W.W.R. 416 (B.C.C.A.) said at 424-425:

> In my opinion, it is the duty of a trial judge to listen fairly to the submissions and evidence made on behalf of a litigant. As I have already intimated, in the circumstances of this case there was at least an arguable case to be presented to the court on behalf of the plaintiff. I do not say that the action would have in any event succeeded. Far from it, because there is no basis upon which to reach that conclusion, the trial never having proceeded to a conclusion. But there was at least an arguable case which, in my opinion, it was the duty of the court to hear.
>
> Further, I think the trial judge's comments concerning the competence of Mr. Geller were, in the circumstances, also improper and unwarranted. Certainly Mr. Geller did not have the experience of other counsel who appear before trial judges and this court, but he had a case to present on behalf of his client, he had formulated that case in the statement of claim, and the statement of defence appeared to give some support to the approach that he had taken, as do

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some at least of the exhibits and some of the evidence which the plaintiff was able to present.

That being the case, I think it was wrong for the trial judge to impose on Mr. Geller the strictures which he did.

I note here that we are advised that the reasons for judgment have been reported, and can only redound to the detriment of Mr. Geller. I think those strictures ought not to stand, and I reject them.

I think, as well, that the order of the judge directing that Mr. Geller pay the costs of the two days of trial was also wrong, and ought to be set aside.

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Solicitors who think that they may be mulcted in costs for advancing points which they honestly believe to be fairly arguable may not act fearlessly and in the best traditions of an independent profession. If solicitors are limited in what they think they can say or do on behalf of their clients, then the rights of those clients are also necessarily limited. The potential for a chilling effect, especially if solicitors may be exposed to orders that they pay costs as between solicitor and client, the repercussions on solicitors' positions and consequently upon that of their clients, if adverse costs awards are made, underscore the need for judges to exercise caution in the making of such orders.

The object of an order requiring a solicitor to pay costs personally is to reimburse a litigant for costs which he has incurred as a result of the solicitor's default. The object is to compensate the litigant, not to punish the solicitor,

although the effect of such an order will necessarily be punitive insofar as the solicitor is concerned.

In Holden & Co. (a firm) v. Crown Prosecution Service, [1990] 1 All E.R. 368 (C.A.), Lord Lane C.J. said, at 372:

> Despite the dictum of Lord Atkin in Myers v. Elman cited earlier, it seems clear that the object of the order is primarily to reimburse a litigant for costs which he has incurred because of the solicitor's default (see Weston v. Courts Administrator of the Central Criminal Court, [1976] 2 All ER 875 at 883, [1977] QB 32 at 45, per Stephenson LJ). The costs which the solicitor will have to pay from his own pocket will be those, and only those, which his default has caused. There is nothing to be added to that figure to mark the disapproval of the court or by way of deterrence. To that extent the object of the jurisdiction is to compensate.
>
> However, there is a punitive element as May J pointed out in Currie & Co. v. Law Society, [1976] 3 All ER 832 and 839, [1977] QB 990 at 997, in that the solicitor is having to pay a bill which would otherwise have to be met by one of the parties to the litigation. There is also necessarily an element of deterrence in that solicitors will wish to avoid the expense and adverse publicity that the exercise of the court's jurisdiction entails.

In Stiles v. Workers' Compensation Board of British Columbia (1989), 38 B.C.L.R. (2d) 307 (B.C.C.A.) this court set aside an order imposing solicitor and client costs against the unsuccessful party to a contested chambers application. I repeat what Lambert J.A. said at 311:

> The principle which guides the decision to award solicitor-and-client costs in a contested matter where there is no fund in issue and where the

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> parties have not agreed on solicitor-and-client costs in advance, is that solicitor-and-client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or in the proceedings, which makes such costs desirable as a form of chastisement. The words "scandalous" and "outrageous" have also been used. See Cominco v. Westinghouse Can. Ltd. (1980), 16 C.P.C. 19 at 22 (B.C.S.C.); Jackh v. Jackh (1981), 31 B.C.L.R. 309 at 312 (S.C.); Sussex Invt' Ltd. v. Leskovar (1981), 30 B.C.L.R. 372 at 378 (C.A.); and Doyle Const. Co. v. Carling-O'Keefe Breweries of Can. Ltd. (1988), 27 B.C.L.R. (2d) 81 (C.A.).

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It would seem to follow that an award of solicitor and client costs against a solicitor personally must necessarily be an award which does more than merely compensate. It carries, as well, some punitive or deterrent element.

This leads to a consideration of the position of barristers as distinguished from solicitors, in light of the applicable legislation and Rules of Court in this Province.

In Myers v. Elman (supra) the House of Lords awarded costs against a solicitor personally in the exercise of the inherent disciplinary jurisdiction of the court over solicitors as officers of the High Court. However, as pointed out in the factum filed on behalf of the Law Society, Myers v. Elman and subsequent English decisions, ought to be applied with some caution in the context of British Columbia's Legal Profession Act and of the role of the Law Society of this Province in the disciplining of lawyers.

In British Columbia all members of the legal profession admitted as solicitors of the Supreme Court are, as are solicitors in England, officers of the courts in which they are licensed to practise (see Legal Profession Act, S.B.C. 1987, c.25, s.2(3)). English barristers, on the other hand, are not considered to be officers of the courts.

In the Legal Professions Act of 1955 the analogous section to the present s.2(3) reads:

> 2. (1) The Law Society of British Columbia (hereinafter called the "Society") shall continue to be incorporated under that name and style as a body politic and corporate, with continued succession and a common seal.
>
> (2) The members of the society shall be all persons called to the Bar of the Province, and all persons admitted as solicitors of the Supreme Court, so long as their names remain on the barristers' roll or the solicitors' roll. They shall be officers of all Courts of the Province.

That section was amended in 1969:

> 1. Section 2 of the Legal Professions Act, being chapter 214 of the Revised Statutes of British Columbia, 1960, is amended
>
> (a) in subsection (2) by striking out all the words after the word "Court" in the third line, and substituting the words "who have not ceased to be members of the Society."; and
>
> (b) by adding the following as subsection (3):
>
> (3) Every member of the Society admitted as a solicitor of the Supreme Court is an officer of all the Courts of the Province.

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(The legislative history is traced in the article An Independent Bar, Sham or Reality by Mary Southin (now Southin J.A., in (1967) 25 Advocate 227-230).

In speaking of the position of the barrister in England Lord Upjohn, in Rondel v. Worsley, [1969] 1 A.C. 191 (H.L.) said, at 282-284:

> . . . the barrister is engaged in the conduct of litigation whether civil or criminal before the courts. He is not an officer of the court in the same strict sense that a solicitor is; if a solicitor fails in his duty to the court he is subject to the jurisdiction of the court, which can, and in proper cases does, make summary orders against him. The barrister is not subject to any such jurisdiction on the part of the judge. To take a simple example: if a solicitor is not present in court personally or by an authorised representative, he is open to be penalised by being ordered to pay personally costs thrown away, at the discretion of the judge. If counsel is not present, it may be that the judge will express his views upon the matter but I do not believe he has any power over counsel save to report him to the Benchers of his Inn. But while the barrister is not an officer of the court in that sense he plays a vital part in the proper administration of justice. I doubt whether anyone who has not had judicial experience appreciates the great extent to which the courts rely on the integrity and fairness of counsel in the presentation of the case. I do not propose to expand this at very great length, for it has been developed in the speeches of those of your Lordships who have already spoken upon this matter; but while counsel owes a primary duty to his client to protect him and advance his cause in every way, yet he has a duty to the court which in certain cases transcends that primary duty. I think that the Scots case of Batchelor v. Pattison and Mackersy [3 R. (Ct. of Sess.) 914, 918] sets out in a lengthy passage, which I will not quote, a very useful description of the independent conduct required of counsel in the conduct of a case. But I may mention some duties cast upon the barrister; if in a civil case the client

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produces a document which may be nearly fatal to his case it is the duty of counsel to insist on its production before the court; the client may want counsel to drag his opponent through the mire by asking a number of questions in cross-examination in the hope that the opposition may be frightened into submission. Counsel here has equally a duty to the court not to cross-examine the opposition save in accordance with the usual principles and practice of the Bar. In a criminal case it is the duty of counsel not to note an irregularity and keep it as a ground of appeal to the Court of Appeal (Criminal Division) but to take the point then and there. This may be seriously prejudicial to his client's case (see Rex v. Neal) [[1949] 2 K.B. 590; 65 T.L.R.]

Counsel is equally under a duty with a view to the proper and speedy administration of justice to refuse to call witnesses, though his client may desire him to do so, if counsel believes that they will do nothing to advance his client's case or retard that of his opponent. So it is clear that counsel is in a very special position and owes a duty not merely to his client but to the true administration of justice. It is because his duty is to the court in the public interest that he must take this attitude. It is this consideration which has led to the immunity from defamation of counsel, as of the judge and the witnesses, for all that he says in court, for all the questions that he asks and for the suggestions he may make to the witnesses on the other side. This immunity is just as necessary in his general conduct of the case as in the case of defamation, not to protect counsel who abuses his position but to protect those who do not, for the reason that, in the words of Fry L.L. in Munster v. Lamb [11 Q.B.D. 588, 607] ". . . it is the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty." Counsel may deliberately decide beforehand not to call a witness but anyone who has practised at the Bar knows the stresses and strains that counsel undergoes during the course of a case. It is all in public; immediate decision may have to be made as to whether to call or not to call a witness and even more quickly whether to ask or not to ask a question. The judge may, for even judges are human, be perhaps unreceptive to counsel's case. All these circumstances may place counsel in a bad light with his client. If counsel is to be subject to

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> actions for negligence it would make it quite impossible for him to carry out his duties properly. I am not, of course, suggesting for one moment that the fact that counsel does or does not call a witness, or does or does not ask a question or does or does not ask to amend his pleadings could possibly by itself be a cause of action for negligence, even if "jobbing backwards" on mature reflection it had been better if counsel had pursued an opposite course. The most that can be said is that he committed an error of judgment. But if the law is that counsel can be sued for negligence it is so difficult to draw the line between an alleged breach of duty where none in fact had been committed; a mere error of judgment; and negligentia or indeed crassa negligentia and counsel might be sued in actions which may well turn out to be quite misconceived: this case may, indeed be a very good example of it. But if the threat of an action is there counsel would be quite unable to give his whole impartial, unfettered and above all, uninhibited consideration to the case from moment to moment, and without that the administration of justice would be gravely hampered. So that in litigation it seems to me quite plain that immunity from action is essential in the interests of the administration of justice as a whole upon the ground of public policy. Regrettable though it may be, if in any case counsel does commit an actionable wrong (but for the immunity) the client who suffers must do so without requite in the public interest.

> I am quite unable to agree with the argument of counsel for the appellant that this immunity is any new ground of public policy. It is all part and parcel of the long-established general policy that judges, witnesses and counsel must be immune from actions arising out of their conduct during the course of litigation in the public interest. That is sufficient to dispose of this appeal.

I leave for another day the question as to whether a lawyer in British Columbia may be held liable for negligence in his capacity as a barrister as distinguished from what he may have done, or failed to do, in his capacity as a solicitor, and

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focus on the question of jurisdiction over disciplinary matters.

In this Province, the legal profession is self-governed. Jurisdiction to discipline members of the profession is vested in the Benchers and the Discipline Committee of the Law Society under the provisions of the Legal Profession Act. The Act does not, as does the English legislation, expressly maintain the disciplinary jurisdiction of the court.

This court has recognized that the Benchers are responsible for determining what is, and what is not, professional misconduct, and has held that the courts ought to be reluctant to interfere in that determination. In Wilson v. Law Society of British Columbia (1986), 9 B.C.L.R. (2d) 260 (B.C.C.A.), Macfarlane J.A. said, at 264:

> What is and what is not professional misconduct is a matter for the benchers to determine, and the court must be very careful not to interfere with the decision of the benchers for their decision is, in theory, based on a professional standard which only they, being members of the profession, can properly apply: see Prescott v. Law Soc. of B.C.; Re Imrie and Inst. of Chartered Accountants of Ont., [1972] 3 O.R. 275 at 279, 28 D.L.R. (3d) 53.

The rationale is to be found in the judgment of Branca J.A. in Prescott v. Law Society of B.C., [1971] 4 W.W.R. 433 (B.C.C.A.), at 440-441 where he said:

> The Benchers are the guardians of the proper standards of professional and ethical conduct. The

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definition, in my judgment, shows that it is quite immaterial whether the conduct complained of is of a professional character, or otherwise, as long as the Benchers conclude that the conduct in question is "contrary to the best interest of the public or of the legal profession, or that tends to harm the standing of the legal profession". The Benchers are elected by their fellow professionals because of their impeccable standing in the profession and are men who enjoy the full confidence and trust of the members of the legal profession of this province. One of the most important statutory duties confided to that body is that of disciplining their fellow members who fail to observe the proper standards of conduct and/or ethics which are necessary to keep the profession on that very high plane of honesty, integrity and efficiency which is essential to warrant the continued confidence of the public in the profession.

I can conceive of the possibility, however remote, that the Benchers might arbitrarily and unreasonably deem that certain conduct is contrary to the best interest of the public or of the legal profession, or tends to harm the standing of the legal profession. I prefer to leave for consideration, if such a situation should arise, what the duty of this Court would be under the broad powers of review reposed in this Court by s.62 of The Legal Professions Act.

Boyd C. in Hands v. Law Society of Upper Canada (1889), 16 O.R. 625 at 635-6, affirmed 17 O.A.R. 41, stated as follows:

"It is for the Benchers, representing what is best in the profession, to determine and adjudge what is and what is not becoming conduct in a member of the Society. The body itself is practically constituted the custodian and judge and vindicator of its own integrity and honour.

Any act of any member that will seriously compromise the body of the profession in public estimation, is surely within the province of this law. It is not for the well-being of the Society itself that any limited construction should be placed upon the extent of the powers delegated to Convocation. Speaking generally, any misconduct which would prevent a person from being admitted to the Society, justifies his removal, because it indicates that he is unsafe and unfit to be entrusted with the powers and privileges of an

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> honourable profession and a confidential office. The conduct which unfits a man to be a solicitor should a fortiori preclude his being a barrister, a degree of greater rank and honour in the law; and where practitioners, as in this Province, usually combine the functions of both branches of the profession, it is impracticable to discipline the solicitor and let the barrister go free. In the case in hand the broad question presented itself: was the solicitor's conduct unbecoming and unprofessional? Convocation, consisting of twenty-two Benchers, has unanimously voted 'yea' and in such a matter no better judges can be found. Having for this reason rejected Mr. Hands the solicitor, they cannot retain Mr. Hands the barrister."

The jurisdiction of the court to make an order as to costs which fulfills the compensatory objective described in Myers v. Elman is found in Rule 57(30) (now Rule 57(37)) of the Rules of Court. It provides:

Disallowance of solicitor client costs

> (30) If it appears to the court that costs have been incurred improperly or without reasonable cause, or that by reason of undue delay in proceeding under an order or of any misconduct or default of the solicitor, any costs properly incurred have proved fruitless to the person incurring them, the court may order the costs disallowed as between the solicitor and his client, and also that the solicitor repay to his client any costs which the client may have been ordered to pay to any other person, or may make such order as the justice of the case may require. The court may refer the matter to the registrar for inquiry and reports and such notice of the proceedings or order shall be given to the solicitor and the client as the court may direct.

Examples of how the court's discretion is to be exercised when considering whether costs should be awarded

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against a solicitor personally under this Rule may be found in the following:

World Wide Treasure Adventures Inc. v. Trivia Games Inc. (1987), 16 B.C.L.R. (2d) 135 (S.C.)

Kern v. Kern & Weylie (1986), 50 R.F.L. (2d) 77 (Ont. H.C.)

Real Securities of Canada Ltd. v. Beland et al. (1987), 16 C.P.C. (2d) 230 (Ont. Dist. Ct.)

Weldo Plastics Ltd. v. Communication Press Ltd. (1987) 19 C.P.C. (2d) 36 (Ont. Dist. Ct.)

Holden & Co. (a firm) v. Crown Prosecution Service, [1990] 1 All E.R. 368 (C.A.)

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Because of the compensatory nature of an award of costs pursuant to Rule 57(30) the Rule should be interpreted in a manner consistent with the traditional immunity of a barrister from suit, as laid down in Rondel v. Worsley (supra), and as applying only to matters other than what may be described as counsel work.

In New Zealand, where, as in this Province, there is a fused bar, Rondel v. Worsley was applied in the case of Rees v. Sinclair, [1974] 1 N.Z.L.R. 180 (C.A.). In that case McCarthy P. said at 186-187:

> In Rondel v. Worsley the House held that the immunity covered not merely the conduct and management of a cause in Court, but also preliminary work in connection therewith, such as the drawing of pleadings. More than one member of the House commented on the difficulty of drawing the line of demarcation in certain classes of barristerial work. Mr. Hassall has contended that the difficulty is even greater in New

> Zealand, where the delineations between the work of a barrister on the one hand and a solicitor on the other are less clearly marked than they are in England. Therefore, he says, we should restrict the coverage to the actual Court appearance. I agree that the boundaries are less certain in New Zealand, and that it is most difficult to draw in advance any statement of them which will satisfactorily dispose of all debatable areas, but that should not deter us from declaring the principle. I agree, too, that, having regard to the capacity of practitioners in New Zealand to be both barristers and solicitors, we should not be controlled by the divisional lines adopted in England. But I cannot narrow the protection to what is done in Court: it must be wider than that and include some pre-trial work. Each piece of before-trial work should, however, be tested against the one rule; that the protection exists only where the particular work is so intimately connected with the conduct of the cause in Court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing. The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice, and that is why I would not be prepared to include anything which does not come within the test I have stated.

It follows that an award of costs pursuant to Rule 57(30) should not be made against a solicitor personally in respect to his role in the management and conduct of a case in court or in the preliminary work which is related to the conduct of the case in court which are his functions as a barrister.

2. <u>Application of the General Principles</u>

For convenient reference I shall repeat here the summary of the findings of the trial judge which led her to make the

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special order she did as to costs. They are that:

(a) the custody claim by the appellant Young (Mr. Young) had little merit;

(b) There had been excessive number of interlocutory applications and motions;

(c) The trial judge and chambers judge were subjected to unwarranted abuse, criticism and insult;

(d) Irrelevant and repetitious material was produced; and

(e) Someone other than Mr. Young was promoting and paying for these proceedings.

(f) Mr. Young attempted to mislead the court;

In making these findings, the trial judge did not distinguish between the three special orders as to costs which were sought, and obtained, by Mrs. Young, i.e. solicitor-and-client costs against Mr. Young, solicitor-and-client costs as against the appellant Burnaby Unit of the New Westminster Congregation of Jehovah's Witnesses (The Burnaby Unit) and solicitor-and-client costs as against Mr. How.

The trial judge made no finding that Mr. How was personally responsible for bringing a custody claim which was

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meritless. Nor did she find that Mr. How was personally responsible for bringing an excessive number of motions, unless her observation that Mr. How "had a forum and a cause to pursue", in the context of her discussion of excessive proceedings, constitutes such a finding against Mr. How personally. I do not see how it can be so construed.

An award of costs should not be made against a solicitor personally on the ground that proceedings brought on behalf of a client lack merit unless it is beyond doubt, not only that the proceedings are devoid of merit and that the solicitor knew or ought to have known them to be so, but also that the responsibility for continuing with the proceedings despite their lack of merit lies with the solicitor, rather than the client. Firstly, a solicitor should not usurp the function of the court by prejudging a client's case. Secondly, it will generally be impossible for a solicitor to defend a charge that he or she is responsible for proceeding with a meritless claim, by showing that the client has been advised of the improbability of success and has nevertheless insisted on proceeding, without a violation or waiver of solicitor client privilege. (See: McGowan, Annotation to Naeyaert v. Elias (1985), 4 C.P.C (2d) 298 (Ont. H.C.).

What I have already said in connection with the appeal of Mr. Young under heading (a) has application here. Mr. How argued the custody issue through these proceedings with

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reference to appropriate authorities. That his submissions did not find favour with the trial judge is no warrant for fixing him personally with solicitor-and-client costs for the entire action.

The trial judge made no finding that Mr. How was a party to Mr. Young's attempt to mislead the court.

The finding that the proceedings were promoted by and paid for by someone other than Mr. Young was clearly relevant only to the award of solicitor-and-client costs against The Burnaby Unit.

Thus, the only findings of the trial judge which might form the basis of her award of solicitor-and-client costs against Mr. How, were there nothing else in the way, are:

(a) her finding that Mr. How produced a great quantity of repetitious and irrelevant material;

(b) her finding that Mr. How subjected the court to unwarranted abuse, criticism and insult; and

(c) her finding that there had been excessive numbers of interlocutory applications and motions.

(a) Repetitious and Irrelevant Material

Counsel bears the responsibility for determining what evidence should be adduced to advance his client's cause. In doing so counsel must be allowed some latitude.

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Insofar as Mr. How acted in good faith in producing the material which he did, in the belief that it was necessary to prove his client's case, the production of material not strictly necessary for the court's decision is not grounds for an award of solicitor-and-client costs against him. There is no finding that Mr. How was not bona fide.

It must also be remembered, as I have already noted, that Mrs. Young had put into issue very early on in the proceeding the question of whether the tenets of the Jehovah's Witness religion were capable of harming the children and she never abandoned her case on that point. In fact, she pursued it vigorously by delivering the Notice of Evidence of Mr. Magnani just before trial and by testifying at trial as to her concerns about the tenets of that faith. In the circumstances, it could not be said that Mr. How breached any duty to the court by adducing or seeking to adduce evidence which might prove that the tenets were not capable of being harmful or that any harm to the children resulted from Mrs. Young's intolerant attitude and not from anything Mr. Young might be teaching them or to which he might be exposing them.

A solicitor ought not to be ordered to pay solicitor-and- client costs where his conduct is merely the product of excessive zeal. That, in my view, is the most that could be said here of Mr. How's conduct, faced as he was with a

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determined attack upon the religious beliefs and practices of the client for whom he was acting.

(b) Abuse and Criticism of Judges

The Law Society submits that Mr. How's remarks regarding the trial and chambers judges are not an appropriate basis for an award of solicitor-and-client costs against Mr. How, as they did themselves not cause costs to be incurred, or to be wasted, as required by Rule 57(30).

There can be no doubt that where the conduct of counsel amounts to contempt the court has ample power to visit it with appropriate consequences. In Re Duncan (1957), 11 D.L.R. (2d) 616, [1958] S.C.R. 41 the Supreme Court of Canada held, at 617 (D.L.R.) and 43 (S.C.R.), that:

> The objection taken by Mr. Duncan to our jurisdiction to cite him for contempt has no foundation. By the provisions of the Supreme Court Act, R.S.C. 1952, c.259, this Court is a common law and equity court of record and its power to cite and, in proper circumstances, find a barrister guilty of contempt of Court for words uttered in its presence is beyond question. That power has been exercised for many years and it is not necessary that steps be taken immediately.

In Weston v. Central Criminal Courts Administrator, [1976] Q.B. 32 (C.A.), a trial judge had ordered a solicitor who failed to appear on the date fixed for his client's trial and who had written an offensive letter protesting the fixing of

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that date to pay the costs thrown away. His appeal was allowed, the Court of Appeal holding that the jurisdiction which the trial judge purported to exercise was not the supervisory jurisdiction of the court over solicitors as its officers, but the inherent jurisdiction to punish for contempt, and that the conduct complained of had not crossed the line dividing mere discourtesy from contempt. Lord Denning M.R. said, at 42-43:

> Seeing that the judge was punishing for contempt, there is an appeal to this court given by section 13(2)(b) of the Administration of Justice Act 1960.
>
> In Balogh v. St. Albans Crown Court, [1975] Q.B. 73, we considered this jurisdiction, and perhaps I may repeat what I said at p.85:
>
> "This power of summary punishment is a great power, but it is a necessary power. It is given so as to maintain the dignity and authority of the court and to ensure a fair trial. It is to be exercised by the judge of his own motion only when it is urgent and imperative to act immediately--so as to maintain the authority of the court--to prevent disorder--to enable witnesses to be free from fear--and jurors from being improperly influenced--and the like . . . The reason is so that [the judge] should not appear to be both prosecutor and judge; for that is a role which does not become him well".
>
> The jurisdiction has rarely been exercised against counsel or solicitors in England. The most relevant authority comes from Nigeria. It was in the Privy Council: Izuora v. The Queen [1953] A.C. 327. The judge in Nigeria was to give a reserved judgment. He directed both counsel to attend. One of them did not do so. The judge held that his absence from the court without leave amounted to a contempt, and fined him £10. The Privy Council held that it was not a contempt of court. Lord Tucker said, at p.336:

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"It is not possible to particularize the acts which can or cannot constitute contempt ... It is not every act of discourtesy to the court by counsel that amounts to contempt, nor is conduct which involves a breach by counsel of his duty to his client necessarily in this category. In the present case the appellant's conduct was clearly discourteous, it may have been in breach of rule 11 of Ord.16, and it may, perhaps, have been in dereliction of duty to his client, but in their Lordships' opinion it cannot properly be placed over the line that divides mere discourtesy from contempt."

I would apply those principles here. First, the letter of November 20, 1975. The judge described it as "scurrilous". It was most discourteous. I realise that it was written by the solicitor in the heat of the moment after a long day, when he found the case suddenly put into the list. Even so, however, it did go beyond all bounds of courtesy. But it was not a contempt of court. It did not interfere with the course of justice in the least. The proper remedy for it was to report it to the Law Society. We have been referred to the Guide to the Professional Conduct of Solicitors (1974) issued with the authority of the Law Society. It says, at p.81:

"It has been held unbefitting conduct for a solicitor to write offensive letters to clients of other solicitors, to government departments and to the public. The use of insulting language and indulging in acrimonious correspondence are neither in the interests of the client nor conducive to the maintenance of the good name of the profession."

I do not dispute the power of the courts in civil cases to visit costs on counsel for his conduct of a trial. That is a power which, because it may inhibit or prevent counsel representing his client fearlessly on the trial of the merits, is to be most sparingly exercised. It is not necessary in my

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view to decide whether it can only be properly applied in a case of contempt although that is my tentative present view.

It is apparent in this case that the trial judge, in making this order against Mr. How, was not relying upon the court's power to punish for contempt. Mr. MacLean agreed that this was so and said that Mr. How's conduct could not be regarded as contumacious. I must not be taken to condone everything that was said by Mr. How in the course of this bitterly contested lawsuit, but his conduct was not such as to engage the contempt powers of the court. It is, if anything, a matter for the disciplinary process of the Law Society as to which, in deference to its jurisdiction, I say no more save that it is not a proper basis for the award of costs made against him.

(c) Interlocutory Applications and Motions

Again, what I have already said in connection with the appeal of Mr. Young, under heading (b), has application here.

The motions made by Mr. Young and the applications he defended respecting access cannot be said to indicate conduct by Mr. How which should merit an order requiring Mr. How to pay costs personally. From his side, Mr. Young was applying to get access which he alleged was being denied to him. In the circumstances, it could not be said that in assisting with these

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interlocutory steps Mr. How was guilty of conduct which tended to defeat justice or constituted a failure on his part in his duty to the court.

There is nothing to suggest that Mr. How was in any way complicit in what I have referred to under heading (f) in Mr. Young's appeal as his lack of candour.

In conclusion, I am of the view that the conduct of Mr. How which was criticized by the trial judge related to his role as a barrister in the conduct and management of these proceedings on behalf of his client; that, while in some instances it could be described as less than impeccable, it fell far short of contempt; and that no order for costs should have been made pursuant to Rule 57(30) against him.

THE APPEAL OF THE BURNABY UNIT OF THE NEW WESTMINSTER CONGREGATION OF JEHOVAH'S WITNESSES

Review Application

At the trial of this action counsel for Mrs. Young gave notice of his client's intention to claim costs against the "organization" thought to be funding Mr. Young in the proceeding. The following exchange between counsel and the court is recorded:

MR. MacLEAN: One final point, my lady, just on another

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Judgment Released: October 25, 1990

CA011876
CA011864
CA011867
CA011865
Vancouver Registry

1990 CanLII 3813 (BC CA)

Court of Appeal for British Columbia

BETWEEN:

IRENE HELEN YOUNG

PETITIONER (RESPONDENT)

AND:

JAMES KAM CHEN YOUNG

RESPONDENT (APPELLANT)

AND:

W. GLEN HOW

APPELLANT

AND:

BURNABY UNIT OF THE NEW WESTMINSTER CONGREGATION OF JEHOVAH'S WITNESSES

APPELLANT

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE WOOD

Before: The Honourable Madam Justice Southin
The Honourable Mr. Justice Cumming
The Honourable Mr. Justice Wood

Counsel for the Appellant, James Kam Chen Young: W. Glen How, Esq.
Miss Joyce L. Dassonville
Miss Sarah E. Mott-Trille

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Counsel for the Appellants, W. Glen How and Burnaby Unit of the New Westminster Congregation of Jehovah's Witnesses:	Gordon Turriff, Esq. M. Ian Giroday, Esq.
Counsel for the Respondent, Irene Helen Young:	Lorne N. MacLean, Esq. David G.M. Nicol, Esq. Miss Linda A. Wong
Counsel for the Law Society of British Columbia, Intervenor in appeal CA011865:	Robert H. Guile, Q.C. Miss Joanne R. Lysyk
Place and Dates of Hearing:	Vancouver, British Columbia August 13th-17th, 1990
Place and Date of Judgment:	Vancouver, British Columbia October 25, 1990

I

I have had the privilege of reading a draft of the reasons for judgment of each of my colleagues. I agree with the disposition of all the financial issues raised on this appeal, as proposed by Southin, J.A. I also agree with the way in which Cumming, J.A. would dispose of all the appeals relating to costs.

I regret, however, that I am unable to agree with the manner in which Southin, J.A. would conclude the appeal brought by Mr. Young against the restrictions which the learned trial judge imposed on the exercise of his right of access, and it is with respect to that issue that I wish to state my own opinions.

Tab 6

CITATION: Best v. Ranking, 2015 ONSC 6279
COURT FILE NO.: CV-14-0815
DATE: 20151013

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

DONALD BEST

Plaintiff

– and –

GERALD LANCASTER, REX RANKING, SEBASTIEN JEAN KWIDZINSKI, LORNE STEPHEN SILVER, COLIN DAVID PENDRITH, PAUL BARKER SCHABAS, ANDREW JOHN ROMAN, MA'ANIT TZIPORA ZEMEL, FASKEN MARTINEAU DUMOULIN LLP, CASSELS BROCK AND BLACKWELL LLP, BLAKE, CASSELS & GRAYDON LLP, MILLER THOMSON LLP, KINGSLAND ESTATES LIMITED, RICHARD IVAN COX, ERIC IAIN STEWART DEANE, MARCUS ANDREW HATCH, PHILIP ST. EVAL ATKINSON, PRICEWATERHOUSECOOPERS EAST CARIBBEAN (FORMERLY 'PRICEWATERHOUSE COOPERS'), ONTARIO PROVINCIAL POLICE, PEEL REGIONAL POLICE SERVICE a.k.a. PEEL REGIONAL POLICE, DURHAM REGIONAL POLICE SERVICE, MARTY KEARNS, JEFFERY R. VIBERT, GEORGE DMYTRUK, LAURIE RUSHBROOK, JAMES (JIM) ARTHUR VAN ALLEN, BEHAVIOURAL SCIENCE SOLUTIONS GROUP INC., TAMARA JEAN WILLIAMSON, INVESTIGATIVE SOLUTIONS NETWORK INC., TORONTO POLICE ASSOCIATION, JANE DOE #1, JANE DOE #2, JANE DOE

Michael R. Kestenberg, for the former lawyer of the Plaintiff, Paul Slansky

Jessica Prince, for the Defendants PricewaterhouseCoopers East Caribbean (formerly PricewaterhouseCoopers), Kingsland Estates Limited, Philip St. Eval Atkinson, Richard Ivan Cox and Marcus Andrew Hatch

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#3, JANE DOE #4, JANE DOE #5, JOHN DOE #1, JOHN DOE #2, JOHN DOE #3, JOHN DOE #4, JOHN DOE #5)
)
)
)
Defendants)
)
) **HEARD:** September 3, 2015

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REASONS FOR DECISION – RULE 57.07 MOTION

HEALEY J.

Nature of the Motion

[1] The moving parties seek an order pursuant to rule 57.07(1)(c) directing that the costs of this action, which have been awarded in their favour in the amount of $84,000, be made payable personally by the plaintiff's former lawyer, Paul Slansky, on a joint and several basis with the plaintiff.

History of the Proceedings

[2] In 2007, an action was commenced in Ontario against 62 defendants by Nelson Barbados Group Inc., of which Donald Best was the principal (the "Nelson Barbados action"). Five of those defendants, referred to as the "Caribbean defendants", brought a successful application for a stay. After the Nelson Barbados action was permanently stayed, the Caribbean defendants sought costs on a substantial indemnity basis against Mr. Best personally.

[3] Ultimately, that proposed costs hearing gave rise to a contempt hearing due to Mr. Best's failure to comply with orders of the court. In January 2010, Shaughnessy J. found Mr. Best in contempt, and ordered him to pay a fine of $7,500 and to serve a three-month sentence of incarceration. Mr. Best unsuccessfully moved to set aside the finding of contempt in May 2013, and then appealed that decision. In the course of that appeal, he made a motion for an order to remove the Caribbean defendants' former lawyers as counsel of record, based on allegations of misconduct. The motion was unsuccessful, and attracted a costs order of $72,000. The Court of Appeal expressed its condemnation of Best's "tactic of making serious allegations of deliberate conduct against the lawyers in the face of a finding to the contrary". Best appealed that decision to a three-judge panel of the Court of Appeal, and was again unsuccessful.

[4] By March 31, 2014, costs orders made against Mr. Best in the Court of Appeal totalled $192,000. He was ordered to pay costs by a deadline, failing which his appeal would be dismissed. Mr. Best unsuccessfully sought a stay of that order. He then sought leave to appeal to the Supreme Court of Canada, which was dismissed with costs on a solicitor-client basis.

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[5] Mr. Best commenced this action on July 14, 2014, within months of the administrative dismissal of his appeal in the Nelson Barbados action. Three of the thirty-nine defendants in this action were part of the group comprising the Caribbean defendants in the Nelson Barbados action, and are hereafter also referred to as the "Caribbean defendants".

[6] As soon as they were retained in this action, counsel for the Caribbean defendants wrote to Mr. Slansky to inform him that they were on the record. At that time, some of the other defendants had already initiated motions to dismiss the action as an abuse of process, or in the alternative, to strike the claim as disclosing no cause of action. In their initial letter, counsel for the Caribbean defendants indicated that they intended to bring a motion to contest jurisdiction if the motions brought by the other defendants were unsuccessful, and for that reason, they did not intend to serve a Notice of Intent to Defend or Statement of Defence. Counsel asked that, in the result, Mr. Slansky refrain from noting their clients in default.

[7] An exchange of letters followed, in which Mr. Slansky insisted that the Caribbean defendants must either file defence pleadings or materials for their jurisdiction motion by November 25, 2014, failing which he would note them in default. He insisted that the jurisdiction motion be scheduled to be heard at the same time as the other defendants' motions to strike.

[8] On December 8, 2014, Mr. Slansky informed counsel for the Caribbean defendants that he had noted their clients in default. This occurred despite that the lawyers for the Caribbean defendants continued to inform Mr. Slansky of their clients' intention to contest jurisdiction, and in the face of an upcoming conference with the case management judge scheduled to occur eight days later.

[9] At the case conference the case management judge, McCarthy J., set a schedule for the Caribbean defendants' motion to set aside the noting in default, as the plaintiff would not consent to such an order.

[10] Within the context of this motion to set aside the Caribbean defendants' noting in default, on February 6, 2015, Mr. Slansky served counsel with notices of examination for two of the Caribbean defendants. Counsel for the Caribbean defendants made it clear that they would not be making their clients available for cross-examination, and a case conference was hurriedly arranged before McCarthy J. The motion regarding the examination of the two Caribbean defendants was ordered to be set for February 27, 2015. In the seven days leading up to the motion, both parties filed motion materials, including facta and authorities.

[11] Following argument by teleconference on February 27, 2015, McCarthy J. found against Mr. Best, noting that there was nothing that the two defendants could add that would be relevant to the narrow issue to be determined on the motion under rule 19.03. McCarthy J. ordered that costs of the examination motion would be dealt with by the judge hearing the motion to set aside the noting in default.

[12] On March 9, 2015, four days before the motion to set aside the noting in default was scheduled to be argued, Mr. Slansky wrote to counsel for the Caribbean defendants and consented to the motion. By this point the parties had exchanged motion records, facta and books of authority in accordance with the schedule set out by McCarthy J.

[13] Although his client consented to the motion to set aside the noting in default, Mr. Slansky still argued that the Caribbean defendants were not entitled to costs. By letter dated March 11, 2015, counsel for the Caribbean defendants disagreed, stating that they intended to seek full indemnity costs for the rule 19.03 motion and, in light of the conduct of the litigation, they had instructions to seek rule 57.07 costs against Mr. Slansky personally.

[14] The costs hearing before McCarthy J. was delayed until April 10, 2015, as a result of three adjournment requests from Mr. Slansky. In his written costs submissions, Mr. Slansky noted that his client was impecunious and unable to pay previous cost orders made against him. That fact was already abundantly clear to the Caribbean defendants, who have yet to collect from Mr. Best the cost orders made in their favour.

[15] On April 10, 2015, McCarthy J. ordered substantial indemnity costs of $45,253.13 in favour of the Caribbean defendants, and made clear findings as to why the plaintiff should not have noted the defendants in default. Referring to the fact that the plaintiff opposed the order to set aside the noting in default, as well as having brought an "emergency" motion to cross-examine, he stated:

> In my view, the plaintiff used the rules to create the need for an unnecessary and time consuming motion. This is reprehensible. That type of conduct should meet with the strong disapproval of the Court. The conduct of the plaintiff in first noting the defendants in default and then opposing the simple, almost routine relief of a setting aside of the noting in default, was entirely unnecessary and unreasonable.
>
> …
>
> In my view, the plaintiff must have reasonably expected to be faced with significant costs if he persisted in his chosen course of action.

[16] Mr. Best sought leave to appeal the costs order. By order dated August 11, 2015, Eberhard J. dismissed Mr. Best's motion and denied leave to appeal McCarthy J.'s costs order. Her endorsement is silent with respect to the costs of the motion for leave to appeal.

[17] As earlier stated, at the plaintiff's insistence the Caribbean defendants' jurisdiction motion was scheduled to be heard during the same four-day period (June 15 to 18, 2015) as the other defendants' motions to dismiss or strike. As of June 10, 2015, Mr. Slansky still proposed that the Caribbean defendants' jurisdiction motion be heard prior to the

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motions to dismiss. Ultimately, counsel came to an agreement that the motions to dismiss should be argued first; however, counsel for the Caribbean defendants was required to attend these motions, as their jurisdiction motion had been scheduled for the same week.

[18] On the evening of June 17, 2015, once the motions to dismiss or strike had been argued but not yet decided, counsel for the Caribbean defendants wrote to Mr. Slansky again, reiterating their intention to seek costs against him personally, and suggesting that this rule 57.07 matter could be argued at a future date. By responding email, Mr. Slansky stated that seeking costs against him personally would constitute an abuse of process, and that if counsel for the Caribbean defendants were to bring such a motion he would respond by seeking costs against them personally and/or sue their clients and the lawyers personally for abuse of process.

[19] On June 18, 2015, this court delivered a short handwritten endorsement dismissing the entire action with reasons to follow, holding that this second action was an abuse of process. As such, the Caribbean defendants' jurisdiction motion was rendered moot and did not proceed.

[20] Arguments on costs were also heard on June 18, 2015. The Caribbean defendants were awarded their full indemnity costs of the action of $84,000, which took into account the prior costs order of Justice McCarthy. The endorsement further noted that the Caribbean defendants intended to bring this rule 57.07 motion, directing that it be scheduled through the trial coordinator's office. A more fulsome overview of the history of the Nelson Barbados action and this action, and the basis for the cost orders made by this court in this action, can be found in *Best v. Ranking*, 2015 ONSC 6269.

[21] At para 7 of those reasons, this court wrote:

> In his submissions on costs at the conclusion of the motions, Best's counsel submitted that, in terms of degree, this claim could not be said to fall at the extreme end of vexatious or abuse of the court's process. This court completely disagrees with that submission. This claim, both in form and substance, is the most vexatious and abusive to ever come before me. The allegations are scandalous, oppressive and shocking, very clearly aimed at undermining key public institutions such as the courts, judges and local and provincial police services, as well as individuals whose professional reputations are intended to be impugned by the allegations made, including lawyers, police officers and a private investigator. The claims are a torturous yarn spun from the most flimsy of material; the evidence presented by Best to purportedly justify these allegations is either non-existent, disturbingly convoluted, irrelevant or, in many instances, the allegations are simply incapable of proof.

[22] It is entirely true that, had the plaintiff cooperated and agreed that the Caribbean defendants should hold off on their motion to contest jurisdiction until after the outcome of the motions to dismiss was known, almost all of their costs would have been saved. In his affidavit, Mr. Slansky asserts "it made no sense to deal with a potential second set of

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motion records (if the Caribbean defendants intended to proceed with a motion to strike after an unsuccessful jurisdiction motion) and prejudice Mr. Best by unnecessarily delaying the matter until after June, 2015." Yet nowhere is there evidence that a delay of any significance would have been caused by agreeing to await the outcome of the other motions. There is no evidence that such inquiries were made of the trial coordinator or the case management judge. There is no evidence of potential prejudice. Mr. Slansky's rationale – that it made no sense to deal with a potential second set of motion records – was exactly the result that occurred. The Caribbean defendants' jurisdiction motion was rendered moot, even though they had had to take time-consuming and extremely expensive steps to bring it forward on the timetable insisted upon by Mr. Best. This tactic lends itself to the conclusion that Mr. Best meant to place pressure on the Caribbean defendants for an improper purpose: retribution for Mr. Best's ill-conceived notion that they and their former lawyers were responsible for his incarceration, and to drive up their legal fees.

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[23] At the present time, Best owes the Caribbean defendants unpaid costs in an amount exceeding $350,000 from the Nelson Barbados action, and $129,253.13 plus interest from this action.

Position of the Parties

[24] The onus is on the moving parties to adduce evidence of Mr. Slansky's role in incurring the costs. The Caribbean defendants argue that Mr. Slansky is personally responsible for incurring costs without reasonable cause, and wasting costs due to his negligence and his adoption of a litigation strategy that was both abusive and an astonishing waste of time and money. They assert that he personally caused these costs to be incurred by either acquiescing to unreasonable instructions from his client, or by advising his client to take a series of unmeritorious steps and unreasonable positions, while knowing that his client was impecunious and unable to pay costs orders.

[25] Mr. Slansky argues that all of the steps he took in the conduct of this litigation were taken upon Mr. Best's instructions. Although Mr. Best has not waived solicitor-client privilege or confidentiality, Mr. Slansky has deposed that his client was involved in all of the litigation decisions and provided detailed instructions for each step of the litigation. He notes that Mr. Best was described as an "experienced litigant" by Shaughnessy J. in the Nelson Barbados action. In addition to acting on his client's instructions, Mr. Slansky asserts that he acted ethically and in accordance with the Law Society of Upper Canada's *Rules of Professional Conduct*.

[26] Mr. Slansky's counsel, Mr. Kestenberg, argues that because of Mr. Best's refusal to waive solicitor-client privilege, Mr. Slansky cannot refute the Caribbean defendants' allegation that he was the cause of any steps taken or any expense incurred unnecessarily. Mr. Kestenberg argues that in this case, there is no evidence regarding the details or advice sought or given relating to the plaintiff's instructions to bring the action, to bring or respond to motions, or relating to Mr. Slansky's communications with opposing counsel.

The Issue

[27] The sole issue to be determined on this motion is whether the costs awarded to the Caribbean defendants ought to be paid by the plaintiff's lawyer, Mr. Slansky, personally. The moving parties also seek an order that Mr. Slansky be jointly and severally liable for the payment of the costs ordered by McCarthy J., and that this court fix the costs of the motion for leave to appeal, with Mr. Slansky being jointly and severally liable for those costs as well.

[28] In a decision released last year, *Bailey v. Barbour*, 2014 ONSC 3698, 2014 CarswellOnt 8412, I attempted to summarize the law developed under rule 57.07 as follows:

> As earlier stated, the legal test for when costs may be awarded against a solicitor personally was outlined by the Ontario Court of Appeal in *Galganov, supra*. In *Galganov* the Court outlined a two-step process or inquiry as to whether costs should be awarded against a solicitor personally, at paras. 13-14:
>
> (1) The first inquiry is whether the lawyer's conduct falls within Rule 57.07(1) in the sense of causing costs to be incurred unnecessarily; and
>
> (2) The second step is to consider, as a matter of discretion (and applying the extreme caution principle), whether in the circumstances of the particular case, the imposition of costs against the lawyer personally is warranted.
>
> The first part of the test requires a "holistic" examination of the lawyer's conduct, however a general observation about the conduct of the litigation is not sufficient to identify the conduct that contributed to delay and unnecessary cost. The Court must also consider specific incidents of conduct to determine whether the conduct caused unreasonable costs to be incurred and thus, falls within the rule: *Galganov*, at paras. 20-12; *Carleton v. Beaverton Hotel*, [2009] O.J. No. 2409 (Ont. Div. Ct.), at para. 20.
>
> The second part of the test is discretionary but, as explained by the Supreme Court of Canada in *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.) at para. 254, the court must exercise this discretion with "extreme caution". Rule 57.07 is concerned with compensating parties for costs unreasonably incurred, and not with regulating lawyers at the instance of the judge or of their client's litigation adversaries; *Carleton v. Beaverton Hotel*, at para. 24, *Young v. Young*, at para. 254; *Galganov*, at para. 14. Even where the parties deserve compensation for costs incurred, the Court's discretion to awards costs against a lawyer personally must be exercised "with

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> the utmost care and only in the clearest of cases". An order for costs against a solicitor "must only be made sparingly, with care and discretion, ... and not simply because the impugned conduct may appear to fall within the circumstances described in Rule 57.07(1)": *Belanger v. McGrade Estate*, [2003] O.J. No. 2853, 65 O.R. (3d) 829 (Ont. S.C.J.) at para. 25.
>
> As the case authorities discuss, the need for extreme caution in awarding costs against lawyers is necessary to ensure that lawyers' conduct is not scrutinized and sanctioned as they carry out their duties to their clients and fulfill their obligations under Rule 4.01(1) of the *Rules of Professional Conduct*, to assist a client's case within all reasonable means. If the evidence is unclear who was responsible for the pursuit of litigation, "any doubt should be resolved in favour of the solicitor": *Byers (Litigation Guardian of) v. Pentex Print Master Industries Inc.*, [2002] O.J. No. 1403, 59 O.R. (3d) 409 (Ont. S.C.J.) at para. 17.

[29] In *Bailey v. Barbour*, costs were awarded against a solicitor personally for knowingly using a biased expert witness to provide expert reports and to give testimony as an expert during the trial. Mr. Kestenberg seeks to distinguish that case, and others noted below, on the basis that Mr. Slansky has not breached his duty to the court and has not misconducted himself in terms of his professional responsibilities.

[30] I agree that this case differs significantly from *Bailey v. Barbour*. Mr. Slansky has not acted in a way that fundamentally interfered with the fairness of the hearing, as occurred in that case. This case is also distinguishable from *Schreiber v. Mulroney*, 2007 CanLII 31754, 2007 CarswellOnt 5267 (S.C.), in which costs were awarded against a solicitor for breaching an agreement with opposing counsel not to note his client in default, as well as delivering several letters that were discourteous and unprofessional. I find that Mr. Slansky is not guilty of similar conduct, other than the isolated example of his reaction to the letter informing him that the defendants were going to seek costs against him personally. Similarly, the conduct of the lawyers in *Sangha v. Sangha*, 2014 ONSC 4088, 47 R.F.L. (7th) 195 was a complete dereliction of their duties to the court and their client, including: (i) commencing ex-parte proceedings for a custody and a restraining order in the wrong forum; (ii) intentionally exaggerating evidence of an "abduction threat" to the court; (iii) delaying service of the ex-parte order and restraining order; (iv) misrepresenting to the court the contents of alleged discussions with opposing counsel regarding an adjournment; and (v) not being present at a hearing.

[31] Counsel for the Caribbean defendants asks that this court consider the procedural choices made by Mr. Slansky, rather than focusing on the lack of merit in Mr. Best's action. She argues that it is sufficient that Mr. Slansky took unnecessary and vexatious steps that wasted costs, regardless of whether he was acting on his client's instructions. She focusses on five particular steps taken that she alleges were unreasonable, unnecessary and wasted costs:

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(i) the decision to note the Caribbean defendants in default;

(ii) opposing the motion to set aside the noting in default;

(iii) bringing an urgent motion to examine two of the Caribbean defendants for purposes of the above motion;

(iv) opposing and delaying the determination of costs in the above motions; and

(v) insisting that the jurisdiction motion had to be argued in June 2015, with the motions to dismiss/strike.

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[32] Counsel for the Caribbean defendants relies upon three cases in which costs were made payable by a solicitor in the context of actions that were dismissed as an abuse of process. The first is *Soderstrom v. Hoffman-La Roche Limited*, 58 C.P.C. (6th) 160, 2008 CanLII 15778 (ONSC), in which the plaintiff commenced a second action that had as its foundation the same subject matter as an earlier, complex class action proceeding, that had been moving through the courts over a six-year period. In contravention of an order, the plaintiff did not seek leave to commence the second action. At para. 24 of the ruling, Justice Perell stated "[t]here is no doubt that the 2nd Soderstrom Proceeding is an effort to re-litigate the causes of action and the issues that were settled by the Vitapharm Proceedings." The plaintiff was bound by the settlement in the earlier action. For reasons explained by Justice Perell, he concluded, at para. 59:

> The last point, in effect, adds *stare decisis* to the various doctrines of *res judicata* that lead to the conclusion that Mr. Soderstrom is re-litigating and abusing the process of the court. His re-litigation is now operating on two planes. There is the underlying re-litigation of the issues in the Vitapharm Proceedings, and by commencing the 2nd Soderstrom Proceeding, Mr. Soderstrom is compelling Hoffman La-Roche to re-litigate the arguments that were dismissed as without merit by Speigel, J. and the same arguments that were rejected by Ellen Macdonald, J.

[33] *Soderstrom* does not reference the law developed under rule 57.07. At para. 5, Justice Perell finds that Mr. Soderstrom's counsel caused costs to be incurred without reasonable cause, and therefore he "shall be personally liable to pay costs of this motion pursuant to rule 57.07 of the *Rules of Civil Procedure*." The comments of the court that seem to be the basis for the cost order against the lawyer are found at paras. 61-78, where Justice Perell analyzes the arguments advanced by counsel to justify commencing the 2nd Soderstrom Proceeding. He concludes, at paras. 66 and 79:

> If this is Mr. Borden's argument on behalf of Mr. Soderstrom, then, in my opinion, it fails because it is bar[r]ed by the several *res judicata* or abuse of process doctrines mentioned above or because on its merits, the argument is fallacious.

> The premises of Mr. Soderstrom's arguments are false and the reasoning from the premises to the conclusion is unsound. He and Mr. Borden cannot justify continuing the 2nd Soderstrom Proceeding.

[34] Justice Perell considered that this extraordinary relief was necessary to protect the defendants, and that the jurisdiction to grant it was "available from the Court's inherent jurisdiction to control its own process, from its jurisdiction to control its own officers, and from rule 57.07 of the *Rules of Civil Procedure*. See *Chavali v. Law Society of Upper Canada,* [2006] O.J. No. 2036 (S.C.J.)" (para. 28).

[35] In *Donmor Industries Ltd. v. Kremlin Canada Inc. (No. 2)*, (1992), 6 O.R. (3d) 506, 3 W.D.C.P. (2d) 57, costs were awarded against a solicitor and his client jointly and severally in circumstances where a lengthy claim was struck as an abuse of process. It contained causes of action unavailable in law and claims that had been or could have been raised in an earlier proceeding, and attempted to re-litigate an issue of costs dealt with in the former proceeding. The justification for the rule 57.07 order was described at pp. 509 - 510:

> I am also satisfied that he was aware that in seeking to re-litigate the costs of the earlier actions in this action the plaintiffs were attempting to do indirectly what they could not do directly. Even more important is the fact that he knew that the claim in this second action included claims which were known to him to have been raised or which were capable of having been raised in the first action and which were known to him to exist at the time of the first action. Mr. Howell says that he knows more about the first action and its surrounding circumstances than anyone else. He was counsel for these plaintiffs who were defendants in the first action throughout the whole of the proceedings which took some five years before the courts and which are still not completed.

[36] In *Baryluk (Wyrd Sisters) v. Campbell*, 2009 CanLII 34042 (ONSC), the statement of claim was struck without leave to amend, and the action was dismissed. The basis for striking the claim was that it sought to re-litigate issues decided in another proceeding, and therefore constituted an abuse of process. Hackland J. ordered that the plaintiff pay the defendants' costs on a substantial indemnity basis fixed in the amount of $103,480, and ordered that the plaintiff's lawyer attend to show cause why she should not be personally ordered to pay all or part of the costs of the action. In applying rule 57.07 and the governing principles in *Young,* Hackland J. set out the basis of the cost award at paras. 13-16:

> Given that Rule 57.07 is not intended to be used to punish solicitors' misconduct, except to the extent that such misconduct has resulted in wasted and unnecessary costs, how should this rule

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be applied in the present case? In my opinion, the entire proceeding necessitated an expenditure of unnecessary costs on the defendants' part because the plaintiff's action was doomed to failure from its inception. The action was a clear abuse of process in the form of a collateral attack on orders made by the judicial defendants in the Harry Potter action in Toronto and could not possibly have succeeded due to the absolute immunity of judicial officers in respect of the performance of their judicial functions. In circumstances comparable to these, costs have been awarded against counsel personally under Rule 57.07, see *Schreiber v. Mulroney*[,] [2007] O.J. No. 3191 (S.C.J.).

As the Supreme Court pointed out in *Young*, personal costs awards against counsel are to be made sparingly, with care and discretion and only in clear cases. Since in my opinion this case falls within Rule 57.07 due to the unwarranted waste of costs involved, I must consider as a matter of discretion whether the interests of justice are served by an award of costs personally against Ms. Townley-Smith.

It is in the context of the exercise of this discretion that Ms. Townley-Smith's conduct is relevant both in terms of her pursuing her own allegations on a personal level and more importantly what I have found to be an egregious and unwarranted attack on the administration of justice by a member of the bar. Ms. Townley-Smith writes in her factum that my original decision in this matter is "an attack on the independence of the Bar and a further attack on the integrity of Canada's judicial system." She submits in oral argument that this court lacks integrity, is guilty of intellectual dishonesty and has engaged in criminal behaviour (altering transcripts). She asserts that her tenacious advocacy is the resolute and honourable advocacy mandated by Rule 4.01(1) of the Rules of Professional Conduct of the Law Society of Upper Canada.

Rule 4.01(1) of the Rules of Professional Conduct does indeed require the vigorous advocacy of counsel, even for unpopular causes, but it also mandates that this be done in a way that demonstrates respect for the administration of justice.

[37] Counsel are in agreement that it is not necessary to show negligence, bad faith or some reprehensible conduct in order to justify an award of costs under rule 57.07. In all of the above-referenced cases relied upon by the Caribbean defendants, the quality that seems to have tipped the scales in favour of awarding costs against a solicitor was the nature of the

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proceeding commenced by each solicitor of record, each constituting an abuse of process, and steps taken in the litigation that run contrary to the interests of justice.

[38] The *Rules of Professional Conduct*, rule 5.1-1, requires a lawyer to represent his or her clients resolutely and honourably. A lawyer has a duty in adversarial proceedings to raise fearlessly every issue, advance every argument, and ask every question however distasteful that the lawyer thinks will help the client's case and obtain a remedy by law. However, reasonable limits are placed on a lawyer's legal and ethical obligations to act as a zealous advocate for his or her clients. These limits were described by Alice Wooley in "Rhetoric and Realities: What Independence of the Bar Requires of Lawyer Regulation" (2012) 45 UBC L. Rev. 145, at pp. 158-159, as follows:

> This justification for the lawyer as a zealous advocate itself dictates the limits on that advocacy. The lawyer's role is not to obtain for the client whatever the client wants. The lawyer is not a gunman for hire. Rather, the lawyer helps the client pursue her conception of the good *within the bounds of the law*. The lawyer must be able to engage in good-faith interpretation of the law, to determine the difference between what the law provides and what the law can simply be made to give. [Footnote omitted.] The lawyer cannot be a morally blinkered technocrat, ignoring the meaning of the law, interpreted reasonably and in good faith. A lawyer may not engage in quasi-legal subterfuge. While the law can be subject to varying interpretations and does not always dictate a single response or answer, it also has a core meaning—interpretations that it does not permit and that cannot be reasonably sustained. As suggested by Marty Lederman in discussing HLA Hart's example of the meaning of a statute forbidding vehicles in the park, we may not know prior to adjudication of the matter whether vehicles include a stroller or an ambulance, but we certainly know that the statute prohibits driving a souped-up Corvette through the park. [Footnote omitted]. Lawyers have an obligation to restrict their advocacy for clients to these legal boundaries.

[39] The specific examples offered by the moving parties as to how costs were incurred unnecessarily must be seen within the context of the action as a whole. As noted, the action was dismissed as an abuse of process, as it was a collateral attack on findings and rulings made in a previous proceeding. The claim was a transparent attempt to re-litigate issues that had already been decided. These processes are not in the interests of justice. They unnecessarily tax the resources of an already strained judicial system. They also tax the resources of the defendants, who have already been oppressed by significant unpaid cost orders from the previous proceedings. Both of these facts should have been known to Mr. Slansky, and should have guided his judgment in accepting this retainer to commence and conduct such an unmeritorious action. Further, for the reasons given, the arguments advanced by Mr. Slansky to justify commencing a second proceeding did not

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have a scintilla of merit. It is Mr. Slansky, who has legal training and expertise, upon whom responsibility for that act must lie. While Mr. Best may have given instructions to proceed, it would be within the purview of Mr. Slansky to guide him as to what causes of action could be supported on the facts presented to him; his judgment was misguided, at the expense of the moving parties. It is also noted that the claim was 90 pages and 234 paragraphs in length, and made scandalous and unsupported allegations of dishonesty, conspiracy, misleading of the court, and fraud against lawyers and law firms in the face of the court's findings to the contrary. It also sought to extend those allegations by way of conspiracy theory to impugn the professional reputations of police officers, a private investigator and various police services, along with the Caribbean defendants. The responsibility for drafting such a claim rests ultimately with Mr. Slansky. The choice to repeat such allegations in affidavits and facta drafted by him, and to repeat those allegations on the record during submissions, was the exercise of Mr. Slansky's professional judgment.

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[40] Mr. Slansky had the benefit of all of the court's rulings in the Nelson Barbados Action, and was counsel of record during the later stages of that proceeding. The court's assessment of Mr. Best's credibility, and of the merits of that action, was made abundantly clear by the various endorsements and reasons issued during that proceeding. And in particular, it is clear that the allegations made against counsel in the Nelson Barbados Action attracted the censure of the court. And yet Mr. Slansky chose to act as counsel for an action in which similar allegations were repeated.

[41] The entire action incurred and wasted costs unnecessarily. Mr. Slansky was instrumental in both starting and advancing the action in the manner that he did. The specific acts undertaken by Mr. Slansky that wasted costs and/or caused them to be incurred unnecessarily were: drafting a claim that was an abuse of process because it was a collateral attack on prior rulings and which sought to re-litigate the same issues, having it issued and served; basing his legal rationale for commencing the action on a theory of joint liability that had no chance of success, and on causes of action that were not properly pleaded and were lacking any factual basis; advancing serious and scandalous allegations in the claim, factum and oral submissions of fraud, dishonesty, criminal conduct, false representations and other improper conduct against various professional individuals; and acting on unreasonable instructions from his client, or providing unreasonable advice to his client, regarding the scheduling of the Caribbean defendants' jurisdiction motion. All of the foregoing leads to the conclusion that the decisions to advance the claim using the litigation strategy adopted can be attributed in part to Mr. Slansky. Accordingly, he can personally be attributed with wasting costs and causing them to be incurred unnecessarily in the same or a similar manner as the lawyers in *Soderstrom*, *Donmor Industries* and *Baryluk*.

[42] While the moving parties raise other specific acts as the basis for the order sought, such as the steps taken in relation to the noting in default, I have declined to base this decision on those steps because they were the subject of McCarthy J.'s cost order. Having not raised the issue of a rule 57.07 order during that hearing before McCarthy J., despite having referred to it in correspondence, I believe that I am now *functus officio* with

respect to those particular costs. Just as I cannot vary the quantum, I may not now go back to vary that order to make the costs payable jointly and severally, where the issue was not specifically reserved for future determination. However, as earlier stated, the costs incurred and wasted in this proceeding were a product of the Caribbean defendants having to be involved in this claim at all.

[43] Similarly, the moving parties request that I assess costs of the plaintiff's unsuccessful motion for leave to appeal that cost order. As earlier stated, the order of Eberhard J. is silent with respect to costs. Although I am loathe to put the Caribbean defendants to more costs, the appropriate recourse would be to address the issue of costs of that motion before Eberhard J., as that material was considered by her and different considerations may apply.

[44] Turning to the second part of the test in *Galganov v. Russell (Township)*, 2012 ONCA 410, 350 D.L.R. (4th) 679, I find that this is one of those rare cases in which costs should be imposed in the interests of justice because:

(i) deterrence is required against the commencement of yet a third unmeritorious claim, potentially again bearing Mr. Slansky's name as counsel of record;

(ii) Mr. Slansky should have known that the proceeding was an abuse of process;

(iii) Mr. Slansky advanced arguments and relied on case law that had no chance of success, despite what he describes as his good-faith belief to the contrary;

(iv) Mr. Slansky drafted and advanced a claim that made spurious and unsupported allegations that maligned the professional reputation of lawyers and others, for which contrary findings had already been made by the court; and

(v) Mr. Slansky may have deferred to his client on a matter of scheduling of a motion without evidence of prejudice to his client, or alternatively, advised his client to take such a position, where that position unnecessarily incurred costs and no evidence exists that he needed to do so to safeguard his client's rights.

[45] It is part of a lawyer's special role in this society and our justice system to endeavour to maintain the public's confidence in and respect for the administration of justice. This mandate is set out in rule 5.6-1 of the *Rules of Professional Conduct*. It requires that a lawyer "encourage public respect for and try to improve the administration of justice". The commentary under this rule, at para. 1, cautions lawyers to take care not to weaken or destroy public confidence in legal institutions by making irresponsible allegations. While it is clear from the context that that rule addresses a lawyer's relationship to the administration of justice and allegations made toward that institution and those positioned within it, the message is nonetheless instructive: lawyers should not advance allegations that impugn the integrity of lawyers, judges, or those who administer our legal institutions, without very solid foundation. And certainly where such allegations are baseless, unsupported by evidence, patently ridiculous and unable to support the causes

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of action advanced, as was the case here, a lawyer should strive to distance himself from, rather than promote, such allegations.

[46] There has been a great deal of focus in the last decade on proportionality between allocation of resources and the importance of the issues being litigated, including the recommendation and rule changes that arose from the Civil Justice Reform Project initiated in 2006. It is discouraging that these efforts can be taken off the rails by vexatious actions, and lawyers who accept retainers to pursue them. This was not a case in which there were important legal issues at stake for Mr. Best. The following assessment of Mr. Best's case can be found in an endorsement from MacPherson, J.A., dismissing Mr. Best's application to stay an order requiring an administrative dismissal of his appeal if costs were not paid:

> Although the appellant attempts to dress up his leave application with the language of access to justice, protection of rights in civil contempt and, most vividly, the return of debtors' prison, the reality is that the subject matter of the proposed appeal is simply the non-payment of costs orders relating to motions and an appeal in meritless proceedings impugning the integrity of counsel. This is not an issue of national importance.

[47] Mr. Slansky represented Mr. Best on that application. Yet, despite the very clear and realistic comments by MacPherson J.A., of the merits of the proceeding, Mr. Slansky was instrumental in commencing this second action, of the same characterization and tenor. A decision by this court to not hold Mr. Slansky responsible for the costs wasted by this litigation would erode the confidence of the Caribbean defendants, lawyers, and the public generally, in the court's ability to safeguard against actions and processes of the type seen here.

[48] For the foregoing reasons, this court orders that costs of the action in the amount of $84,000 shall be paid jointly and severally by Donald Best and Paul Slansky.

HEALEY J.

Released: October 13, 2015

2015 ONSC 6279 (CanLII)

Tab 7

COURT OF APPEAL FOR ONTARIO

CITATION: Best v. Ranking, 2016 ONCA 492
DATE: 20160621
DOCKET: C61271

Blair, Pardu and Brown JJ.A.

BETWEEN

Donald Best

Plaintiff

and

Gerald Lancaster Rex Ranking, Sebastien Jean Kwidzinski, Lorne Stephen Silver, Colin David Pendrith, Paul Barker Schabas, Andrew John Roman, Ma'anit Tzipora Zemel, Fasken Martineau Dumoulin LLP, Cassels Brock and Blackwell LLP, Blake, Cassels & Graydon LLP, Miller Thomson LLP, Kingsland Estates Limited, Richard Ivan Cox, Eric Iain Stewart Deane, Marcus Andrew Hatch, Philip St. Eval Atkinson, PricewaterhouseCoopers East Caribbean (Formerly 'PricewaterhouseCoopers'), Ontario Provincial Police, Peel Regional Police Service a.k.a. Peel Regional Police, Durham Regional Police Service, Marty Kearns, Jeffery R. Vibert, George Dmytruk, Laurie Rushbrook, James (Jim) Arthur Van Allen, Behavioural Science Solutions Group Inc., Tamara Jean Williamson, Investigative Solutions Network Inc., Toronto Police Association, Jane Doe #1, Jane Doe #2, Jane Doe #3, Jane Doe #4, Jane Doe #5, John Doe #1, John Doe #2, John Doe #3, John Doe #4, John Doe #5

Defendants (Respondents)

Paul J. Pape and Justin H. Nasseri, for the appellant, Paul Slansky

Mark Polley and Eric Brousseau, for the respondents

2016 ONCA 492 (CanLII)

Heard: May 24, 2016

On appeal from the judgment of Justice Susan E. Healey of the Superior Court of Justice, dated October 13, 2015, with reasons reported at 2015 ONSC 6279.

2016 ONCA 492 (CanLII)

Pardu J.A.:

[1] Paul Slansky, counsel for the plaintiff Donald Best, appeals from a decision requiring Mr. Slansky to pay costs personally, in the sum of $84,000, on a joint and several basis with his client. He submits that the motion judge erred in two respects:

- The hearing was unfair, because he did not have adequate notice of the grounds upon which the motion judge grounded her decision to order him to pay costs personally.
- The motion judge awarded costs against him because he took on a weak case, not on the basis pleaded by the respondents, which was that he had taken procedural steps which wasted costs.

[2] More generally, Mr. Slansky submits that the motion judge should not have ordered him to pay costs personally, and would not have done so had she exercised the extreme caution required.

[3] For the following reasons, I would dismiss the appeal.

A. BACKGROUND

(1) The first action

[4] Donald Best was the appellant's client. In 2007, Mr. Best, not then represented by the appellant, started an action for negligence and economic loss against 62 defendants – including three of the respondents on this appeal, Richard Ivan Cox, Kingsland Estates Limited and PricewaterhouseCoopers East Caribbean. This action ("Action 1") was stayed on jurisdictional grounds in 2009: 75 C.P.C. (6th) 58 (Ont. S.C.J.).

[5] Several of the defendants in Action 1, among them the respondents named above, moved for a finding of contempt against Mr. Best for failure to comply with court orders related to attempts to collect costs from him. Mr. Best failed to appear at the hearing of the motion and was held in contempt: 2010 ONSC 569. He failed to purge his contempt when given an opportunity to do so on February 22, 2010, choosing instead to live outside Canada for a period of time.

[6] In 2012, Mr. Best returned to Canada and applied to purge the contempt. He swore an affidavit that contained accusations of perjury, conspiracy, fraud, obstruction of justice and fabrication of evidence by opposite parties and their counsel. These accusations were rejected as baseless by the contempt judge,

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who dismissed Mr. Best's application: 2013 ONSC 9025. Mr. Best served 60 days in prison for contempt.

[7] It was at this point that Mr. Slansky first appeared in court on behalf of Mr. Best. The latter sought to appeal to this court the finding of contempt and the dismissal of his application to set that finding aside. As part of his appeal, he brought a motion before Feldman J.A. on October 29, 2013 to remove counsel of record for the opposing parties.

[8] At that time, Mr. Best, through Mr. Slansky, repeated his allegations of serious misconduct on the part of opposite counsel. Feldman J.A. indicated that the repetition of these allegations, in the face of express judicial findings rejecting them, required the court to "express its condemnation by awarding costs on the full indemnity scale": 2013 ONCA 695.

[9] A panel of this court rejected Mr. Best's attempt to review the order of Feldman J.A. and ordered him to pay costs owing to the defendants by April 1, 2014, failing which his appeal from the decision dismissing his action on jurisdictional grounds would be dismissed by the Registrar: 2014 ONCA 167.

[10] Attempts by Mr. Best to stay the Court of Appeal decision and to obtain leave to appeal from the Supreme Court of Canada were unsuccessful. He did not pay the costs and his appeal was dismissed.

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(2) The second action

[11] Before the Supreme Court released its decision on leave, Mr. Best started a new action, with the appellant as his counsel of record.

[12] This action ("Action 2") named 39 defendants, including the five respondents to this appeal. It added claims against opposing counsel from Action 1 and their firms, and claims against police and private investigators, alleging intentional torts committed during the contempt proceedings. The allegations included intentional infliction of harm and mental suffering, misfeasance of public office and abuse of authority, malicious prosecution, conspiracy to injure and invasion of privacy.

[13] Once Action 2 was started, counsel for the respondents wrote to Mr. Slansky on October 24 and November 6, 2014 indicating that they intended to contest jurisdiction. They advised that for that reason they did not propose to file a defence and asked that he not note their clients in default.

[14] The letters also noted that other defendants were bringing a motion to strike the claim entirely. Counsel proposed that the parties defer the jurisdiction motion until that other motion was decided. If the action were struck, there would be no need to proceed with the jurisdiction motion and the respondents would not incur the costs of so doing. By this point, Mr. Best owed $375,000 in unpaid costs awards to the three respondents who had been involved in Action 1.

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[15] Mr. Slansky responded that he would not agree to defer the jurisdiction motion until after the motion to strike. He demanded that the respondents serve either a defence or a notice of motion to challenge jurisdiction by November 25, 2014, failing which he would note them in default.

[16] Counsel asked Mr. Slansky to reconsider his position on noting the respondents in default on November 17, 2014. He did not agree but extended his deadline for a Statement of Defence or notice of motion to contest jurisdiction to December 2. Failing receipt of either, Mr. Slansky noted the respondents in default on December 8 and advised their counsel.

[17] At a case conference held on December 16, Mr. Slansky refused to agree to set aside the noting in default, and the case conference judge set a timetable to deal with a motion to set aside the noting in default.

[18] On February 6, 2015, Mr. Slansky served counsel with notices of examination for two of the respondents. The respondents refused to produce themselves for cross-examination, and Mr. Best, in turn, brought a motion to compel them to give evidence. Justice McCarthy dismissed this motion on February 27, noting that there was nothing the respondents could add that would be relevant to the narrow issue to be determined on the motion to set aside.

[19] Mr. Slansky eventually consented to an order setting aside the default judgment on March 9, 2015, just four days before the motion to set aside the

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noting in default was to be argued. Motion materials had already been prepared and exchanged. In a letter written two days later, counsel for the respondents informed Mr. Slansky that they intended to seek costs against him personally.

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[20] A hearing to determine the costs of the examination motion and the motion to set aside the noting in default took place on April 10, 2015. Justice McCarthy ordered substantial indemnity costs against Mr. Best, holding that Mr. Best had used the rules to create the need for an unnecessary and time-consuming motion. He described the plaintiff's conduct as reprehensible, requiring strong disapproval from the court. He said the plaintiff's conduct in noting the defendants in default and then opposing the setting aside of that step was "entirely unnecessary and unreasonable".

[21] Mr. Best's motion for leave to appeal the April 10 costs order to the Divisional Court was dismissed: 2015 ONSC 5075. Upon learning that Mr. Best sought leave to appeal, counsel for the respondents again wrote to Mr. Slansky on April 29, 2015, informing him that they were considering seeking costs against him personally.

[22] A further letter from counsel for the respondents followed on May 7, 2015, again warning of their intention to seek costs personally from him:

> [I]t is not just a mere disagreement with your client's positions or actions that leads us to this drastic step of seeking costs against you personally. **Fundamentally, your approach to this litigation has been abusive**

> **and continues to waste an astonishing amount of money on legal costs.** You personally have caused these costs to be incurred without any reasonable cause by either acquiescing to absolutely unreasonable instructions from your client, or worse by advising your client to take the unreasonable steps he has taken through you. Either way, you personally are liable for these costs. [Emphasis added.]

(3) The hearing of the motions to strike

[23] From June 15 to 18, the motions to strike brought by 21 of the 39 defendants in Action 2 were argued before Healey J. The defendants sought to dismiss Action 2 as frivolous, vexatious and an abuse of process, or to strike the claim as disclosing no reasonable cause of action, without leave to amend.

[24] On the first day of argument, nearly eight months after the issue was first raised, Mr. Slansky conceded that the respondents' jurisdictional motion should await the outcome of the motions to strike.

[25] On the third day of argument, counsel for the respondents again notified Mr. Slansky of their intention to seek costs against him personally.

[26] On the fourth day of argument, Justice Healey dismissed the action as an abuse of process, making the jurisdiction motion moot. In her endorsement dated that same day, she ordered costs of the action to the respondents on a full indemnity basis. She noted that the respondents would be moving for an order under rule 57.07, requiring Mr. Slansky to be jointly and severally liable for the costs of the action. In reasons released later, she found that Action 2 had not a

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"scintilla of merit" and that it was the most "vexatious and abusive" claim to ever come before her: 2015 ONSC 6269, at para. 7.

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[27] Mr. Best attempted to appeal from the dismissal of his action, but the appeal was dismissed after he failed to comply with an order to provide security for costs.

B. THE NOTICE OF MOTION

[28] As noted, counsel for the respondents provided written notice of the respondents' intention to seek costs personally against the appellant on four occasions during the course of Action 2: March 11, 2015; April 29, 2015; May 7, 2015 and June 17, 2015.

[29] On July 22, 2015, the respondents served their Notice of Motion. Pursuant to rule 57.07(1)(c) of the *Rules of Civil Procedure*, they sought that Mr. Slansky be held jointly and severally liable with Mr. Best for all costs awarded in the respondents' favour in Action 2 – an amount totaling over $160,000. The motion was heard on September 3, 2015. On October 13, 2015, Healey J. ordered Mr. Slansky to pay costs fixed at $84,000 on a joint and several basis with Mr. Best.

[30] Rule 57.07 provides in part:

> (1) Where a lawyer for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,

...

(c) requiring the lawyer personally to pay the costs of any party.

(2) An order under subrule (1) may be made by the court on its own initiative or on the motion of any party to the proceeding, but no such order shall be made unless the lawyer is given a reasonable opportunity to make representations to the court.

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[31] The grounds advanced in support of the motion emphasized, but were not limited to, the unreasonable procedural steps taken. The Notice of Motion included factors related to the merits of Action 2 at paras. (c) and (n):

> Mr. Slansky counselled the plaintiff or otherwise allowed his client to proceed with a series of unmeritorious steps and to take unreasonable positions to achieve unattainable goals in this action;
>
> ...
>
> On June 18, 2015, Justice Healey dismissed the entire action from the bench for being vexatious and an abuse of process and stated that Mr. Best's position lacked a "scintilla of merit"[.]

C. MOTION JUDGE'S DECISION

[32] The motion judge observed that the onus lay upon the moving parties, the respondents, to establish that Mr. Slansky should pay costs personally, and that a two-step inquiry was required:

- Did the lawyer's conduct fall within rule 57.07(1) in that he caused costs to be incurred unnecessarily?

- As a matter of discretion, applying the extreme caution principle, was the imposition of costs against the lawyer personally warranted? (See *Galganov v. Russell (Township)*, 2012 ONCA 410, 350 D.L.R. (4th) 679, application for leave to appeal to S.C.C. discontinued, [2012] S.C.C.A. No. 382.)

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[33] Counsel agreed that it was not necessary to show negligence, bad faith or reprehensible conduct in order to justify an award of costs under rule 57.07.

[34] In addressing the first step of the inquiry, counsel for the respondents (who were referred to below as the "Caribbean defendants") urged the motion judge to rely on the procedural steps undertaken by Mr. Slansky, rather than focusing on the lack of merit to Action 2. The motion judge described counsel's submissions:

> [Counsel] argues that it is sufficient that Mr. Slansky took unnecessary and vexatious steps that wasted costs, regardless of whether he was acting on his client's instructions. She focusses on five particular steps taken that she alleges were unreasonable, unnecessary and wasted costs:
>
> (i) the decision to note the Caribbean defendants in default;
>
> (ii) opposing the motion to set aside the noting in default;
>
> (iii) bringing an urgent motion to examine two of the Caribbean defendants for purposes of the above motion;
>
> (iv) opposing and delaying the determination of costs in the above motions; and

(v) insisting that the jurisdiction motion had to be argued in June 2015, with the motions to dismiss/strike.

[35] The motion judge found that Action 2 was an abuse of process, doomed to failure, and that Mr. Slansky should have known this. She explained that the specific examples of unnecessary costs provided by the respondents had to be seen "within the context of the action as a whole." That action was dismissed as an abuse of process – "a transparent attempt to re-litigate issues that had already been decided." Rather than being in the interests of justice, the litigation taxed the resources of a strained judicial system. It also taxed the resources of the respondents, who faced significant unpaid costs orders from the previous action.

[36] The motion judge stated:

> Both of these facts should have been known to Mr. Slansky, and should have guided his judgment in accepting this retainer to commence and conduct such an unmeritorious action. Further, for the reasons given, the arguments advanced by Mr. Slansky to justify commencing a second proceeding did not have a scintilla of merit. It is Mr. Slansky, who has legal training and expertise, upon whom responsibility for that act must lie. While Mr. Best may have given instructions to proceed, it would be within the purview of Mr. Slansky to guide him as to what causes of action could be supported on the facts presented to him; his judgment was misguided, at the expense of the moving parties.

[37] The motion judge observed that the Statement of Claim in Action 2 was 90 pages and 234 paragraphs. It made scandalous and unsupported allegations of

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dishonesty and fraud against lawyers and law firms, and it sought to extend those allegations by way of conspiracy theory "to impugn the professional reputations of police officers, a private investigator and various police services, along with the Caribbean defendants."

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[38] The motion judge continued:

> The responsibility for drafting such a claim rests ultimately with Mr. Slansky. The choice to repeat such allegations in affidavits and facta drafted by him, and to repeat those allegations on the record during submissions, was the exercise of Mr. Slansky's professional judgment.

[39] The motion judge found that the entire action incurred and wasted costs unnecessarily, and that Mr. Slansky was instrumental in "both starting and advancing the action in the manner that he did." The specific steps she found to have wasted costs were:

- He drafted a claim that was an abuse of process because it was a collateral attack on prior rulings and sought to relitigate the same issues.
- He issued and served the claim.
- He based his legal rationale for commencing the action on a theory that had no chance of success.
- The causes of action were not properly pleaded and lacked any factual basis.

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- He advanced serious and scandalous allegations in the claim, factum and oral submissions of fraud, dishonesty, criminal conduct, false representations and other improper conduct against various professional individuals knowing that courts had previously ruled that those same allegations were baseless.
- He acted on unreasonable instructions from his client, or provided unreasonable advice to his client, regarding the scheduling of the respondents' jurisdiction motion.

[40] The motion judge observed that, had Mr. Slansky consented to deferring the respondents' jurisdiction motion at the outset, the respondents would have incurred only minimal costs. Given the absence of prejudice to Mr. Best, in the event of such forbearance, the motion judge concluded that the tactic was adopted to "place pressure on the Caribbean defendants for an improper purpose: retribution for Mr. Best's ill-conceived notion that they and their former lawyers were responsible for his incarceration, and to drive up their legal fees."

[41] Turning to the second arm of the test, the motion judge concluded that this was one of the rare cases in which counsel should personally pay costs for the following reasons:

- The need to deter the commencement of a third unmeritorious claim, potentially bearing Mr. Slansky's name as counsel of record.

- Mr. Slansky should have known Action 2 was an abuse of process.
- He advanced arguments that had no chance of success, despite what he described as his good faith belief to the contrary.
- He drafted and advanced a claim that made spurious and unsupported allegations that maligned the professional reputation of lawyers and others, for which contrary findings had already been made by the court.
- He may have deferred to his client on a matter of scheduling of a motion without evidence of prejudice to his client, or alternatively advised his client to take a position that unnecessarily incurred costs, without evidence that he needed to do so to safeguard his client's rights.

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D. ANALYSIS

[42] In oral argument on appeal, the appellant submits that the appellant did not have a reasonable opportunity to make representations to the court on the particular ground upon which the motion was decided, which was that the action lacked merit and should never have been brought by the appellant on behalf of Mr. Best. He indicated that the grounds listed in his factum distill "down to that."

[43] As I explain below, I do not accept the appellant's argument. First, Mr. Slansky did have adequate notice that the merits of Action 2 would be a component of the rule 57.07 motion. Second, it was not merely the meritless

nature of Action 2 that was a factor in the motion judge's award of costs against Mr. Slansky, but rather that Action 2 was an abuse of process.

[44] The motion judge exercised her discretion as to costs with extreme caution, as was required, and her decision is entitled to deference.

(1) Was the requisite notice provided to Mr. Slansky?

[45] I do not accept the argument that Mr. Slansky did not have adequate notice of the reliance upon the meritless nature of Action 2.

[46] The Notice of Motion making the claim for costs against him included amongst the grounds:

- He counselled the plaintiff or otherwise allowed his client to proceed with a series of unmeritorious steps and to take unreasonable positions to achieve unattainable goals in this action: para. (c).
- On June 18, 2015, Justice Healey dismissed the entire action from the bench for being vexatious and an abuse of process and stated that Mr. Best's position lacked a "scintilla of merit": para. (n).

[47] Mr. Slansky was represented by counsel on the motion. He was aware, as of June 18, that the action had been dismissed as an abuse of process. His own factum filed on the motion devoted argument to the merits of the action. Overall, there was no unfairness in the notice given to him of the claim for costs.

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[48] While the lack of merit and abusive nature of the overall action was emphasized in the motion judge's reasons, the motion judge also found that Mr. Slansky wasted costs unnecessarily by acting on unreasonable instructions from or providing unreasonable advice to his client on the scheduling of the respondents' jurisdiction motion. In particular, she found that "almost all of [the respondent's] costs would have been saved" had it not been insisted that the jurisdiction motion be argued in June 2015 together with the motions to strike.

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[49] This core finding supporting the motion judge's ruling – that counsel caused "costs to be incurred without reasonable cause" – is unassailable. It was open to the motion judge to conclude that it was a waste of costs to require the respondents to move to contest jurisdiction immediately rather than await the motion to strike by other defendants. It was also open to her to conclude that there was no justification for Mr. Slansky to require this, whether it was insisted upon by Mr. Best or not.

(2) Does a lawyer become liable to pay costs personally because he starts an action that has little chance of success?

[50] I agree with the submission of the appellant that the fact that a lawyer starts an action which is unlikely to succeed is not, on its own, a basis to award costs personally against that lawyer.

[51] Rule 57.07 is "designed to protect and compensate a party who has been subjected to costs being incurred without reasonable cause, not to punish a lawyer": *Galganov*, at para. 14.

[52] The motion judge here did not make Mr. Slansky liable for costs personally simply because he started a case that was weak. As the motion judge pointed out, the nature of the proceedings is an important contextual factor in assessing whether costs wasted by a solicitor justify an order that he pay costs personally.

[53] As this court held in *Galganov*, at para. 20:

> [R]ule 57.07(1) requires an examination of "the entire course of litigation that went on before the application judge so that the application judge can put in proper context the specific actions and conduct of counsel." This holistic examination of the lawyer's conduct produces an accurate tempered assessment. [Citation omitted.]

[54] The motion judge examined the entire course of the litigation in assessing the specific actions and conduct of counsel, as she was required to do. In particular, she focused on the vexatious or abusive nature of the proceeding. This is not a necessary element of an award of costs against counsel personally but is not unfamiliar in this context. (See e.g. *Soderstrom v. Hoffman-LaRoche Limited* (2008), 58 C.P.C. (6th) 160 (Ont. S.C.J.); *Donmor Industries Ltd. v. Kremlin Canada Inc. (No. 2)* (1992), 6 O.R. (3d) 506 (Gen. Div.); and *Baryluk (Wyrd Sisters) v. Campbell* (2009), 81 C.P.C. (6th) 172 (Ont. S.C.J.).)

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[55] On appeal, Mr. Slansky argues that Action 2 was not abusive. It was against many different parties and for different causes of action. That issue has now been conclusively determined by the dismissal of Mr. Best's appeal from the decision striking Action 2 as an abuse of process. Action 2 made similar allegations of impropriety as had been voiced in the course of Action 1. The motion judge did not err in considering that Mr. Slansky incorporated into the pleading in Action 2 accusations of criminal misconduct against opposing counsel that had repeatedly been judicially rejected as baseless.

[56] Finally, as this court indicated in *Galganov*, at paras. 23-25, deference is owed to a motion judge's decision as to whether a lawyer should pay costs personally:

> The determination as to costs is a matter within the discretion of the application judge. An appellate court may set aside a costs award if the application judge made an error in principle or if the costs award is plainly wrong.
>
> In *Rand Estate*, this court held that:
>
>> The application judge who managed the proceedings was in a much better position than this court to make the necessary assessments underlying the findings of fact he eventually made. Those findings are, by their nature, somewhat subjective and the cold paper record cannot, in our view, capture all of the considerations that would be relevant to those findings. We defer to the [application] judge's findings unless

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> they are clearly in error and clearly material
> to his ultimate determination.
>
> As a result, this court owes a high degree of deference to the application judge's holding.... [Citations omitted.]

[57] I see no basis to interfere with the motion judge's discretionary decision to order Mr. Slansky to pay some portion of the costs wasted.

[58] In the event leave to appeal a costs order against counsel personally is necessary, I would grant leave.

E. DISPOSITION

[59] For these reasons, the appeal is dismissed with costs payable by Mr. Slansky in favour of the respondents in the agreed sum of $30,000 inclusive of HST and disbursements.

Released: "RAB" June 21, 2016

"G. Pardu J.A."
"I agree R.A. Blair J.A."
"I agree David Brown J.A."

2016 ONCA 492 (CanLII)

Tab 8

COURT FILE NO.: 07-CV-343380CP
DATE: April 14, 2008

2008 CanLII 15778 (ON SC)

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

LARS INGMAR SODERSTROM

Plaintiff

- and -

HOFFMAN-LA ROCHE LIMITED and BASF CANADA INC.

Defendants

COUNSEL:

J. Perry Borden, Q.C. for the Plaintiff
William Vanveen for the Defendant Hoffman-La Roche Limited
David Kent for the Defendant BASF Canada Inc.

HEARING DATE: April 9, 2008

REASONS FOR DECISION

PERELL, J.

Introduction and Overview

[1] In an action that I will call "the Vitapharm Proceedings," Hoffman-La Roche Limited ("Hoffman-La Roche") and BASF Canada Inc. ("BASF") and others settled a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c.6 in connection with an alleged conspiracy to fix prices and otherwise manipulate the market in vitamins. The Settlement Administrator's Final Report indicates that the total of settlement monies available for distribution was $102,782,000.

[2] Mr. Lars Ingmar Soderstrom was a class member of the Vitapharm Proceedings, and he is now before the court as the plaintiff in an action that I will call the "2nd Soderstrom Proceeding." In this action, Mr. Soderstrom sues Hoffman-La Roche and BASF, and he advances the same claims that were subject of the settlement in the Vitapharm Proceedings.

[3] Relying on, amongst other things, *res judicata*, the doctrine precluding collateral attacks on court orders, abuse of process, *stare decisis*, rule 57.07 of the *Rules of Civil Procedure,* the vexatious litigant provisions of the *Courts of Justice Act*, R.S.O. 1990, c.43, and the court's inherent jurisdiction to control its own process, Hoffman-La Roche

and BASF submit that Mr. Soderstrom - and his counsel Mr. J. Perry Borden - are re-litigating – and not for the first time. They ask that the 2nd Soderstrom Proceeding be dismissed, and they ask for relief designed to stop Mr. Soderstrom and Mr. Borden from re-litigating against them ever again.

[4] In response, relying on, amongst other things, s. 27(3) of the *Class Proceedings Act, 1992* and *Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321 (C.A.), Mr. Soderstrom asserts that he can and ought to be able to prosecute the 2nd Soderstrom Proceeding, and he submits that his claim and the claim of the class of which he is a member against the Defendants has never been determined and can and ought to be pursued in this action. He says that the court has never determined the question asked on behalf of the class of ultimate purchasers who were the alleged victims of the vitamin conspiracy.

[5] As I will explain in more detail below, Mr. Soderstrom's arguments fail in the sense of being barred or they are fallacious. He has had his day in court; the 2nd Soderstrom Proceeding is an abuse of process, and it shall be dismissed. Further, the Defendants will receive extraordinary relief to protect them from re-litigation and to maintain the integrity of the administration of justice. Further, still Mr. Borden has caused costs to be incurred without reasonable cause, and he shall be personally liable to pay costs of this motion pursuant to rule 57.07 of the *Rules of Civil Procedure.*

[6] In particular: (a) the 2nd Soderstrom Proceeding shall be dismissed with costs; (b) the costs shall be payable jointly and severally by Messrs. Soderstrom and Borden; (c) Messrs. Soderstrom and Borden shall pay costs to Hoffman-La Roche on a substantial indemnity basis in the amount of $46,000 all inclusive of counsel fee, disbursements, and GST; (d) Messrs. Soderstrom and Borden shall pay costs to BASF on a substantial indemnity basis in the amount of $34,000; (d) Messrs. Soderstrom and Borden shall not initiate or commence any proceedings (actions, applications, motions, or Small Claims Court proceedings) against the Defendants without leave of the court; and (e) if in contravention of this order, Messrs. Soderstrom and Borden or anybody associated with them do commence proceedings without leave of this court, Hoffman-La Roche or BASF may file a copy of this order without proof of service and the proceedings shall be stayed until further order of this Court.

[7] Because of the above order, it is not necessary to address the Defendants' alternative request for security for costs.

Discussion - Introduction

[8] The factual background to the motion now before the court is complex. Details of the history of the various proceedings and the involvement of Mr. Borden are available from numerous judgments; namely: *Vitapharm Canada Ltd. v. F. Hoffman-Laroche Ltd.*, [2000] O.J. No. 4594 (S.C.J.) (carriage motion); *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2001] O.J. No. 3682 (S.C.J.) (Curran Proceeding motion for leave), leave to appeal to C.A. quashed [2002] O.J. No. 2010 (C.A.); *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.) (settlement approval motion);

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Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., [2005] O.J. No. 1117 (S.C.J.) (approval of class counsel fees); *Ford v. Hoffmann-Laroche Ltd.*, [2005] O.J. No. 5427 (Div. Ct.) (claim for costs in Curran Proceedings); and *Soderstrom v. Hoffmann-La Roche* Ltd. [2006] O.J. No. 63 (S.C.J.) (dismissal of 1st Soderstrom Proceeding).

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[9] While the facts could be described chronologically, in order to explain to Mr. Soderstrom why his action should be dismissed, it is helpful to identify the various proceedings and then to analyze them separately. This is also necessary because Mr. Soderstrom's role differed in the various proceedings from among being a putative class member, a class member, an objector to a settlement, an applicant in an application, a person seeking status an intervenor, and a putative representative plaintiff.

The Vitapharm Proceedings and the 2nd Soderstrom Proceeding

[10] The history of the several legal crusades initiated by Mr. Borden begins in 1999, when Mr. Borden commenced a proposed class proceeding on behalf of end consumers who had purchased vitamins. It was alleged that Hoffman-La Roche and BASF were parties to a conspiracy to fix the prices of vitamins. The plaintiffs in this action were Elsa Horvath and Herbert Hollander, and Mr. Soderstrom was a member of the proposed class. I will call this proceeding the "Horvath Proceeding."

[11] By order dated December 4, 2000, in what has come to be called a "carriage motion," Cumming, J. stayed the Horvath Proceeding. It was one of six other proposed class proceedings, and Cumming, J. decided that Mr. Harvey Strosberg, Q.C. and Mr. Scott Ritchie - and not Mr. Borden - should be appointed as lead class counsel in prosecuting class actions against the Defendants and other vitamin manufactures. This is the class proceeding that I have called the Vitapharm Proceedings. Cumming, J. also ordered that no other class proceedings with respect to the alleged vitamin price fixing conspiracy be commenced without leave of the court.

[12] Ms. Horvath commenced but abandoned an appeal of Justice Cumming's carriage order, and four years passed in the Vitapharm Proceedings, until a settlement was reached in the fall of 2004. However, during this period there were two other proceedings initiated through Mr. Borden. One involved a class proceeding in which the plaintiffs included James Curran ("the Curran Proceeding") and the other was a proceeding by application brought by Mr. Soderstrom, which I will call the "1st Soderstrom Proceeding." I will pass over these two proceedings but return to them later.

[13] On March 8 and 9, 2005, Cumming, J. heard a motion to approve the settlement reached in the fall of 2004 in the Vitapharm Proceedings. Mr. Soderstrom attended the hearing of the motion. He was given status as an objector, and he made submissions opposing the settlement.

[14] By judgment dated March 23, 2005, Cumming, J. approved the settlement in the Vitapharm Proceedings. In his Reasons for Judgment, Cumming, J. expressly rejected Mr. Soderstrom's objections. See *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.) (settlement approval motion) at para. 169. In April

2005, courts in British Columbia and Quebec approved settlements in parallel class proceedings.

[15] The Settlement Approval Order in the Vitapharm Proceedings released Hoffman-La Roche and BASF (and other settling defendants) from any and all claims by class members including end consumers - which would include Mr. Soderstrom - in respect of the vitamins conspiracy.

[16] Mr. Soderstrom did not opt out of the settlement in the Vitapharm Proceedings. Indeed, no member of the class of which Mr. Soderstrom was a member opted out in any of the three jurisdictions in which the settlement was approved.

[17] By order dated August 12, 2005, Cumming, J. declared that all notice provisions in the Settlement Approval Order had been satisfied, and he declared the settlement binding according to its terms. Ultimately, by way of a *cy pres* distribution, $37,077,000 was paid by the settling defendants in favour of the end consumer class that Mr. Soderstrom seeks to represent in the 2nd Soderstrom action.

[18] During the summer of 2005 and throughout 2006, there were skirmishes in the Curran Proceeding and the 1st Soderstrom Proceeding, which again I will pass over for the moment.

[19] As a matter of interpretation, the settlement approved by Cumming, J. includes, amongst other things, a release of claims by the members of the class of which Mr. Soderstrom is a member and a dismissal of other actions including the Horvath Proceeding. In the motion before me, no argument was advanced to suggest that Mr. Soderstrom was not covered by the settlement.

[20] By statement of claim dated November 9, 2007, Mr. Soderstrom commenced the 2nd Soderstrom Proceeding. Mr. Borden is the solicitor of record. The subject matter of the 2nd Soderstrom Proceeding is the same as the Vitapharm Proceedings. In contravention of the December 4, 2000 carriage motion order, Mr. Soderstrom did not seek leave to commence the 2nd Soderstrom Proceeding.

[21] In the 2nd Soderstrom Proceeding, Mr. Soderstrom seeks appointment as representative plaintiff and the certification of his action as a class proceeding. Remarkably, he seeks the joinder of the 2nd Soderstrom Proceeding with the Horvath Proceeding – which it may be noted was stayed and was later actually dismissed as a part of the settlement of the Vitapharm Proceedings.

[22] In justifying the 2nd Soderstrom Proceeding, Mr. Soderstrom relies on s. 27 (3) of the Act which states:

> (3) A judgment on common issues of a class or subclass binds every class member who has not opted out of the class proceeding, but only to the extent that the judgment determines common issues that,
>
> (a) are set out in the certification order;

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(b) relate to claims or defences described in the certification order; and

(c) relate to relief sought by or from the class or subclass as stated in the certification order.

[23] I will return to this point later in my Reasons for Decision, but the short answer to Mr. Soderstrom is that it is s.29(3), which makes a settlement binding, and not s. 27 (3), of the *Class Proceedings Act, 1992* which makes a judgment on common issues binding, that applies to the circumstances of this case.

[24] There is no doubt that the 2nd Soderstrom Proceeding is an effort to re-litigate the causes of action and the issues that were settled by the Vitapharm Proceedings. The class members of the Vitapharm Proceedings have released Hoffman-La Roche and BASF and they have received the benefit of the *cy-pres* distribution.

[25] Section 29 (3) of the *Class Proceedings Act*, 1992, provides that a settlement of a class proceeding that is approved by the court binds all class members. Mr. Soderstrom obviously had notice of the settlement because he appeared to object to it. He is a class member because he did not opt out, although he had the opportunity to do so.

[26] Mr. Soderstrom is bound by the settlement, and it follows that his action; namely the 2nd Soderstrom Proceeding should be dismissed. The 2nd Soderstrorm Proceeding is barred by the principles of *res judicata* and is an abuse of process. It is also barred by the doctrine that precludes a collateral attack on the judgments and orders of the court. See: *Toronto (City) v. C.U.P.E., Local 79* (2003), 232 D.L.R. (4th) 385 (S.C.C.); *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A) at paras. 55-56, *per* Goudge, J.A., dissenting, approved [2002] 3 S.C.R. 307; *Alvi v. MIsir* (2004), 73 O.R. (3d) 566 (S.C.J.); *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706.

[27] The dismissal of the 2nd Soderstrom Proceeding, however, is not enough. Given the history of re-litigation already described and to be described further below, extraordinary relief is necessary to protect the Defendants.

[28] I have described the terms of that relief in the introduction to these Reasons for Decision. In my opinion, the jurisdiction to grant this relief is available from the Court's inherent jurisdiction to control its own process, from its jurisdiction to control its own officers, and from rule 57.07 of the *Rules of Civil Procedure*. See *Chavali v. Law Society of Upper Canada*, [2006] O.J. No. 2036 (S.C.J.).

[29] In granting relief to the Defendants, it is not necessary to rely on s. 140 (1) of the *Courts of Justice Act,* and thus it is not necessary for me to decide whether Mr. Borden, who is counsel or solicitor of record and not a party to the various proceedings that I have described, comes within the definition of a "person" who "has persistently and without reasonable grounds (a) instituted vexatious proceedings in any court or (b) conducted a proceeding in any court in a vexatious manner."

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The Curran Proceeding

[30] In my opinion, the above analysis is sufficient to establish that the 2nd Soderstrom Proceeding should be dismissed and to justify the relief set out in the introduction to these Reasons for Decision. The above analysis, however, passes over the circumstances of the Curran Proceeding and of the 1st Soderstrom Proceeding, to which I now return. As will become clear, the circumstances of these two proceedings provide further support for granting the relief requested by the Defendants.

[31] The context of the Curran Proceeding was that Cumming, J. had stayed the Horvath Proceeding and he had ordered that no other proceedings involving the vitamins conspiracy could be brought without the leave of the court. Acting on behalf of the plaintiffs in the Curran Proceeding, Mr. Borden sought leave to commence an action as a proposed class action.

[32] By order dated September 14, 2001, Cumming, J. dismissed the motion for leave. He held that the Curran Proceeding was substantially similar to the Horvath Proceeding and an attempt to re-litigate the carriage motion.

[33] The plaintiffs in the Curran Proceeding sought to appeal Cumming J.'s order to the Court of Appeal, but in May 2002, the appeal was quashed on the basis that the order was interlocutory and leave to appeal to the Divisional Court was required.

[34] The plaintiffs in the Curran Proceeding sought leave to appeal to the Divisional Court. However, on November 4, 2002, with counsel other than Mr. Borden, they consented to a dismissal of their motion for leave.

[35] There appears to have been some second thoughts, and with Mr. Borden returning as counsel, Mr. Curran brought a motion to have the consent order set aside. By order dated August 21, 2003, the Divisional Court dismissed the motion.

[36] Class counsel in the Vitapharm Proceedings sought costs against Mr. Curran and against Mr. Borden and there were several attendances in the Divisional Court with respect to this claim for costs. Mr. Soderstrom, with Mr. Borden as counsel, sought to intervene, but his motion for intervenor status was dismissed as devoid of merits, and costs were awarded against him on a substantial indemnity basis.

[37] The reasons of the Divisional Court refer to the matter as having a lamentable history and note a history of re-litigating issues that had been rejected by Cumming, J. and the Court of Appeal. Carnwath, J. writing for the Divisional Court concluded that Mr. Borden had caused costs to be incurred without reasonable cause by his advice to Mr. Curran … and "by his almost pathological pursuit of obtaining somebody's appointment as a representative plaintiff in a class action when he knew, or ought to have known, there was no merit in his cause." Costs orders were made against both Mr. Curran and Mr. Borden.

[38] On May 26, 2006, the Court of Appeal denied the request for leave to appeal the costs orders made by the Divisional Court.

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[39] With this background to the Curran Proceeding, I turn now to the analysis of its significance.

[40] Strictly speaking Mr. Soderstrom was not a party to the Curran Proceeding, although he would have been a member of the class in this proposed class proceeding. The factual record, some of which I have not detailed, however, reveals that Mr. Soderstrom was a close supporter of the plaintiffs in the Curran Proceedings. Here it may be noted that Mr. Curran has returned the favour by filing a supporting affidavit in response to the motion now before the court.

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[41] Messrs. Curran, Soderstrom, and Borden are together in seeking to circumvent the settlement in the Vitapharm Proceedings. It is arguable that they are privies one to another, and here it may be recalled that Mr. Soderstrom sought to intervene in the Curran Proceeding. As privies, the various doctrines of *res judicata* would apply to Mr. Soderstrom as a result of his association with the Curran Proceeding. As to the law about privies, see: *Bank of Montreal v. Mitchell,* [1997] O.J. No. 602 (Gen. Div.), affd [1997] O.J. No. 2848 (C.A.); *Banque Nationale de Paris (Canada) v. Canadian Imperial Bank of Commerce* (2001), 52 O.R. (3d) 161 (C.A.).

[42] However, it is not necessary to rely on the circumstance of the Curran Proceeding to support the orders that I am making on this motion, and in my opinion, for present purposes the main relevance of the Curran Proceeding is that it goes to showing the pattern of re-litigation and the irresponsibility of Mr. Borden, who persists in assisting class members of the Vitapharm Proceedings to pursue litigation when they have been denied carriage and have not opted out of a class proceeding.

[43] The Curran Proceeding along with the Horvath Proceeding, the 1st Soderstrom Proceeding, to be discussed next, and the 2nd Soderstrom Proceeding, already discussed above, also show that extraordinary measures are required to protect the Defendants and the integrity of the administration of justice.

[44] And since all of these proceedings have been driven by the advice of Mr. Borden, who has been repeatedly told by the Court that the proceedings are without merit or are re-litigation of matters already decided, and since the 1st and 2nd Soderstrom Proceedings were commenced contrary to the order of Cumming, J. that leave was required, it is appropriate to award costs jointly and severally on a substantial indemnity basis against Mr. Soderstrom and Mr. Borden.

The 1st Soderstrom Proceeding

[45] I turn now to discuss the significance of the 1st Soderstrom Proceeding, which was commenced in February 2005. The context of this proceeding was that: (a) in 2000, Cumming J. had stayed the Horvath Proceeding and had ordered that no other proceedings involving the vitamins conspiracy could be brought without the leave of the court; (b) in 2001-2002, Mr. Borden unsuccessful sought leave for the Curran Proceeding and he failed to set aside the order refusing leave to appeal the order refusing leave; and (c) in 2004 and 2005, the Vitapharm Proceedings were in the settlement approval stage.

[46] The 1st Soderstrom Proceeding was a proceeding by application. Contrary to the order of Cumming, J., Mr. Soderstrom did not obtain leave to commence this proceeding.

[47] The 1st Soderstrom Proceeding has some peculiar aspects. The relief requested in the notice of application was for a remedy under the *Canadian Charter of Rights and Freedoms* and for "an order in the determination of rights that depend on the interpretation of the *Class Proceedings Act, 1992* ... on behalf of members of a class of persons similarly situate to that of the applicant, to recover loss occasioned to the interest of the applicant."

[48] In argument, Mr. Borden submitted that the 1st Soderstrom Proceeding was something different from a procedure to certify a class action; however, Mr. Soderstrom filed an affidavit in support of the 1st Soderstrom Proceeding to which he appended a draft statement of claim that replicates the claims that had been advanced in the Vitapharm Proceedings, the stayed Horvath Proceeding, and the stymied Curran Proceeding. The affidavit indicates an intention to use the 1st Soderstrom Proceeding to pursue a claim under the *Class Proceedings Act, 1992* as set out in that statement of claim. Moreover, in a motion heard by Speigel, J., which I will come to describe shortly, Mr. Soderstrom in his notice of motion described the 1st Soderstrom Proceeding as a proceeding "for the recovery of loss to his interest as a purchaser of product, an accounting to his interest of the amount of the increase in the price of product by reason of unlawful conduct and a trust imposed upon the sum so determined for the benefit of the interest of the moving parties and like purchasers of product in Ontario and elsewhere throughout Canada."

[49] However, it may be dressed up as application or action, the 1st Soderstrom Proceeding was designed to be a class proceeding about the vitamin conspiracy.

[50] Having commenced the 1st Soderstrom Proceeding, as already noted above, Mr. Soderstrom, nevertheless, participated as an objector during the settlement approval stage of the Vitapharm Proceedings.

[51] His objections were unsuccessful in stopping the settlement, but he then attempted to use the 1st Soderstrom Proceeding to restrain the administrator of the settlement from implementing the settlement. Mr. Soderstrom moved for an injunction. However, by order dated August 17, 2005, Speigel, J. dismissed the motion with costs, and in her brief endorsement, she stated that there was absolutely no merit to the motion. She ordered Mr. Soderstrom to pay costs of $2,000 to each of Hoffman-La Roche and BASF. These costs have not been paid to date.

[52] In the summer of 2005, Hoffman-La Roche and BASF moved for an order dismissing the 1st Soderstrom Proceeding. The motion was commenced in July and argued in September 2005, and judgment was reserved.

[53] By order dated January 9, 2006, Ellen Macdonald, J. dismissed the 1st Soderstrom Proceeding, and she ordered that Mr. Soderstrom pay costs of $22,000 to Hoffman-La Roche and of $20,000 to BASF. These costs awards have not been paid.

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[54] Justice Ellen Macdonald concluded that the 1st Soderstrom Proceeding was an attempt to re-litigate the issues of the Vitapharm Proceedings and was contrary to the settlement in that proceeding. She ruled that the 1st Soderstrom Proceeding was a collateral attack on a series of orders reached in the Vitapharm Proceedings, including an attempt to set aside the settlement. She stated that "the history of this manner in which Mr. Soderstrom has conducted his litigation constitutes a wasteful and abusive use of the court's resources. To my mind this is a clear abuse of process."

[55] The Court of Appeal dismissed an appeal from Ellen Macdonald, J.'s order because Mr. Soderstrom did not pay security for costs as ordered by MacPherson, J.A. by orders made by him dated June 29, 2006 and September 1, 2006. Justice MacPherson observed that "[Mr. Soderstom's] and his counsel's conduct [Mr. Borden] through this and related litigation is a sorry and expensive abuse of process." He ordered Mr. Soderstrom to pay costs of which $2,000 has not been paid.

[56] On December 20, 2006, on motion by Mr. Soderstrom, a full panel of the Court of Appeal refused to reinstate the appeal and the Court ordered him to pay $1.500 to each of Hoffman-Roche and BASF. Those costs have also not been paid, which means that Hoffman-La Roche has unpaid costs orders against Soderstrom in the amount of $25,500 and BASF has unpaid costs orders against him in the amount of $23,500.

[57] With this background and with four observations, the significance of the 1st Soderstrom Proceeding to the motion now before the court can now be explained.

[58] The first observation is that Ellen Macdonald, J. treated the 1st Soderstrom Proceeding, which technically was an application, as advancing the claims in the appended statement of claim; that is, she treated it as a class proceeding for which leave was required pursuant to Cumming J's carriage order. For the reasons that I have described above, this undoubtedly was correct. The second observation is that the statement of claim of the 1st Soderstrom Proceeding raises the same claims as in the 2nd Soderstrom Proceeding, which, in turn, are the same claims that were advanced in the Vitapharm Proceedings. These claims were settled in the Vitapharm Proceedings. The third observation is that it would appear that the arguments that Mr. Soderstrom made to both Speigel, J. and to Ellen Macdonald, J. are the same arguments that Mr. Soderstrom made in argument before me on this motion, and the fourth observation is that given the similitude of the 1st and 2nd Soderstrom Proceedings, whatever Ellen Macdonald, J. had to say about the 1st Soderstrom Proceeding applies equally to the 2nd Soderstrom Proceeding.

[59] The last point, in effect, adds *stare decisis* to the various doctrines of *res judicata* that lead to the conclusion that Mr. Soderstrom is re-litigating and abusing the process of the court. His re-litigation is now operating on two planes. There is the underlying re-litigation of the issues in the Vitapharm Proceedings, and by commencing the 2nd Soderstrom Proceeding, Mr. Soderstrom is compelling Hoffman La-Roche to re-litigate the arguments that were dismissed as without merit by Speigel, J. and the same arguments that were rejected by Ellen Macdonald, J.

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[60] If I was looking for precedents for deciding the motion before me, in the judgments of Ellen Macdonald, J. and Speigel, J. I have two that are truly "on all fours" with the case before me. Those precedents bind or persuade me to dismiss the 2nd Soderstrom Proceeding on the grounds of *res judicata*, collateral attack, and abuse of process.

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The Failed or Fallacious Arguments of Mr. Borden and Mr. Soderstrom

[61] Finally, this brings me to Mr. Soderstrom's arguments - advanced by Mr. Borden - as to why the Court should not dismiss the 2nd Soderstrom Proceeding.

[62] These arguments are not easy to understand, as may be demonstrated by the following written submissions delivered at the argument of this motion. Mr. Borden writes:

> 1. The process as engaged by the plaintiffs in [the Vitapharm Proceedings] was a process, repeated by the subject motion for an order to arrest, whereby the interest of the ultimate purchaser would fail to secure independent representation in that relief pursuant to section 2 or 10 as the residual interest in conflict with that of sellers or the common issue of the quantum of damages. That interest was to fail in securing a determination of the amount of the increase in the price of the product by a judgment on common issues and consistent with that purpose, the quantum of damages was not to be **'set out'** as a common issue in a certification order, any certification order. That interest was not to be permitted relief from the court in securing knowledge of the facts which respect to the amount of the overcharge with a trust impressed upon the sum so determined.
>
> 2. From December 2000 onwards the interest of the ultimate purchaser as an interest in conflict with that of the sellers was not to be permitted to state a case in the protection of its interest on a determination of the issue of the quantum of damages. An accounting to the residual interest was to be avoided in the defeating of an opportunity to be heard pursuant to a section 2 mandatory motion or by a section 10 motion in challenge of representation. Neither a Curran or Webster or Soderstrom thereafter were to have knowledge of the facts, the truth as to the amount of the overcharge. Those facts were to be and remain concealed from the court by a deriving of the residual interest of relief pursuant to statutory provisions permitting such relief in access to justice coupled with a negotiated failure to **'set out'** the issue of the quantum of damages as a common issue denying and thereby section 30 relief from **'a judgment on common issues.'**

[63] In a letter, which was filed on the argument of this motion, from Mr. Borden to Regional Senior Justice Then, Mr. Borden writes:

> The issue that presents itself for determination on the subsection 2 (2) promotion of my client may be expressed as follows: "what did the Ontario

> legislature intend as the purpose of subsection 27 (3) if not to protect Mr. Soderstrom and all other unnamed plaintiffs bound by the judgment of the Court on issues common to all members of the "global class" determined in that proceeding as with the fundamental issue of a determination of the amount of the increase in the price of the product?"

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[64] In making his argument, Mr. Borden places a great deal of reliance on the decision of the Court of Appeal in *Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321 (C.A.). In his factum for this motion, he states:

> . . . neither the respondent [Mr. Soderstrom] nor any absent member of the class in the proceeding of *Glen Ford et al* [the Vitapharm Proceedings] are bound by the terms of the judgment in that proceeding by reason of: . . . application of the jurisdictional principle determined by the Court of Appeal in *Currie v. McDonald's Restaurants of Canada Ltd.* for the purpose of protecting the interests of absent members of a class in access to justice, permitting a proceeding under the CPA upon failed notice with failed opportunity to state by motion pursuant to s. 10 the case of representational failure by reason of conflict on the common issue of quantum of damages, the case of the existence of a class in which representative plaintiffs in the proceeding had **'on the common issues for the class, an interest in conflict with the interests of other class members,'** a residual interest non-aligned in relief to be sought directing an accounting of the amount of the overcharge.

[65] I have read Mr. Borden's factum and the other material filed on this motion, and I have tried to understand the argument advanced by him. Doing the best I can, I understand it to be as follows: Section 2 of the *Class Proceedings Act* gives a person a right to commence a class proceeding on behalf of a member of a class and requires the person to make a motion to certify the action as a class proceeding and to appoint a representative plaintiff. Ms. Horvath, and Messrs. Curran, and Soderstrom have so far been denied their constitutionally protected right to be a representative plaintiff on behalf of the ultimate purchasers of Vitamins who were the victims of a price fixing conspiracy of Hoffman-La Roche and BASF. The representative plaintiff(s) in the Vitapharm Proceedings could not represent the ultimate purchasers because they had a conflict of interest and they were not independent of the ultimate purchasers of Vitamins. Section 10 of *the Class Proceedings Act, 1992* permits a class member to move a certification order amended or an action decertified, and Ms. Horvath and Messrs. Curran, and Soderstrom have been denied the right to exercise their rights to represent the independent interest of the ultimate purchasers, which could not be represented by the representative plaintiffs in the Vitapharm Proceedings because of their conflict of interest. The ultimate purchasers had a right through their own independent representative plaintiff to have the court determine what was the quantum of the overcharge they suffered from the price fixing conspiracy and they had a right to a constructive trust for that overcharge. This right for a determination of the interest of the ultimate purchasers has never been recognized and the truth has been concealed. Further, under s. 27 (3), the only way that the class of ultimate

purchasers could be bound is if there had been a judgment on a precise common issue setting out what was the quantum of their interest and/or their constructive trust claim.

[66] If this is Mr. Borden's argument on behalf of Mr. Soderstrom, then, in my opinion, it fails because it is bared by the several *res judicata* or abuse of process doctrines mentioned above or because on its merits, the argument is fallacious.

[67] No person, including Messrs. Horvath, Curran and Soderstrom, has an absolute right to be a representative plaintiff. Rather, a person has a right to apply to be a representative plaintiff and to have an action certified as a class proceeding or continued as one or more individual actions. Ms. Horvath and Mr. Curran exercised their rights, and the court selected others to be representative plaintiffs. It is now too late and it is improper for Mr. Soderstrom to seek to be appointed a representative plaintiff of a proceeding that has been settled. It is also too late to exercise the rights under s. 10 of the Act. In any event, by their participation as members of the class or as objectors to the settlement approval process, Ms. Horvath, Mr. Curran, and Mr. Soderstrom had their day in court and an ample opportunity to exercise their rights under the Act, which in truth, they did exercise. Indeed, the multiplicity of proceedings associated with them demonstrates they have abused their rights, be they substantive or procedural.

[68] The premise of Mr. Borden's argument that the representative plaintiffs in the Vitapharm Proceedings had a conflict of interest with the ultimate consumers has already been litigated - more than once - and the point has been decided against Mr. Soderstrom.

[69] A review of Cumming, J.'s Reasons for Decision reveals that at the early phases of the Vitapharm Proceedings, he concluded that there was no conflict of interest at the common issues stage. See *Vitapharm Canada Ltd. v. F. Hoffman-Laroche Ltd.*, [2000] O.J. No. 4594 (S.C.J.) at paras. 45-46 and *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2001] O.J. No. 3682 (S.C.J.), where the point was re-litigated. At the approval phase, the idea of conflict was rejected by Cumming, J. as any obstacle to certification and to the approval of the settlement. See *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.) at paras. 43-44. And, in any event, if Mr. Soderstrom did not wish to be represented and bound by the class proceeding because of a conflict of interest, he had the opportunity to opt out and advance an individual proceeding.

[70] It is true that no common issue about the quantum of the ultimate purchaser's interest in the overcharging was certified (the common issue going to liability only), and it is a fact that there was no common issues trial. However, as already noted above, s. 27 (3) is not applicable in these circumstances, precisely because there was no common issues trial judgment to bind the ultimate purchasers. Rather, they and Mr. Soderstrom are bound because of the provisions of s. 29(3) of the Act.

[71] The alleged denial of the right to have a determination of the amount of the overcharge is bogus and specious. In the Vitapharm Proceedings, the determination of rights by adjudication was replaced by the binding settlement that was approved by the

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court. Moreover, Mr. Soderstrom actually knows the amount attributed by the settlement as the recovery for the interest of the ultimate purchasers; namely, $37,077,000.

[72] Bound by the settlement, Mr. Soderstrom has no right to learn whether an adjudication of a stated common issue about the quantum of damages would have allocated a different sum.

[73] It may be that Mr. Soderstrom's real complaint is that he feels that he and the members of the ultimate purchaser class got no benefit from the settlement of the Vitapharm Proceedings. But that too is false, and the point also has already been litigated. The benefit (and a benefit supported by the *Class Proceedings Act, 1992* as a means to provide access to justice and behaviour modification) is that there was a $37,077,000 *cy-pres* distribution for the ultimate purchaser class of which Mr. Soderstrom was a member. Cumming, J. discussed this matter at length in his Reasons for Decision in the approval of the settlement in the Vitapharm Proceedings.

[74] For all of the above reasons, *Currie v. McDonald's Restaurants of Canada Ltd., supra* is also of no assistance to Mr. Soderstrom.

[75] The issue in the *Currie* case was whether Mr. Currie, who wished to bring a class action in Ontario, was precluded from doing so because he had not opted out of a Michigan class action that included non-American residents who had a grievance against McDonald's Restaurants arising from a promotional contest. The Court of Appeal concluded that the notice given to Mr. Currie was insufficient to bind him and the class he would represent in Ontario because of the principles of natural justice and the principles governing *res judicata* and the enforcement of foreign judgments.

[76] In the case at bar, Mr. Soderstrom had notice, participated, and did not opt out of the class proceedings. There is no principle from the *Currie* case that would preclude the binding effect of the settlement that was approved by Cumming, J. after a diligent review by the Court.

[77] One final point needs to be addressed. Mr. Soderstrom correctly submitted that under s. 2 (2) of the *Class Proceeding Act,* a person who commences a proceeding shall make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing the person representative plaintiff. From this premise, Mr. Soderstrom argued that a certification motion in the 2nd Soderstrom Proceeding was mandatory, and thus the Defendants' motion to dismiss cannot be heard now but must wait for the certification motion.

[78] This argument is incorrect. Depending upon the circumstances of each case, a motion for summary judgment, a motion to determine whether there is a reasonable cause of action, or a motion with respect to the propriety of evidence for a certification motion may be dealt with before the certification motion: *Attis v. Canada (Minister of Health)* (2005), 75 O.R. (3d) 302 (S.C.J.) at para. 8. A motion to strike a class claim may be brought in advance of a certification hearing: *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2000), 51 O.R. (3d) 603 (S.C.J.) at para. 10; *Stone v. Wellington (County)*

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Board of Education, [1999] O.J. No. 1298 (C.A.), leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 336; *Potter v. Bank of Canada*, [2005] O.J. No. 772 (S.C.J.).

[79] The premises of Mr. Soderstrom's arguments are false and the reasoning from the premises to the conclusion is unsound. He and Mr. Borden cannot justify continuing the 2nd Soderstrom Proceeding.

Conclusion

[80] There has been repeated re-litigation of causes of actions, of issues, and of arguments, and there have been collateral attacks and circumventions of court orders. It is time for all of this to stop.

Perell, J.

Released: April 14, 2008

2008 CanLII 15778 (ON SC)

COURT FILE NO.: 07-CV-343380CP
DATE: April 14, 2008

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

LARS INGMAR SODERSTROM

Plaintiff

- and -

HOFFMAN-LA ROCHE LIMITED and BASF CANADA INC.

Defendants

REASONS FOR DECISION

Perell, J.

Released: April 14, 2008

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Tab 9

Donmor Industries Ltd. and Factory Care Products Inc.
v. Kremlin Canada Inc., Gauthier, Keith, Nassar, Kerr,
SKM SA, Binoche, Courtarde and Vasseur

[Indexed as: Donmor Industries Ltd. v. Kremlin Canada
Inc. (No. 2)]

6 O.R. (3d) 506

ONTARIO
Ontario Court (General Division)
Haley J.
January 7, 1992

1992 CanLII 7543 (ON SC)

Civil procedure -- Costs -- Solicitor-and-client -- Punitive order -- Costs awarded personally against solicitor for plaintiffs in action which constituted attempt to re-litigate issues decided against plaintiffs in previous action -- Solicitor knowing that statement of claim contained allegations of behaviour which did not found civil action in Ontario -- Action amounting to abuse of court's process -- Costs incurred by solicitor "without reasonable cause" -- Rules of Civil Procedure, O. Reg. 560/84, rule 57.07.

The defendants moved to have their costs incurred on a motion to strike out the plaintiffs' statement of claim paid personally by the solicitor for the plaintiffs.

Held, the motion should be granted.

Costs were incurred by the solicitor for the plaintiffs "without reasonable cause" (rule 57.07). The solicitor must have known that allegations of suppression of evidence and misrepresentation, if proved, did not found a cause of action in Ontario, and must have been aware that in seeking to relitigate the costs of the earlier action the plaintiffs were attempting to do indirectly what they could not do directly.

Furthermore, the claims in the second action included claims which were known to him to have been raised or which were capable of having been raised in the first action.

The defendants were entitled to their costs of the action and the motion to strike on a solicitor-and-client basis, and to the costs of this motion on a party-and-party basis.

Fekete v. 415585 Ontario Ltd. (1988), 64 O.R. (2d) 552, 27 C.P.C. (2d) 121 (Master); Fekete v. 415585 Ontario Ltd. (1988), 64 O.R. (2d) 542, 27 C.P.C. (2d) 108 (H.C.J.), supplementary reasons at (1988), 64 O.R. (2d) 542 at 552, 30 C.P.C. (2d) 10 (H.C.J.), distd

Other cases referred to

Apotex Inc. v. Egis Pharmaceuticals (1991), 4 O.R. (3d) 321, 37 C.P.R. (3d) 335 (Gen. Div.)

Statutes referred to

Courts of Justice Act, 1984, S.O. 1984, c. 11, s. 141 [am. 1984, c. 64, s. 9]

Rules and regulations referred to

Rules of Civil Procedure, O. Reg. 560/84, Rule 13, rules 1.03 para. 22 "proceeding", 13.01, 57.07

J.A. Campion and Paul N. Richardson, for defendants.
William T. Howell, appearing in person.

HALEY J.:--This is a motion by the defendants to have their costs incurred on a motion to strike out the statement of claim and dismiss this action paid personally by the solicitor for the plaintiffs.

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The jurisdiction of the court to make such an order springs from s. 141 [am. 1984, c. 64, s. 9] of the Courts of Justice Act, 1984, S.O. 1984, c. 11, and rule 57.07 of the Rules of Civil Procedure, O. Reg. 560/84. Such an order is unusual and one pregnant with serious consequences for not only the solicitor but for the profession in general. For that reason the rule requires that the solicitor be given a reasonable opportunity to make representations to the court and to retain counsel for that purpose.

On November 19, 1991 a motion was brought by the defendants to strike out the statement of claim and have the action dismissed. Mr. Howell represented the plaintiffs on that motion and argued against the motion. At the end of the argument counsel for the defendants indicates that it would seek to have the costs allowed on a solicitor-and-client basis and charged against Mr. Howell personally. On November 20, 1991 I made my endorsement [now reported, p. 501, supra] dismissing the action and adjourning the matter of costs to allow the defendants, if so advised, to give notice under rule 57.07 to Mr. Howell. I said in the endorsement that, had the costs been dealt with then, I would have had no hesitation in awarding the costs of the motion and of the action to the defendants on a solicitor-and-client basis.

On December 6, 1991 the defendants served Mr. Howell with the notice of motion under rule 57.07 returnable December 16, 1991. On that latter date both Mr. Howell and counsel for the defendants appeared. Neither was gowned because they had anticipated they would be heard in my chambers. Counsel for the defendants was prepared to proceed, but Mr. Howell took a preliminary objection that there would not be time that day for the argument to be heard as he expected the matter to take a full day and the court was not so available that day. Accordingly the motion was adjourned to January 6, 1992 at 10 a.m. As of December 16, 1991 Mr. Howell had filed no factum and no material in response to the motion. The court then directed that if he wished to file material he should do so on or before December 27, 1991 so that the defendants would have an opportunity to respond. Mr. Howell advised the court that he did not expect to retain counsel for the motion.

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On January 3, 1992 Mr. Howell served the defendants' solicitors with material. On the hearing counsel for the defendants objected to the court receiving the material and I refused to do so. Later I also refused to allow Mr. Howell to call Mr. Turner, the main shareholder of the plaintiff corporations, on the basis that his evidence could have been reduced to affidavit form and delivered by December 27, 1991 as stipulated on December 16, 1991.

Mr. Howell was gowned for the motion. He was unrepresented by counsel. Mr. Turner sat at the counsel table with Mr. Howell but did not address the court.

I relate these details as Mr. Howell argues that he has been denied natural justice in that he was not made a party to the proceedings or allowed to intervene under rule 13.01. I am unaware of any motion for leave to intervene brought by Mr. Howell. In any case intervention is limited by Rule 13 to a "proceeding" which under rule 1.03 para. 22 is defined as an action or application. In this case Mr. Howell is fully aware, as counsel for the plaintiffs who was present and argued on the motion to strike the statement of claim, of all the things which occurred on that motion. This is not a case like the circumstances in Fekete v. 415585 Ontario Ltd. (1988), 64 O.R. (2d) 552, 27 C.P.C. (2d) 121 (Master) and (1988), 64 O.R. (2d) 542 at 552, 30 C.P.C. (2d) 10 (H.C.J.) [which are supplementary reasons to (1988), 64 O.R. (2d) 542, 27 C.P.C. (2d) 108 (H.C.J.)], where it was sought to charge a solicitor who was no longer retained and who took no part on the motion.

I am satisfied that Mr. Howell had proper and reasonable notice as required by rule 57.07 and that there was no denial of natural justice.

On the motion on November 19, 1991 I found that various paragraphs in the statement of claim should be struck out for the reasons set out in my endorsement and that overall the commencement of the action was an abuse of the process of the court and that the action was dismissed rather than allowing an

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opportunity to amend. Because of the nature of many of the allegations contained in the claim which were by the defendants' material, which was not cross-examined upon, or responded to in any way, shown to be unfounded and because I found that the issuing of the claim was an abuse of the process of the court, I find that costs should be awarded on a solicitor-and-client basis.

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The remaining question is whether the defendants have shown that these costs have been caused to be incurred by the solicitor for the plaintiffs "without reasonable cause or to be wasted by undue delay, negligence or other default" (rule 57.07). The only part of the rule which applies, in my opinion, is whether costs were incurred without reasonable cause. The onus is on the defendants and I am satisfied that while that onus is not one of beyond a reasonable doubt, the serious nature of the allegation should only be found proved on clear and cogent evidence.

The statement of claim was prepared by Mr. Howell. It is 25 pages long and contains 90 paragraphs. It contains claims for malicious prosecution, suppression of evidence, misrepresentation and relitigation of costs. I am satisfied that Mr. Howell, who is of obvious ability, knew that suppression of evidence and obstruction of justice, if proved, were crimes and would not alone found a civil action in this province. I am also satisfied that he was aware that in seeking to re-litigate the costs of the earlier actions in this action the plaintiffs were attempting to do indirectly what they could not do directly. Even more important is the fact that he knew that the claim in this second action included claims which were known to him to have been raised or which were capable of having been raised in the first action and which were known to him to exist at the time of the first action. Mr. Howell says that he knows more about the first action and its surrounding circumstances than anyone else. He was counsel for these plaintiffs who were defendants in the first action throughout the whole of the proceedings which took some five years before the courts and which are still not completed.

Mr. Howell admits preparing this statement of claim in April

or May 1991. At that time he had launched a motion to set aside the original judgment of Philp J. in the first action. (The motion has still not been heard.) He says, however, that after preparing the statement of claim he gave it to his clients and then left for England. He said he did not issue the statement of claim on June 11, 1991 and that he had no knowledge of its issue until later. He argues, therefore, that he has no responsibility for what is contained in the statement of claim even though it bears his name and address as solicitor for the plaintiffs. I reject his argument. He must have known the statement of claim was issued at least by July 29, 1991 when he wrote to Mr. Keith, one of the defendants, as follows:

With respect to the suit initiated recently, you are named as a defendant because of your ill advised visit to the premises of Factory Care Products Inc.; you were not acting in your capacity as Counsel. After that time he took no step to remove himself as solicitor of record and in fact appeared as counsel on the motion to strike out the statement of claim and argued vigorously in its defence. I do not see how he can now disavow any responsibility for the statement of claim and its contents and say that any allegations were the responsibility of the plaintiffs alone.

I am satisfied that Mr. Howell was in consultation with his clients and was the legal mind which, at the very least, supplied the method by which the material of the plaintiffs might be used in an action against these defendants. The plaintiffs may well have given him instructions to proceed in the fashion he outlined in the statement of claim but he was the solicitor and he was under a duty to advise his clients concerning the law and the use of the court's process. I find, therefore, in allowing the statement of claim to go forward in the form it was he has caused the defendants to incur costs for their defence and of these motions without reasonable cause and that he should share the responsibility for indemnifying the defendants accordingly.

Counsel for the defendants has filed his bill of solicitor-and-client costs setting out the amount the defendants seek as complete indemnity to which they are entitled. The principle

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of complete indemnity has recently been stated by Henry J. in Apotex Inc. v. Egis Pharmaceuticals (1991), 4 O.R. (3d) 321, 37 C.P.R. (3d) 335 (Gen. Div.). I find that the bill of costs submitted does not contain extra charges beyond the reasonable scope of the litigation and the preparation and presentation of the client's case. I note too that the hourly rates are shown in the bill of costs. I have asked counsel about each one and I have no reason to doubt their accuracy. Accordingly I fix the defendants' solicitor-and-clients costs of the action and of the original motion at $29,087.32. These costs shall be paid on a joint and several basis by the plaintiffs and Mr. Howell in his personal capacity.

The defendants are also entitled to their costs of this motion but on a party-and-party basis. I fix these costs at $3,500 and order that they be paid personally by Mr. Howell alone.

Mr. Howell also submitted a bill for his costs pending the decision and is now concerned that it may have contained an error. I appreciate his having advised the court of his concern but do not think it is necessary to consider his bill of costs further.

Order accordingly.

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Tab 10

CITATION: 2403177 Ontario Inc. v. Bending lake Iron Group Limited, 2017 ONSC 3566
COURT FILE NO.: CV-14-0274
DATE: 2017-06-13

2017 ONSC 3566 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
2403177 Ontario Inc.	*Michael Strickland*, for the Plaintiff (Applicant)
Plaintiff (Applicant)	
– and –	
Bending Lake Iron Group Limited	*Robert MacRae*, for the Defendant (Respondent)
Defendant (Respondent)	
	Kenneth Kraft and *John Salmas*, for A. Farber & Partners in its capacity as Court-appointed Receiver
	Mark Mikulasik, for the Trustee in Bankruptcy
	HEARD: Via written submissions

JUSTICE PATRICK SMITH

DECISION ON COSTS

Introduction

[1] The narrow issue before the Court is who will pay the costs ordered on February 27, 2017 following the dismissal of the motion brought by Bending Lake Iron Group Limited (**"BLIG"**) and as clarified by email dated February 28, 2017.

[2] My endorsement on February 27, 2017, as clarified by an email to counsel February 28, sets out in detail the history of the proceeding however a brief overview is necessary to provide a contextual framework for this decision.

Overview

[3] By Court order, dated September 11, 2014, A. Farber & Partners Ltd. were appointed the Receiver of all assets, undertakings and properties of BLIG.

[4] On November 27, 2014, the Receiver sought and obtained an SISP Order which authorized it, *inter alia*, to conduct a sales and investment solicitation process for all or part of the property and assets of BLIG.

[5] On January 8, 2016, an approval and vesting order was issued approving the sale agreement between the Receiver and the Purchaser. That transaction closed on November 18, 2016.

[6] On January 13, 2016, BLIG filed a Notice of Appeal with the Ontario Court of Appeal which was followed by motion for Advice and Directions motion filed by the Receiver.

[7] On January 19, 2016, BLIG filed a motion in the Ontario Superior Court requesting leave to commence an action against the Receiver for damages resulting from the alleged failure of the Receiver to uphold the honour of the Crown and the Crown's fiduciary duties to the affected Aboriginal Communities. BLIG did not file a confirmation that the motion was proceeding prior to the motion date scheduled for January 28, 2016.

[8] On January 19, 2016, BLIG also filed a Request for Leave to Appeal the decision of Justice D.C. Shaw dated January 8, 2016. In the Request for Leave, BLIG asserted, *inter alia*, that Justice Shaw erred in failing to consider the alleged failure of the Receiver to uphold the honour of the Crown and the Crown's fiduciary duties to affected Aboriginal communities.

[9] On March 22, 2016, Brown J.A. released reasons quashing the Notice of Appeal and directing that leave to appeal the January 2016 orders was required.

[10] On March 24, 2016, BLIG filed a motion with the Ontario Court of Appeal seeking leave to appeal the January 2016 orders and the January decision of Shaw J.

[11] On June 16, 2016, the Ontario Court of Appeal released its reasons denying leave to appeal.

[12] On December 1, 2016, BLIG was assigned into bankruptcy. MNP Ltd. was appointed the Trustee.

[13] On January 17, 2017, the Trustee sent notice to the creditors of BLIG indicating that it would not pursue the BLIG Leave Motion and if creditors wished to do so they must comply with section 38 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended. (the "***BIA***").

[14] On February 6, 2017, counsel for the Receiver served motion materials requesting a distribution and discharge order. The motion was returnable in Thunder Bay on February 23, 2017.

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[15] On February 17, 2017, Mr. MacRae, purporting to act on behalf of BLIG, advised counsel for the Receiver that he would be pursuing a claim against the Receiver and seek other relief on February 23, 2017 – the return date for the Receiver's motion. Shortly thereafter, motion materials were served and filed.

[16] On February 23, Robert MacRae appeared and advised the Court that he had been instructed by BLIG to bring the motion and that he was representing the Directors and Officers of BLIG. He asked that the Receiver's motion be adjourned to allow him time to bring a motion to set aside the bankruptcy, time to pursue a constitutional question, to seek intervenor status for the Wabigoon Metis Indigenous Community and to obtain an order prohibiting the Receiver from continuing to act because of an alleged conflict of interest.

[17] The current Directors and Officers of BLIG are J. Chris Bailey, Dawn Elaine Mackay-Daynes, Henry Grant Wetelainen and Henry Clayton Wetelainen.

[18] On February 27, 2017 the BLIG motion was dismissed as an abuse of this Court's process, as a collateral attack on prior orders of this Court and of the Ontario Court of Appeal and that the issues raised were *res judicata*.

[19] The court's endorsement dated February 27, 2017 followed by an email dated the next day awarded costs in favour of a) A. Farber & Associates Inc. in its capacity as the court appointed Receiver (the "**Receiver**"); b) the Applicant, 2403177 Ontario Inc. and c) MNP Ltd. in its capacity as Trustee in Bankruptcy in the amount of $5,000 each.

Discussion

[20] The Applicant, Receiver and Trustee now seek an order that the Directors and Officers of BLIG and Robert MacRae are jointly and severally liable for the costs award.

[21] The BLIG motion that was returnable February 23, 2017 states that it was brought on behalf of BLIG. The Trustee was appointed Licenced Insolvency Trustee of BLIG's Estate on December 1, 2016.

[22] The BLIG motion, supported by the affidavit of Henry Wetelainen, sought relief pursuant to section 38 of the *BIA* to permit BLIG and Henry Wetelainen to pursue remedies as the "s. 38 Creditors." Henry Wetelainen is the President, CEO and major shareholder of BLIG.

[23] On several occasions prior to the return of the BLIG motion, the Trustee wrote to Mr. MacRae asking him to comply with Rule 15.02 (1) of the *Rules of Civil Procedure* and to advise whether he or his client authorized the commencement of the proceeding and to explain how he and/or BLIG could have standing before the Court given BLIG's assignment into bankruptcy. Mr. MacRae failed to reply.

[24] By virtue of the appointment of the Trustee neither BLIG, its officers and directors and/or Robert MacRae had authority to bring the motion since all authority to do so had vested exclusively in the Trustee.

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[25] The record shows that the s. 38 creditors of BLIG had not filed Proof of Claim in BLIG's bankruptcy. It was procedurally incorrect for BLIG to attempt to obtain an order under s. 38 of the *BIA* since that section requires the motion to be brought by a creditor.

[26] The attendance of the Applicant, Trustee and Receiver at the BLIG motion and the filing of the First Report by the Trustee should not have been required. Given the insolvency of BLIG the costs ordered will rank in *pari passu* with all the claims of BLIG's unsecured creditors and hence will only be paid if ordered payable personally by Mr. MacRae and/or the Directors and Officers of BLIG.

[27] In bankruptcy proceedings, the Court has a broad discretion to award costs under s. 197(1) of the *BIA*:

> 197(1) Subject to this Act and to the General Rules, the costs of and incidental to any proceedings in court under this Act are in the discretion of the court.

[28] The Ontario Court of Appeal has ruled that, pursuant to section 197(1) of the *BIA*, the court has the discretion to award costs against a non-party where there has been fraud or an abuse of the court's process in general and the bankruptcy process in particular. (*1730960 Ontario Ltd.*, Re, 2009 ONCA 720; *Dallas/North Group Inc.*, Re, 2001 CarswellOnt 2344)

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The Claim for Costs Against Henry Wetelainen

[29] I find that the motion brought by BLIG based upon the affidavit of Henry Wetelainen is an abuse of the Court's process and of the bankruptcy process. The issues raised in the motion were rendered *res judicata* by previous court decisions and constitute a collateral attack on the decision of Shaw J. and the Ontario Court of Appeal

[30] The BLIG motion was filed when it was clear that BLIG had no standing to do so and when it was incapable of satisfying any costs award.

[31] I agree with the submissions of the Applicant, Trustee and Receiver that Mr. Wetelainen and/or the directors of BLIG should not be allowed to hide behind the insolvency of BLIG to avoid the cost consequences of bringing an improper, frivolous and abusive motion.

The Claim for Costs Against Robert MacRae

[32] Costs should only be awarded personally against a lawyer in exceptional and rare cases. (*Young v. Young*, [1993] 4 S.C.R.3)

[33] Rule 57.07 (1)(2) of the *Rules of Procedure* provides:

> 57.07 (1) Where a lawyer for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,

(a) disallowing costs between the lawyer and client or directing the lawyer to repay to the client money paid on account of costs;

(b) directing the lawyer to reimburse the client for any costs that the client has been ordered to pay to any other party; and

(c) requiring the lawyer personally to pay the costs of any party. O. Reg. 575/07, s. 26.

(2) An order under subrule (1) may be made by the court on its own initiative or on the motion of any party to the proceeding, but no such order shall be made unless the lawyer is given a reasonable opportunity to make representations to the court. R.R.O. 1990, Reg. 194, r. 57.07 (2); O. Reg. 575/07, s. 1.

[34] A two-part test is required when determining the liability of a lawyer for costs pursuant to Rule 57.07: 1. Inquire whether the lawyer's conduct falls within Rule 57.07(1) in that it caused costs to be incurred unnecessarily and 2. To consider whether costs against the lawyer personally are warranted.

[35] I find that Mr. MacRae's conduct falls within Rule 57.07(1). But for the BLIG motion the Applicant, Trustee and Receiver would not have incurred the costs of attending before this court on February 23. The BLIG motion was a complete waste of time and money. BLIG had no authority to bring any motion or to oppose the Receiver's motion. All powers had vested exclusively in the trustee upon the bankruptcy of BLIG. Only the Trustee had standing to bring the BLIG motion and Mr. MacRae was aware of this.

[36] Mr. MacRae purported to have standing before this Court on February 23, 2017 stating that he was acting on behalf of BLIG, its Directors and shareholders. He had been asked several times before the return of the BLIG motion by counsel for the Trustee to confirm who he was acting for and on what basis he believed BLIG had standing to bring the motion. It was only on the return of the Receiver's motion on February 23 that Mr. MacRae advised opposing counsel and the Court the nature of his motion, his standing and that he was acting on instructions from BLIG.

[37] Mr. MacRae has been a Director of BLIG and has represented it throughout multiple court appearances relating to the bankruptcy. He knew that BLIG was insolvent, had been assigned into bankruptcy and lacked standing to bring any motion or to instruct him to do so. As a solicitor and officer of the Court he knew that the BLIG motion was improper and that he could not receive instructions to bring any motion on its behalf.

[38] Further, Mr. MacRae knew or ought to have known that the BLIG motion was frivolous and that the issues that he intended to raise had already been adjudicated by the Superior Court and Ontario Court of Appeal and were *res judicata*.

[39] By acting as he did, Mr. MacRae participated in a collateral attack on the decisions of Shaw J. and the Court of Appeal and in the abuse of this Court's process. (See: *Dallas/North Group Inc.* at para. 6, *supra*)

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[40] I am also satisfied that the requirements of Rule 57.07 (2) have been satisfied and that Mr. MacRae has been provided a reasonable opportunity to make representations to this Court. On April 18, 2017 he filed a lengthy brief setting out his position in which he requested that this court dismiss the claims for costs against himself and the Directors and Officers of BLIG. I am satisfied that the record before the Court to decide this issue is adequate and that nothing further would be gained by having this issue determined by way of a formal motion.

[41] The provisions of Rule 15.02 are also applicable:

> 15.02 (1) A person who is served with an originating process may deliver a request that the lawyer who is named in the originating process as the lawyer for the plaintiff or applicant deliver a notice declaring whether he or she commenced or authorized the commencement of the proceeding or whether his or her client authorized the commencement of the proceeding. O. Reg. 427/01, s. 9; O. Reg. 575/07, s. 1.
>
> 15.02 (2) If the lawyer fails to deliver a notice in accordance with the request, the court may:
>
> a) order the lawyer to do so;
> b) stay the proceeding; and
> c) order the lawyer to pay the costs of the proceeding.

[42] In contravention of Rule 15.02 of the *Rules of Civil Procedure*, Mr. MacRae neglected or refused to deliver a notice as required by the rule informing the Trustee and opposing counsel as to the capacity in which he had standing and who authorized the bringing of the motion.

[43] Based upon the above facts, I find that this is an exceptional case justifying an award of costs personally against a lawyer.

Decision

[44] For the above reasons, in addition to the broad discretion provided to the court pursuant to section 197(1) of the *BIA*, it is my order that the costs that have been awarded shall be payable jointly and severally by Robert MacRae and the Director and Officers of BLIG namely, Henry Grant Wetelainen, J. Chris Bailey, Dawn Elaine Mackay-Daynes and Henry Clayton Wetelainen.

"original signed by"
The Honourable Justice P. Smith

2017 ONSC 3566 (CanLII)

Released: June 13, 2017

2017 ONSC 3566 (CanLII)

CITATION: 2403177 Ontario Inc. v. Bending lake Iron Group Limited, 2017 ONSC 3566
COURT FILE NO.: CV-14-0274
DATE: 2017-06-13

2017 ONSC 3566 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

2403177 Ontario Inc.

Plaintiff (Applicant)

– and –

Bending Lake Iron Group Limited

Defendant (Respondent)

DECISION ON COSTS

Smith J.

Released: June 13, 2017

Tab 11

Sawridge Band v. Canada, [2003] 4 FC 748, 2003 FCT 347 (CanLII)

Date:	2003-03-27
File number:	T-66-86A
Other citations:	[2003] 3 CNLR 344; 232 FTR 54
Citation:	Sawridge Band v. Canada, [2003] 4 FC 748, 2003 FCT 347 (CanLII), <http://canlii.ca/t/hbq>, retrieved on 2018-02-26

T-66-86 A

2003 FCT 347

Bertha L'Hirondelle suing on her own behalf and on behalf of all other members of the Sawridge Band (*Plaintiffs*)

v.

Her Majesty the Queen (*Defendant*)

and

Native Council of Canada, Native Council of Canada (Alberta), Non-Status Indian Association of Alberta, Native Women's Association of Canada (*Interveners*)

Indexed as: Sawridge Band v. Canada (T.D.)

Trial Division, Hugessen J.--Toronto, March 19 and 20; Edmonton, March 27, 2003.

Native Peoples -- Registration -- Crown motion for interlocutory declaration or mandatory injunction requiring registration on Band List of persons having acquired rights under 1985 amendments to Indian Act -- Crown says Band has refused to comply with Bill C-31 remedial provisions -- Interim relief necessary due to old age of women seeking registration, protracted litigation -- Band's argument: doing only what empowered by legislation -- Interim declaration could not be granted -- Band having effectively given itself injunction to which not entitled in terms of irreparable harm, balance of convenience -- Public interest damaged by Band's flouting of law enacted by Parliament -- Court having power to grant injunction -- Crown not lacking standing -- Irrelevant that some of 11 women in question not having applied under Band membership rules as implicitly refused -- Amendments intended to bring Indian Act into line with Charter guarantee of gender equality -- Band having imposed onerous membership application rules for acquired rights persons -- Whether acquired rights persons entitled to automatic membership, inclusion in Band's own List -- As of date assumed control of List, Band obliged to include names of acquired rights women --

Could not create membership barriers for those deemed members by law -- Intention of Parliament revealed by House of Commons debates -- Amendments recognized women's rights at expense of certain Native rights -- Mandatory injunction granted.

Administrative Law -- Judicial Review -- Injunctions -- Interlocutory mandatory injunction sought by Crown requiring registration on Indian Band List of persons having acquired rights under 1985 Indian Act amendments -- Crown says Band refused to comply with remedial legislation -- Interim relief needed as litigation protracted, women seeking registration aged -- Band says just exercising powers conferred by legislation -- Band having, in effect, given itself injunction, disregarding law -- Three-part test reversed in unusual circumstances: has Band raised serious issue, will it suffer irreparable harm if law enforced, where lies balance of convenience? -- Band not meeting last two parts of test -- Enforcement of law rarely causes irreparable harm -- Flouting of law damaging to public interest -- Private interests of women seeking registration -- Delegated, subordinate Band legislation (membership rules) insufficient to abrogate Charter-protected rights -- Mandatory injunction granted.

Some 17 years ago, plaintiff commenced litigation against the Crown seeking a declaration that the 1985 amendments to the *Indian Act*--Bill C-31--were unconstitutional. That legislation, while conferring on bands the right to control their own band lists, obliged them to include certain persons in their membership.

This motion by the Crown was for an interlocutory declaration, pending final determination of plaintiff's action, that those who acquired the right of membership in the Sawridge Band before it took control of its List, be deemed to be registered thereon or, in the alternative, an interlocutory mandatory injunction requiring plaintiffs to register such persons. The Crown alleged that the Band has refused to comply with the remedial provisions of Bill C-31 and that 11 women who lost Band membership due to marriage to non-Indians continue to be denied the benefits of the amendments. Interim relief is needed since these women are getting on in years and it may still be a long time before a trial date is fixed. The Band argued that it is merely exercising the powers conferred upon it by the legislation.

Held, a mandatory injunction should be granted.

An interim declaration of right could not be granted for that is a contradiction in terms. A declaration of right puts an end to a matter. On the other hand, there can be no entitlement to have an unproved right declared to exist. Therefore the motion was considered as one for an interlocutory injunction.

In the unusual--perhaps unique--circumstances of this case, the three-part test was, in effect, reversed. If the allegations of non-compliance are true, the Band has effectively given itself an injunction, choosing to act as if the law did not exist. Would the Band have been entitled to an interlocutory injunction suspending the effects of Bill C-31 pending trial? The classic test required that the Court determine (1) whether the Band had raised a serious issue, (2) whether it will suffer irreparable harm if the law is enforced, and (3) where lay the balance of convenience. The test was not altered in that the injunction sought was mandatory in nature.

While the Band met the first part of the test, it could not possibly meet the other two parts. Rarely will the enforcement of a law cause irreparable harm. Any inconvenience to the Band in admitting 11 elderly women to membership is nothing compared to the damage to the public interest caused by the flouting of a law enacted by Parliament and to the private

interests of the these women who are unlikely to benefit from a statute adopted with persons such as them in mind.

The argument that the Court lacked power to grant the injunction in that the Crown had not alleged a cause of action in support thereof in its statement of defence, was rejected. The Court's power to issue injunctions is granted by *Federal Court Act*, section 44 and is very broad. Nor could the Court agree that the Crown lacked standing. It is the Crown which represents the public interest in upholding the laws of Canada unless and until struck down by a court of competent jurisdiction.

It was irrelevant that only some of these women had applied in accordance with the Band's membership rules. They were refused, at least implicitly, because they could not fulfil the onerous application requirements.

The amending statute was made retroactive to the date Charter, section 15 took effect. That was an indication that the amendments were intended to bring the legislation into line with the Charter guarantee of gender equality.

The Band lost no time in taking control of its List and none of these 11 women were able to have their names entered by the Registrar before the Band took control. Under the Band's membership rules, to secure membership acquired rights individuals must either be resident on the reserve or demonstrate a significant commitment to the Band and they must also complete a 43-page application form requiring the composition of several essays. In addition, they must submit to interviews. If the legislation provides for automatic membership entitlement, these requirements would violate it. The Act does entitle women who lost status for marrying non-Indians to be registered as status Indians and to have their names automatically added to the Departmental Band List. The question remains as to whether a band is obliged to add names to its own Band List. Unfortunately, subsections 10 (4) and 10(5) do not make it absolutely clear that acquired rights persons are entitled to automatic membership and that a band may not establish pre-conditions for membership. But the use of "shall" in section 8 makes it clear that a band must enter the names of all entitled persons on the list, which it maintains. As of the date the Sawridge Band assumed control of its List, it was obliged to include therein the names of the acquired rights women. A band may not create barriers to membership for those deemed by law to be members. By reference to certain debates in the House of Commons and what was said by the Minister to the Standing Committee on Indian Affairs and Northern Development, it was clear that Parliament's intention was to create an automatic right to Band membership even though this would restrict a band's control over membership. The legislation establishes a membership regime that recognizes women's rights at the expense of certain Native rights.

Subsection 10(5) states, by reference to paragraph 11(*c*), that nothing can deprive an acquired rights individual of automatic membership entitlement unless the entitlement is subsequently lost. The Band's membership rules fail to make specific provision for the subsequent loss of membership and establishment of the application requirements was not enough to abrogate the rights of Charter-protected persons. The Band's application of its membership rules in which pre-conditions were created to membership, is in contravention of the *Indian Act*.

A mandatory injunction should be granted and the names of these 11 acquired rights women shall be added to the Band List. They shall be accorded all the rights of Band membership.

statutes and regulations judicially

considered

An Act to amend the Indian Act, R.S.C., 1985 (1st Supp.), c. 32.

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 15.

Federal Court Act, R.S.C., 1985, c. F-7 , s. 44.

Federal Court Rules, 1998, SOR/98-106, r. 369.

Indian Act, R.S.C., 1985, c. I-5 , ss. 2(1) "member of a band", 5 (as am. by R.S.C., 1985 (1st Supp.), c. 32, s. 4), 6 (as am. *idem*), 8 (as am. *idem*), 9 (as am. *idem*), 10 (as am. *idem*), 11 (as am. *idem*), 12 (as am. *idem*).

cases judicially considered

applied:

Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd., 1996 CanLII 215 (SCC), [1996] 2 S.C.R. 495; (1996), 136 D.L.R. (4th) 289; 21 B.C.L.R. (3d) 201; 45 Admin. L.R. (2d) 95; 50 C.P.C. (3d) 128; 198 N.R. 161.

considered:

Sawridge Band v. Canada, 1997 CanLII 5294 (FCA), [1997] 3 F.C. 580; (1997), 3 Admin. L.R. (3d) 69; 215 N.R. 133 (C.A.); *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, 1987 CanLII 79 (SCC), [1987] 1 S.C.R. 110; (1987), 38 D.L.R. (4th) 321; [1987] 3 W.W.R. 1; 46 Man. R. (2d) 241; 25 Admin. L.R. 20; 87 CLLC 14,015; 18 C.P.C. (2d) 273; 73 N.R. 341; *RJR -- MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311; (1994), 111 D.L.R. (4th) 385; 54 C.P.R. (3d) 114; 164 N.R. 1; 60 Q.A.C. 241.

referred to:

Sankey v. Minister of Transport, [1979] 1 F.C. 134 (T.D.); *Ansa International Rent-a-Car (Canada) Ltd. v. American International Rent-a-Car Corp.* (1990), 32 C.P.R. (3d) 340; 36 F.T.R. 98 (F.C.T.D.); *Canada (Human Rights Commission) v. Canadian Liberty Net*, 1998 CanLII 818 (SCC), [1998] 1 S.C.R. 626; (1998), 157 D.L.R. (4th) 385; 6 Admin. L.R. (3d) 1; 22 C.P.C. (4th) 1; 224 N.R. 241.

authors cited

Canada. *House of Commons Debates*, Vol. II, 1st Sess., 33rd Parl., March 1, 1985, p. 2644.

Canada. House of Commons. *Minutes of Proceedings and Evidence of the Standing Committee on Indian Affairs and Northern Development*, Issue No. 12 (March 7, 1985).

MOTION for an interlocutory declaration or an interlocutory mandatory injunction with respect to the registration of names on an Indian Band List. Mandatory injunction granted.

appearances:

Martin J. Henderson, Lori A. Mattis, Catherine M. Twinn and *Kristina Midbo* for plaintiffs.

James E. Kindrake and *Kathleen Kohlman* for defendant.

Kenneth S. Purchase for intervener Native Council of Canada.

P. Jonathan Faulds for intervener Native Council of Canada (Alberta).

Michael J. Donaldson for intervener Non-Status Indian Association of Alberta.

Mary Eberts for intervener Native Women's Association of Canada.

solicitors of record:

Aird & Berlis LLP, Toronto, for plaintiffs.

Deputy Attorney General of Canada for defendant.

Lang Michener, Ottawa, for intervener Native Council of Canada.

Field LLP, Edmonton, for intervener Native Council of Canada (Alberta).

Burnet, Duckworth & Palmer LLP for intervener Non-Status Indian Association of Alberta.

Eberts Symes Street & Corbett, Toronto, for intervener Native Women's Association of Canada.

The following are the reasons for order and order rendered in English by

[1]Hugessen J.: In this action, started some 17 years ago, the plaintiff has sued the Crown seeking a declaration that the 1985 amendments to the *Indian Act*, R.S.C., 1985, c. I-5, commonly known as Bill C-31 [*An Act to amend the Indian Act*, R.S.C., 1985 (1st Supp.), c. 32], are unconstitutional. While I shall later deal in detail with the precise text of the relevant amendments, I cannot do better here than reproduce the Court of Appeal's brief description of the thrust of the legislation when it set aside the first judgment herein and ordered a new trial [*Sawridge Band v. Canada*, 1997 CanLII 5294 (FCA), [1997] 3 F.C. 580 (C.A.), at paragraph 2]:

Briefly put, this legislation, while conferring on Indian bands the right to control their own band lists, obliged bands to include in their membership certain persons who became entitled to Indian status by virtue of the 1985 legislation. Such persons included: women who had become disentitled to Indian status through marriage to non-Indian men and the children of such women; those who had lost status because their mother and paternal grandmother were non-Indian and had gained Indian status through marriage to an Indian; and those who had lost status on the basis that they were illegitimate offspring of an Indian woman and a non-Indian man. Bands assuming control of their band lists would be obliged to accept all these people as members. Such bands would also be allowed, if they chose, to accept certain other categories of persons previously excluded from Indian status.

[2]The Crown defendant now moves for the following interlocutory relief:

a. An interlocutory declaration that, pending a final determination of the Plaintiff's action, in accordance with the provisions of the *Indian Act*, R.S.C. 1985 c. I-5, as amended, (the "*Indian Act, 1985*") the individuals who acquired the right to be members of the Sawridge Band before it took control of its own Band List, shall be deemed to be registered on the Band List as members of the Sawridge Band, with the full rights and privileges enjoyed by all band members;

b. In the alternative, an interlocutory mandatory injunction, pending a final resolution of the Plaintiffs' action, requiring the Plaintiffs to enter or register on the Sawridge Band List the names of the individuals who acquired the right to be members of the Sawridge Band before it took control of its Band list, with the full rights and privileges enjoyed by all band members.

[3]The basis of the Crown's request is the allegation that the plaintiff Band has consistently and persistently refused to comply with the remedial provisions of Bill C-31, with the result that 11 women, who had formerly been members of the Band and had lost both their Indian status and their Band membership by marriage to non-Indians pursuant to the former provisions of paragraph 12(1)(*b*) of the Act, are still being denied the benefits of the amendments.

[4]Because these women are getting on in years (a twelfth member of the group has already died and one other is seriously ill) and because the action, despite intensive case management over the past five years, still seems to be a long way from being ready to have the date of the new trial set down, the Crown alleges that it is urgent that I should provide some form of interim relief before it is too late.

[5]In my view, the critical and by far the most important question raised by this motion is whether the Band, as the Crown alleges, is in fact refusing to follow the provisions of Bill C-31 or whether, as the Band alleges, it is simply exercising the powers and privileges granted to it by the legislation itself. I shall turn to that question shortly, but before doing so, I want to dispose of a number of subsidiary or incidental questions which were discussed during the hearing.

[6]First, I am quite satisfied that the relief sought by the Crown in paragraph a. above is not available. An interim declaration of right is a contradiction in terms. If a court finds that a right exists, a declaration to that effect is the end of the matter and nothing remains to be dealt with in the final judgment. If, on the other hand, the right is not established to the court's satisfaction, there can be no entitlement to have an unproved right declared to exist. (See *Sankey v. Minister of Transport*, [1979] 1 F.C. 134 (T.D.).) I accordingly treat the motion as though it were simply seeking an interlocutory injunction.

[7]Second, in the unusual and perhaps unique circumstances of this case, I accept the submission that since I am dealing with a motion seeking an interlocutory injunction, the well-known three-part test established in such cases as *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, 1987 CanLII 79 (SCC), [1987] 1 S.C.R. 110 and *RJR--MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311 should in effect be reversed. The universally applicable general rule for anyone who contests the constitutionality of legislation is that such legislation must be obeyed unless and until it is either stayed by court order or is set aside on final judgment. Here, assuming the Crown's allegations of non-compliance are correct, the plaintiff Band has effectively given itself an injunction and has chosen to act as though the law which it contests did not exist. I can only permit this situation to continue if I am satisfied that the plaintiff could and should have been given an interlocutory injunction to suspend the effects of Bill C-31 pending trial. Applying the classic test, therefore, requires that I ask myself if the plaintiff has raised a serious issue in its attack on the law, whether the enforcement of the law will result in irreparable harm to the plaintiff, and finally, determine where the balance of convenience lies. I do not accept the proposition that because the injunction sought is of a mandatory nature, the test should in any way be different from that set down in the cited cases. (See *Ansa International Rent-a-*

Car (Canada) Ltd. v. American International Rent-a-Car Corp. (1990), 32 C.P.R. (3d) 340 (F.C.T.D.).)

[8]It is not contested by the Crown that the plaintiff meets the first part of the test, but it seems clear to me that it cannot possibly meet the other two parts. It is very rare that the enforcement of a duly adopted law will result in irreparable harm and there is nothing herein which persuades me that this is such a rarity. Likewise, whatever inconvenience the plaintiff may suffer by admitting 11 elderly ladies to membership is nothing compared both to the damage to the public interest in having Parliament's laws flouted and to the private interests of the women in question who, at the present rate of progress, are unlikely ever to benefit from a law which was adopted with people in their position specifically in mind.

[9]Thirdly, I reject the proposition put forward by the plaintiff that would deny the Court the power to issue the injunction requested because the Crown has not alleged a cause of action in support thereof in its statement of defence. The Court's power to issue injunctions is granted by section 44 of the *Federal Court Act* [R.S.C., 1985, c. F-7] and is very broad. Interpreting a similar provision in a provincial statute in the case of *Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.*, 1996 CanLII 215 (SCC), [1996] 2 S.C.R. 495, the Supreme Court said at page 505:

Canadian courts since *Channel Tunnel* have applied it for the proposition that the courts have jurisdiction to grant an injunction where there is a justiciable right, wherever that right may fall to be determined. . . . This accords with the more general recognition throughout Canada that the court may grant interim relief where final relief will be granted in another forum.

[10]The Supreme Court of Canada confirmed the Federal Court of Canada's broad jurisdiction to grant relief under section 44: *Canada (Human Rights Commission) v. Canadian Liberty Net*, 1998 CanLII 818 (SCC), [1998] 1 S.C.R. 626.

[11]Likewise, I do not accept the plaintiff's argument to the effect that the Crown has no standing to bring the present motion. I have already indicated that I feel that there is a strong public interest at play in upholding the laws of Canada unless and until they are struck down by a court of competent jurisdiction. That interest is uniquely and properly represented by the Crown and its standing to bring the motion is, in my view, unassailable.

[12]Finally, the plaintiff argued strongly that the women in question have not applied for membership. This argument is a simple "red herring". It is quite true that only some of them have applied in accordance with the Band's membership rules, but that fact begs the question as to whether those rules can lawfully be used to deprive them of rights to which Parliament has declared them to be entitled. The evidence is clear that all of the women in question wanted and sought to become members of the Band and that they were refused at least implicitly because they did not or could not fulfil the rules' onerous application requirements.

[13]This brings me at last to the main question: has the Band refused to comply with the provisions of Bill C-31 so as to deny to the 11 women in question the rights guaranteed to them by that legislation?

[14]I start by setting out the principal relevant provisions.

2. (1) . . .

"member of a band" means a person whose name appears on a Band List or who is entitled to have his name appear on a Band List;

. . .

5. (1) There shall be maintained in the Department an Indian Register in which shall be recorded the name of every person who is entitled to be registered as an Indian under this Act.

. . .

(3) The Registrar may at any time add to or delete from the Indian Register the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in the Indian Register.

. . .

(5) The name of a person who is entitled to be registered is not required to be recorded in the Indian Register unless an application for registration is made to the Registrar.

6. (1) Subject to section 7, a person is entitled to be registered if

. . .

(*c*) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(*a*)(iv), paragraph 12(1)(*b*) or subsection 12(2) or under subparagraph 12(1)(*a*)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;

. . .

8. There shall be maintained in accordance with this Act for each band a Band List in which shall be entered the name of every person who is a member of that band.

9. (1) Until such time as a band assumes control of its Band List, the Band List of that band shall be maintained in the Department by the Registrar.

(2) The names in a Band List of a band immediately prior to April 17, 1985 shall constitute the Band List of that band on April 17, 1985.

(3) The Registrar may at any time add to or delete from a Band List maintained in the Department the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in that List.

. . .

(5) The name of a person who is entitled to have his name entered in a Band List maintained in the Department is not required to be entered therein unless an application for entry therein is made to the Registrar.

10. (1) A band may assume control of its own membership if it establishes membership rules for itself in writing in accordance with this section and if, after the band has given

appropriate notice of its intention to assume control of its own membership, a majority of the electors of the band gives its consent to the band's control of its own membership.

(2) A band may, pursuant to the consent of a majority of the electors of the band,

(*a*) after it has given appropriate notice of its intention to do so, establish membership rules for itself; and

(*b*) provide for a mechanism for reviewing decisions on membership.

. . .

(4) Membership rules established by a band under this section may not deprive any person who had the right to have his name entered in the Band List for that band, immediately prior to the time the rules were established, of the right to have his name so entered by reason only of a situation that existed or an action that was taken before the rules came into force.

(5) For greater certainty, subsection (4) applies in respect of a person who was entitled to have his name entered in the Band List under paragraph 11(1)(*c*) immediately before the band assumed control of the Band List if that person does not subsequently cease to be entitled to have his name entered in the Band List.

(6) Where the conditions set out in subsection (1) have been met with respect to a band, the council of the band shall forthwith give notice to the Minister in writing that the band is assuming control of its own membership and shall provide the Minister with a copy of the membership rules for the band.

(7) On receipt of a notice from the council of a band under subsection (6), the Minister shall, if the conditions set out in subsection (1) have been complied with, forthwith

(*a*) give notice to the band that it has control of its own membership; and

(*b*) direct the Registrar to provide the band with a copy of the Band List maintained in the Department.

(8) Where a band assumes control of its membership under this section, the membership rules established by the band shall have effect from the day on which notice is given to the Minister under subsection (6), and any additions to or deletions from the Band List of the band by the Registrar on or after that day are of no effect unless they are in accordance with the membership rules established by the band.

(9) A band shall maintain its own Band List from the date on which a copy of the Band List is received by the band under paragraph (7)(*b*), and, subject to section 13.2, the Department shall have no further responsibility with respect to that Band List from that date.

(10) A band may at any time add to or delete from a Band List maintained by it the name of any person who, in accordance with the membership rules of the band, is entitled or not entitled, as the case may be, to have his name included in that list.

. . .

11. (1) Commencing on April 17, 1985, a person is entitled to have his name entered in a Band List maintained in the Department for a band if

. . .

(*c*) that person is entitled to be registered under paragraph 6(1)(*c*) and ceased to be a member of that band by reason of the circumstances set out in that paragraph; . . . .

. . .

(2) Commencing on the day that is two years after the day that an Act entitled *An Act to amend the Indian Act*, introduced in the House of Commons on February 28, 1985, is assented to, or on such earlier day as may be agreed to under section 13.1, where a band does not have control of its Band List under this Act, a person is entitled to have his name entered in a Band List maintained in the Department for the band

(*a*) if that person is entitled to be registered under paragraph 6(1)(*d*) or (*e*) and ceased to be a member of that band by reason of the circumstances set out in that paragraph; or

(*b*) if that person is entitled to be registered under paragraph 6(1)(*f*) or subsection 6(2) and a parent referred to in that provision is entitled to have his name entered in the Band List or, if no longer living, was at the time of death entitled to have his name entered in the Band List.

[15]The amending statute was adopted on June 28, 1985 but was made to take effect retroactively to April 17, 1985, the date on which section 15 of the Charter [*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] took effect. This fact in itself, without more, is a strong indication that one of the prime objectives of the legislation was to bring the provisions of the *Indian Act* into line with the new requirements of that section, particularly as they relate to gender equality.

[16]On July 8, 1985, the Band gave notice to the Minister that it intended to avail itself of the provisions of section 10 allowing it to assume control of its own Band List and that date, therefore, is the effective date of the coming into force of the Band's membership rules. Because Bill C-31 was technically in force but realistically unenforceable for over two months before it was adopted and because the Band wasted no time in assuming control of its own Band List, none of the 11 women who are in question here were able to have their names entered on the Band List by the Registrar prior to the date on which the Band took such control.

[17]The relevant provisions of the Band's membership rules are as follows:

3. Each of the following persons shall have a right to have his or her name entered in the Band List:

(a) any person who, but for the establishment of these rule, would be entitled pursuant to subsection 11(1) of the Act to have his or her name entered in the Band List required to be maintained in the Department and who, at any time after these rules come into force, either

(i) is lawfully resident on the reserve; or

(ii) has applied for membership in the band and, in the judgment of the Band Council, has a significant commitment to, and knowledge of, the history, customs, traditions, culture and communal life of the Band and a character and lifestyle that would not cause his or her admission to membership in the Band to be detrimental to the future welfare or advancement of the Band;

. . .

5. In considering an application under section 3, the Band Council shall not refuse to enter the name of the applicant in the Band List by reason only of a situation that existed or an action that was taken before these Rules came into force.

. . .

11. The Band Council may consider and deal with applications made pursuant to section 3 of these Rules according to such procedure and as such time or times as it shall determine in its discretion and, without detracting from the generality of the foregoing, the Band Council may conduct such interviews, require such evidence and may deal with any two or more of such applications separately or together as it shall determine in its discretion.

[18]Subparagraphs 3(a)(i) and (ii) clearly create pre-conditions to membership for acquired rights individuals, referred to in this provision by reference to subsection 11(1) of the Act. Those individuals must either be resident on the reserve, or they must demonstrate a significant commitment to the Band. In addition, the process as described in the evidence and provided for in section 11 of the membership rules requires the completion of an application form some 43 pages in length and calling upon the applicant to write several essays as well as to submit to interviews.

[19]The question that arises from these provisions and counsel's submissions is whether the Act provides for an automatic entitlement to Band membership for women who had lost it by reason of the former paragraph 12(1)(*b*). If it does, then the pre-conditions established by the Band violate the legislation.

[20]Paragraph 6(1)(*c*) of the Act entitles, *inter alia*, women who lost their status and membership because they married non-Indian men to be registered as status Indians.

[21]Paragraph 11(1)(*c*) establishes, *inter alia*, an automatic entitlement for the women referred to in paragraph 6(1)(*c*) to have their names added to the Band List maintained in the Department.

[22]These two provisions establish both an entitlement to Indian status, and an entitlement to have one's name added to a Band List maintained by the Department. These provisions do not specifically address whether bands have the same obligation as the Department to add names to their Band List maintained by the Band itself pursuant to section 10.

[23]Subsection 10(4) attempts to address this issue by stipulating that nothing in a band's membership code can operate to deprive a person of her or his entitlement to registration "by reason only of" a situation that existed or an action that was taken before the rules came into force. For greater clarity, subsection 10(5) stipulates that subsection 10(4) applies to persons automatically entitled to membership pursuant to paragraph 11(1)(*c*), unless they subsequently cease to be entitled to membership.

[24]It is unfortunate that the awkward wording of subsections 10(4) and 10(5) does not make it absolutely clear that they were intended to entitle acquired rights individuals to automatic membership, and that the Band is not permitted to create pre-conditions to membership, as it has done. The words "by reason only of" in subsection 10(4) do appear to suggest that a band might legitimately refuse membership to persons for reasons other than those contemplated by the provision. This reading of subsection 10(4), however, does not sit easily

with the other provisions in the Act as well as clear statements made at the time regarding the amendments when they were enacted in 1985.

[25]The meaning to be given to the word "entitled" as it is used in paragraph 6(1)(*c*) is clarified and extended by the definition of "member of a band" in section 2, which stipulates that a person who is entitled to have his name appear on a Band List is a member of the Band. Paragraph 11(1)(*c*) requires that, commencing on April 17, 1985, the date Bill C-31 took effect, a person was entitled to have his or her name entered in a Band List maintained by the Department of Indian Affairs for a band if, *inter alia*, that person was entitled to be registered under paragraph 6(1)(*c*) of the 1985 Act and ceased to be a member of that band by reason of the circumstances set out in paragraph 6(1)(*c*).

[26]While the Registrar is not obliged to enter the name of any person who does not apply therefor (see subsection 9(5)), that exemption is not extended to a band which has control of its list. However, the use of the imperative "shall" in section 8, makes it clear that the band is obliged to enter the names of all entitled persons on the list which it maintains. Accordingly, on July 8, 1985, the date the Sawridge Band obtained control of its List, it was obliged to enter thereon the names of the acquired rights women. When seen in this light, it becomes clear that the limitation on a band's powers contained in subsections 10(4) and 10(5) is simply a prohibition against legislating retrospectively: a band may not create barriers to membership for those persons who are by law already deemed to be members.

[27]Although it deals specifically with Band Lists maintained in the Department, section 11 clearly distinguishes between automatic, or unconditional, entitlement to membership and conditional entitlement to membership. Subsection 11(1) provides for automatic entitlement to certain individuals as of the date the amendments came into force. Subsection 11(2), on the other hand, potentially leaves to the band's discretion the admission of the descendants of women who "married out."

[28]The debate in the House of Commons, prior to the enactment of the amendments, reveals Parliament's intention to create an automatic entitlement to women who had lost their status because they married non-Indian men. Minister Crombie stated as follows (*House of Commons Debates*, Vol. II, March 1, 1985, page 2644):

. . . today, I am asking Hon. Members to consider legislation which will eliminate two historic wrongs in Canada's legislation regarding Indian people. These wrongs are discriminatory treatment based on sex and the control by Government of membership in Indian communities.

[29]A little further, he spoke about the careful balancing between these rights in the Act. In this section, Minister Crombie referred to the difference between status and membership. He stated that, while those persons who lost their status and membership should have both restored, the descendants of those persons are only automatically entitled to status (*House of Commons Debates, idem*, at page 2645):

This legislation achieves balance and rests comfortably and fairly on the principle that those persons who lost status and membership should have their status and membership restored. While there are some who would draw the line there, in my view fairness also demands that the first generation descendants of those who were wronged by discriminatory legislation should have status under the Indian Act so that they will be eligible for individual benefits provided by the federal Government. However, their relationship with respect to membership and residency should be determined by the relationship with the Indian communities to which they belong.

[30]Still further on, the Minister stated the fundamental purposes of amendments, and explained that, while those purposes may conflict, the fairest balance had been achieved (*House of Commons Debates, idem*, at page 2646):

. . . I have to reassert what is unshakeable for this Government with respect to the Bill. First, it must include removal of discriminatory provisions in the Indian Act; second, it must include the restoration of status and membership to those who lost status and membership as a result of those discriminatory provisions; and third, it must ensure that the Indian First Nations who wish to do so can control their own membership. Those are the three principles which allow us to find balance and fairness and to proceed confidently in the face of any disappointment which may be expressed by persons or groups who were not able to accomplish 100 per cent of their own particular goals.

This is a difficult issue. It has been for many years. The challenge is striking. The fairest possible balance must be struck and I believe it has been struck in this Bill. I believe we have fulfilled the promise made by the Prime Minister in the Throne Speech that discrimination in the Indian Act would be ended.

[31]At a meeting of the Standing Committee on Indian Affairs and Northern Development, Minister Crombie again made it clear that, while the Bill works towards full Indian self-government, the Bill also has as a goal remedying past wrongs (*Minutes of Proceedings and Evidence on the Standing Committee on Indian Affairs and Northern Development*, Issue No. 12, March 7, 1985, at page 12:7):

Several members of this committee said during the debate on Friday that this bill is just a beginning and not an end in itself, but rather the beginning of a process aimed at full Indian self-government. I completely agree with that view. But before we can create the future, some of the wrongs of the past have to be corrected. That is, in part, the purpose of Bill C-31.

[32]Furthermore, in the Minister's letter to Chief Walter Twinn on September 26, 1985, in which he accepted the membership code, the Minister reminded Chief Twinn of subsections 10(4) and (5) of the Act, and stated as follows:

We are both aware that Parliament intended that those persons listed in paragraph 6(1)(c) would at least initially be part of the membership of a Band which maintains its own list. Read in isolation your membership rules would appear to create a prerequisite to membership of lawful residency or significant commitment to the Band. However, I trust that your membership rules will be read in conjunction with the Act so that the persons who are entitled to reinstatement to Band membership, as a result of the Act, will be placed on your Band List. The amendments were designed to strike a delicate balance between the right of individuals to Band membership and the right of Bands to control their membership. I sponsored the Band control of membership amendments with a strongly held trust that Bands would fulfill their obligations and act fairly and reasonably. I believe you too feel this way, based on our past discussions.

[33]Sadly, it appears from the Band's subsequent actions that the Minister's "trust" was seriously misplaced. The very provisions of the Band's rules to which the Minister drew attention have, since their adoption, been invoked by the Band consistently and persistently to refuse membership to the 11 women in question. In fact, since 1985, the Band has only admitted three acquired rights women to membership, all of them apparently being sisters of the addressee of the Minister's letter.

[34]The quoted excerpts make it abundantly clear that Parliament intended to create an automatic right to Band membership for certain individuals, notwithstanding the fact that this would necessarily limit a band's control over its membership.

[35]In a very moving set of submissions on behalf of the plaintiff, Mrs. Twinn argued passionately that there were many significant problems with constructing the legislation as though it pits women's rights against Native rights. While I agree with Mrs. Twinn's concerns, the debates demonstrate that there existed at that time important differences between the positions of several groups affected by the legislation, and that the legislation was a result of Parliament's attempt to balance those different concerns. As such, while I agree wholeheart-edly with Mrs. Twinn that there is nothing inherently contradictory between women's rights and Native rights, this legislation nevertheless sets out a regime for membership that recognizes women's rights at the expense of certain Native rights. Specifically, it entitles women who lost their status and band membership on account of marrying non-Indian men to automatic band membership.

[36]Subsection 10(5) is further evidence of my conclusion that the Act creates an automatic entitlement to membership, since it states, by reference to paragraph 11(1)(*c*), that nothing can deprive acquired rights individuals of their automatic entitlement to membership unless they subsequently lose that entitlement. The Band's membership rules do not include specific provisions that describe the circumstances in which acquired rights individuals might subsequently lose their entitlement to membership. Enacting application requirements is certainly not enough to deprive acquired rights individuals of their automatic entitlement to band membership, pursuant to subsection 10(5). To put the matter another way, Parliament having spoken in terms of entitlement and acquired rights, it would take more specific provisions than what is found in section 3 of the membership rules for delegated and subordinate legislation to take away or deprive Charter protected persons of those rights.

[37]As a result, I find that the Band's application of its membership rules, in which pre-conditions have been created to membership, is in contravention of the *Indian Act*.

[38]While not necessarily conclusive, it seems that the Band itself takes the same view. Although on the hearing of the present motion, it vigorously asserted that it was in compliance with the Act, its statement of claim herein asserts without reservation that Bill C-31 has the effect of imposing on it members that it does not want. Paragraph 22 of the fresh as amended statement of claim reads as follows:

22. The plaintiffs state that with the enactment of the Amendments, Parliament attempted unilaterally to require the First Nations to admit certain persons to membership. The Amendments granted individual membership rights in each of the First Nations without their consent, and indeed over their objection. Furthermore, such membership rights were granted to individuals without regard for their actual connection to or interest in the First Nation, and regardless of their individual desires or that of the First Nation, or the circumstances pertaining the First Nation. This exercise of power by Parliament was unprecedented in the predecessor legislation.

[39]I shall grant the mandatory injunction as requested and will specifically order that the names of the 11 known acquired rights women be added to the Band List and that they be accorded all the rights of membership in the Band.

[40]I reserve the question of costs for the Crown. If it seeks them, it should do so by moving pursuant to rule 369 of the *Federal Court Rules, 1998* [SOR/98-106]. While the interveners have made a useful contribution to the debate, I would not order any costs to or against them.

ORDER

The plaintiff and the persons on whose behalf she sues, being all the members of the Sawridge Band, are hereby ordered, pending a final resolution of the plaintiff's action, to enter or register on the Sawridge Band List the names of the individuals who acquired the right to be members of the Sawridge Band before it took control of its Band List, with the full rights and privileges enjoyed by all Band members.

Without restricting the generality of the foregoing, this order requires that the following persons, namely, Jeannette Nancy Boudreau, Elizabeth Courtoreille, Fleury Edward DeJong, Roseina Anna Lindberg, Cecile Yvonne Loyie, Elsie Flora Loyie, Rita Rose Mandel, Elizabeth Bernadette Poitras, Lillian Ann Marie Potskin, Margaret Ages Clara Ward and Mary Rachel L'Hirondelle be forthwith entered on the Band List of the Sawridge Band and be immediately accorded all the rights and privileges attaching to Band membership.

Tab 12

Sawridge Band v. Canada, [2004] 3 FC 274, 2004 FCA 16 (CanLII)

Date: 2004-01-19
File number: A-170-03
Other citations: 316 NR 332; [2004] FCJ No 77 (QL); [2004] 2 CNLR 316
Citation: Sawridge Band v. Canada, [2004] 3 FC 274, 2004 FCA 16 (CanLII), <http://canlii.ca/t/1g8b9>, retrieved on 2018-02-26

A-170-03

2004 FCA 16

Bertha L'Hirondelle, suing on her own behalf and on behalf of all other members of the Sawridge Band (*Plaintiffs*) (*Appellants*)

v.

Her Majesty the Queen (*Defendant*) (*Respondent*)

and

Native Council of Canada, Native Council of Canada (Alberta), Native Women's Association of Canada and **Non-Status Indian Association of Alberta** (*Interveners*) (*Respondents*)

Indexed as: Sawridge Band v. Canada (F.C.A.)

Federal Court of Appeal, Rothstein, Noël and Malone JJ.A.--Calgary, December 15 and 16, 2003; Ottawa, January 19, 2004.

Native Peoples -- Registration -- Appellants opposing requirement to enter on Sawridge Band List names of 11 individuals, to accord them rights, privileges attaching to Band membership -- Bill C-31 granting certain persons whose names omitted, deleted from Indian Register prior to April 17, 1985 entitlement to status under Indian Act -- Indian Act, s. 10(4), (5) must be interpreted in accordance with modern approach -- Act, s. 11(1)(c) granting appellants automatic entitlement to membership in Sawridge Band -- Requiring such acquired rights individuals to comply with Sawridge Band membership code in contravention of Act.

Administrative Law -- Judicial Review -- Injunctions -- Trial Judge granting mandatory interlocutory injunction sought by Crown, requiring appellants to register names of 11 individuals on Sawridge Band List -- Making determination of law as condition precedent to

granting of interlocutory injunction -- Such determination appropriate -- Where substantive question of law at issue, applicable standard of review correctness -- Three-part test for granting interlocutory injunction met -- First part, serious issue to be tried, applies to interlocutory injunction applications whether mandatory or prohibitory.

Constitutional Law -- Aboriginal and Treaty Rights -- Appellants submitting provisions of Bill C-31 conferring entitlement to Band membership inconsistent with Constitution Act, 1982, s. 35, therefore of no force, effect -- Legislation must be complied with until found to be unconstitutional -- Clear public interest in seeing legislation obeyed until application stayed by Court order, legislation set aside on final judgment.

Construction of Statutes -- Interpretation of Indian Act, s. 10(4), (5) -- All legislation must be read in context -- Trial Judge correctly interpreted s. 10(4), (5) in accordance with modern approach -- Act creating automatic entitlement to membership unless acquired rights individuals subsequently lose entitlement.

Practice -- Parties -- Standing -- Whether Crown lacked standing, has not met test for seeking interlocutory injunctive relief -- Crown having standing to seek injunctions to ensure public bodies, such as Indian band council, follow law.

This was an appeal from a Trial Judge's order granting a mandatory interlocutory injunction sought by the Crown, requiring the appellants to register the names of 11 individuals on the Sawridge Band List and to accord them all the rights and privileges attaching to Band membership. In an action commenced on January 15, 1986, the appellants sought a declaration that the provisions of Bill C-31(*An Act to amend the Indian Act*) that confer an entitlement to Band membership are inconsistent with section 35 of the *Constitution Act, 1982*, and are therefore of no force and effect. Bill C-31 granted certain persons whose names were omitted or deleted from the Indian Register by the Minister of Indian and Northern Affairs prior to April 17, 1985, entitlement to status under the *Indian Act*. By notice of motion, the Crown applied for an interlocutory mandatory injunction requiring the Sawridge Band to comply with the provisions of the Act unless and until they are determined to be unconstitutional. By order dated March 27, 2003, Hugessen J. granted the requested injunction. In appealing the order of Hugessen J., the appellants raised two issues: (1) whether the Band's membership application process complied with the requirements of the Act, and (2) whether the Crown had standing and had met the test for granting interlocutory injunctive relief.

Held, the appeal should be dismissed.

(1) The Crown's notice of motion for a mandatory interlocutory injunction was based on the appellants' refusal to comply with the legislation pending determination of whether the legislation was constitutional. It was agreed that the interpretation of the legislation and whether or not the appellants were in compliance with it was relevant to this litigation. Courts do not normally make determinations of law as a condition precedent to the granting of an interlocutory injunction, but that is what occurred here. It was appropriate for Hugessen J. to have made a preliminary determination of law that was final and conclusive for purposes of the action, subject to being varied on appeal.

Where a substantive question of law is at issue, even if it is decided by a case management judge, the applicable standard of review will be correctness. Hugessen J. was not satisfied that subsections 10(4) and (5) of the *Indian Act* are as clear and unambiguous as the appellants suggested. He correctly interpreted these provisions in accordance with the modern approach to statutory construction which states that the words of an Act are to be

read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. The term "acquired rights" which appears as a marginal note beside subsection 10(4) is a convenient "shorthand" to identify those individuals who, by reason of paragraph 11(1)(*c*) of the Act, became entitled to automatic membership in the Indian Band with which they were connected. The instant paragraph 11(1)(*c*) came into force, i.e. April 17, 1985, these individuals were entitled to have their names entered on the membership list of their Band. The words "by reason only of" in subsection 10(4) could allow a band to create restrictions on continued membership for situations that arose or actions taken after the membership code came into effect. However, the code cannot operate to deny membership to those individuals who come within paragraph 11(1)(*c*). There is no automatic membership in a band, but there is an automatic entitlement to membership. The words "commencing on April 17, 1985" only indicate that subsection 11(1) was not retroactive to before April 17, 1985. As of that date, the individuals in question acquired an automatic entitlement to membership in the Sawridge Band. For these persons entitled to membership, a simple request to be included in the Band's membership list is all that is required. The fact that the individuals in question did not complete a Sawridge Band membership application is irrelevant. Requiring acquired rights individuals to comply with the Sawridge Band membership code, in which preconditions had been created to membership, was in contravention of the Act.

(2) The Crown was seeking an injunction, not only on behalf of the individuals denied the benefits of a validly enacted legislation, but on behalf of the public interest in having the laws of Canada obeyed. It has traditionally had standing to seek injunctions to ensure that public bodies, such as an Indian band council, follow the law. Having regard to the Crown's standing at common law, statutory authority is unnecessary. Hugessen J. correctly found that the Crown had standing to seek the injunction. Moreover, the Crown was seeking essentially the same relief on the injunction application as in the main action. Further, section 44 of the *Federal Courts Act* confers a very broad jurisdiction on the Federal Court, even to granting an injunction where it is not being asked to grant final relief. That being so, the Court surely has jurisdiction to grant an injunction where it will itself make a final determination on an interconnected issue. The requested injunction was therefore sufficiently connected to the final relief claimed by the Crown.

The test for granting an interlocutory injunction, as adopted by the Supreme Court of Canada in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*; and *RJR--MacDonald Inc. v. Canada (Attorney General)*, is threefold. First, there must be a serious question to be tried. Such test should be applied to an interlocutory injunction application, whether it is prohibitory or mandatory. The Crown's argument that Bill C-31 is constitutional was neither frivolous nor vexatious. There was, therefore, a serious question to be tried. Second, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Ordinarily the public interest would only be considered in the third branch of the test, but since the government was the applicant in this motion for interlocutory relief, the public interest had to be considered in the second stage as well. Allowing the appellants to ignore the requirements of the Act would irreparably harm the public interest in seeing that the law is obeyed. Until a law is struck down as unconstitutional or an interim constitutional exemption is granted by a court of competent jurisdiction, citizens and organizations must obey it. Further the individuals who have been denied Band membership are aging and may never benefit from amendments adopted to redress their discriminatory exclusion. The public interest in preventing discrimination by public bodies will be irreparably harmed if the requested injunction is denied and the appellants are able to continue to ignore their obligations under Bill C-31, pending a determination of its constitutionality. The appellants

argued that there could not be irreparable harm because the Crown would not have waited 16 years after the commencement of the action to seek an injunction. The question of whether delay in bringing an injunction application is fatal is a matter of discretion for the motions judge. There was no suggestion that Hugessen J. did not act judicially in the exercise of his discretion. The third branch of the test is the balance of convenience. In the *Metropolitan Stores* case, it was held that interlocutory injunctions should not be granted in public law cases, "unless, in the balance of convenience, the public interest is taken into consideration and given the weight it should carry". In this case, the public interest in seeing that laws are obeyed and that prior discrimination is remedied weighs in favour of granting the injunction requested by the Crown. There is a clear public interest in seeing that legislation is obeyed until its application is stayed by court order or the legislation is set aside on final judgment. On the other hand, the Sawridge Band will suffer little or no damage by admitting nine elderly ladies and one gentleman to membership. Therefore, the balance of convenience favoured granting the injunction.

statutes and regulations judicially

considered

An Act to amend the Indian Act, R.S.C., 1985 (1st Supp.), c. 32.

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 15.

Constitution Act, 1982, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 35.

Federal Courts Act, R.S.C., 1985, c. F-7 , ss. 1 (as am. by S.C. 2002, c. 8, s. 14), 44 (as am. *idem*, s. 41).

Federal Court Rules, 1998, SOR/98-106, rr. 220, 369.

Indian Act, R.S.C., 1985, c. I-5 , ss. 6 (as am. by R.S.C., 1985 (1st Supp.), c. 32, s. 4), 10(4) (as am. *idem*), (5) (as am. *idem*), 11(1)(*c*) (as am. *idem*), 12.

Interpretation Act, R.S.C.. 1985, c. I-21 , s. 14.

cases judicially considered

applied:

Manitoba (Attorney General) v. Metropolitan Stores Ltd., 1987 CanLII 79 (SCC), [1987] 1 S.C.R. 110; (1987), 38 D.L.R. (4th) 321; [1987] 3 W.W.R. 1; 46 Man. R. (2d) 241; 25 Admin. L.R. 20; 87 CLLC 14,015; 18 C.P.C. (2d) 273; 73 N.R. 341; *RJR -- MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311; (1994), 111 D.L.R. (4th) 385; 54 C.P.R. (3d) 114; 164 N.R. 1; 60 Q.A.C. 241.

considered:

Canada (Human Rights Commission) v. Canadian Liberty Net, 1998 CanLII 818 (SCC), [1998] 1 S.C.R. 626; (1998), 157 D.L.R. (4th) 385; 6 Admin. L.R. (3d) 1; 22 C.P.C. (4th) 1; 50 C.R.R. (2d) 189; 224 N.R. 241; *Relais Nordik Inc. v. Secunda Marine Services Ltd.* (1988), 24 F.T.R. 256 (F.C.T.D.); *Ansa International Rent-a-Car (Canada) Ltd. v. American International Rent-a-Car Corp.* (1990), 32 C.P.R. (3d) 340; 36 F.T.R. 98 (F.C.T.D.); *Patriquen v. Canada (Correctional Services)* (2003), 2003 FC 927 (CanLII), 238 F.T.R. 153 (F.C.).

referred to:

Sawridge Band v. Canada, 2001 FCA 338 (CanLII), [2002] 2 F.C. 346; (2001), 213 F.T.R. 57; 283 N.R. 107 (C.A.); *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27; (1998), 36 O.R. (3d) 418; 154 D.L.R. (4th) 193; 50 C.B.R. (3d) 163; 33 C.C.E.L. (2d) 173; 221 N.R. 241; 106 O.A.C. 1; *Ontario (Attorney General) v. Ontario Teachers' Federation* (1997), 1997 CanLII 12182 (ON SC), 36 O.R. (3d) 367; 44 O.T.C. 274 (Gen. Div.); *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (H.L.); *Breen v. Farlow*, [1995] O.J. No. 2971 (Gen. Div.) (QL); *493680 Ontario Ltd. v. Morgan*, [1996] O.J. No. 4776 (Gen. Div.) (QL); *Samoila v. Prudential of America General Insurance Co. (Canada)*, [1999] O.J. No. 2317 (Sup. Ct.) (QL); *Morgentaler et al. v. Ackroyd et al.* (1983), 1983 CanLII 1748 (ON SC), 42 O.R. (2d) 659; 150 D.L.R. (3d) 59 (H.C.); *Consorzio del Prosciutto di Parma v. Maple Leaf Meats Inc.*, 2002 FCA 417 (CanLII), [2003] 2 F.C. 451; (2002), 22 C.P.R. (4th) 177; 297 N.R. 135 (C.A.).

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Sharpe, Robert J. *Injunctions and Specific Performance*, looseleaf ed., Aurora, Ont.: Canada Law Book, 1998.

APPEAL from a Trial Division decision (*Sawridge Band v. Canada*, 2003 FCT 347 (CanLII), [2003] 4 F.C. 748; [2003] 3 C.N.L.R. 344; (2003), 232 F.T.R. 54) granting a mandatory interlocutory injunction sought by the Crown, requiring the appellants to enter on the Sawridge Band List the names of 11 individuals and to accord them all the rights and privileges attaching to Band membership. Appeal dismissed.

appearances:

Martin J. Henderson and *Catherine M. Twinn* for plaintiffs (appellants).

E. James Kindrake and *Kathleen Kohlman* for defendant (respondent).

Kenneth S. Purchase for intervener Native Council of Canada.

P. Jonathan Faulds, Q.C. for intervener Native Council of Canada (Alberta).

Mary Eberts for intervener Native Women's Association of Canada.

Michael J. Donaldson for intervener Non-Status Indian Association of Alberta.

solicitors of record:

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Lang Michener LLP, Ottawa, for intervener Native Council of Canada.

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Burnet, Duckworth & Palmer LLP, Calgary, for intervener Non-Status Indian Association of Alberta.

The following are the reasons for judgment rendered in English by

[1]Rothstein J.A.: By order dated March 27, 2003 [2003 FCT 347 (CanLII), [2003] 4 F.C. 748], Hugessen J. of the Trial Division (as it then was) granted a mandatory interlocutory injunction sought by the Crown, requiring the appellants to enter or register on the Sawridge Band List the names of 11 individuals who, he found, had acquired the right to be members of the Sawridge Band before it took control of its Band List on July 8, 1985, and to accord the 11 individuals all the rights and privileges attaching to Band membership. The appellants now appeal that order.

HISTORY

[2]The background to this appeal may be briefly stated. *An Act to amend the Indian Act*, R.S.C., 1985, (1st Supp.), c. 32 (Bill C-31), was given Royal Assent on June 28, 1985. However, the relevant provisions of Bill C-31 were made retroactive to April 17, 1985, the date on which section 15, the equality guarantee, of the *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] (the Charter) came into force.

[3]Among other things, Bill C-31 granted certain persons an entitlement to status under the *Indian Act*, R.S.C., 1985, c. I-5 (the Act), and, arguably, entitlement to membership in an Indian Band. These persons included those whose names were omitted or deleted from the Indian Register by the Minister of Indian and Northern Affairs prior to April 17, 1985, in accordance with certain provisions of the Act as they read prior to that date. The disqualified persons included an Indian woman who married a man who was not registered as an Indian as well as certain other persons disqualified by provisions that Parliament considered to be discriminatory on account of gender. The former provisions read [section 12]:

12. (1) The following persons are not entitled to be registered, namely,

(*a*) a person who

. . .

(iii) is enfranchised, or

(iv) is born of a marriage entered into after September 4, 1951 and has attained the age of twenty-one years, whose mother and whose father's mother are not persons described in paragraph 11(1)(*a*), (*b*) or (*d*) or entitled to be registered by virtue of paragraph 11(1)(*e*),

unless, being a woman, that person is the wife or widow of a person described in section 11; and

(*b*) a woman who married a person who is not an Indian, unless that woman is subsequently the wife or widow of a person described in section 11.

(2) The addition to a Band List of the name of an illegitimate child described in paragraph 11 (1)(*e*) may be protested at any time within twelve months after the addition, and if on the

protest it is decided that the father of the child was not an Indian, the child is not entitled to be registered under that paragraph.

[4]Bill C-31 repealed these disqualifications and enacted the following provisions to allow those who had been stripped of their status to regain it [sections 6 (as am. by R.S.C., 1985 (1st Supp.), c. 32, s. 4), 11 (as am. *idem*)]:

6. (1) Subject to section 7, a person is entitled to be registered if

. . .

(*c*) the name of that person was omitted or deleted from the Indian Register, or from a band list prior to September 4, 1951, under subparagraph 12(1)(*a*)(iv), paragraph 12(1)(*b*) or subsection 12(2) or under subparagraph 12(1)(*a*)(iii) pursuant to an order made under subsection 109(2), as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;

. . .

11. (1) Commencing on April 17, 1985, a person is entitled to have his name entered in a Band List maintained in the Department for a band if

. . .

(*c*) that person is entitled to be registered under paragraph 6(1)(*c*) and ceased to be a member of that band by reason of the circumstances set out in that paragraph;

[5]By an action originally commenced on January 15, 1986, the appellants claim a declaration that the provisions of Bill C-31 that confer an entitlement to Band membership are inconsistent with section 35 of the *Constitution Act, 1982* [Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] and are, therefore, of no force and effect. The appellants say that an Indian Band's right to control its own membership is a constitutionally protected Aboriginal and treaty right and that legislation requiring a Band to admit persons to membership is therefore unconsti-tutional.

[6]This litigation is now in its 18th year. By notice of motion dated November 1, 2002, the Crown applied for:

. . . an interlocutory mandatory injunction, pending a final resolution of the Plaintiffs' action, requiring the Plaintiffs to enter or register on the Sawridge Band List the names of the individuals who acquired the right to be members of the Sawridge Band before it took control of its Band list, with the full rights and privileges enjoyed by all band members.

[7]The basis of the Crown's application was that until legislation is found to be unconstitutional, it must be complied with. The mandatory injunction application was brought to require the Band to comply with the provisions of the Act unless and until they are determined to be unconstitutional. By order dated March 27, 2003, Hugessen J. granted the requested injunction.

[8]This Court was advised that, in order for the Band to comply with the order of Hugessen J., the 11 individuals in question were entered on the Sawridge Band List. Nonetheless, the appellants submit that Hugessen J.'s order was made in error and should be quashed.

ISSUES

[9]In appealing the order of Hugessen J., the appellants raise the following issues:

1. Does the Band's membership application process comply with the requirements of the Act?

2. Even if the Band has not complied with the Act, did Hugessen J. err in granting a mandatory interlocutory injunction because the Crown lacks standing and has not met the test for granting interlocutory injunctive relief?

APPELLANTS' SUBMISSIONS

[10]The appellants say that the Band's membership code has been in effect since July 8, 1985 and that any person who wishes to become a member of the Band must apply for membership and satisfy the requirements of the membership code. They say that the 11 individuals in question have never applied for membership. As a result, there has been no refusal to admit them. The appellants submit that the code's requirement that all applicants for membership go through the application process is in accordance with the provisions of the Act. Because the Band is complying with the Act, there is no basis for granting a mandatory interlocutory injunction.

[11]Even if the Band has not complied with the Act, the appellants say that Hugessen J. erred in granting a mandatory interlocutory injunction because the Crown has no standing to seek such an injunction. The appellants argue that there is no *lis* between the beneficiaries of the injunction and the appellants. The Crown has no interest or, at least, no sufficient legal interest in the remedy. Further, the Crown has not brought a proceeding seeking final relief of the nature sought in the mandatory interlocutory injunction application. In the absence of such a proceeding, the Court is without jurisdiction to grant a mandatory interlocutory injunction. Further, there is no statutory authority for the Crown to seek the relief in question. The appellants also argue that the Crown has not met the three-part test for the granting of an interlocutory injunction.

ARE THE APPELLANTS COMPLYING WITH THE *INDIAN ACT*?

<u>The Appropriateness of Deciding a Legal Question in the Course of an Interlocutory Injunction Application</u>

[12]The question of whether the Sawridge Band membership code and application process are in compliance with the Act appears to have been first raised by the appellants in response to the Crown's injunction application. Indeed, the appellants' fresh as amended statement of claim would seem to acknowledge that, at least when it was drafted, the appellants were of the view that certain individuals could be entitled to membership in an Indian Band without the consent of the Band. Paragraph 22 of the fresh as amended statement of claim states in part:

The plaintiffs state that with the enactment of the Amendments, Parliament attempted unilaterally to require the First Nations to admit certain persons to membership. The Amendments granted individual membership rights in each of the First Nations without their consent, and indeed over their objection.

[13]There is nothing in the appellants' fresh as amended statement of claim that would suggest that an issue in the litigation was whether the appellants were complying with the Act. The entire fresh as amended statement of claim appears to focus on challenging the constitutional validity of the Bill C-31 amendments to the *Indian Act*.

[14]The Crown's notice of motion for a mandatory interlocutory injunction was based on the appellants' refusal to comply with the legislation pending determination of whether the legislation was constitutional. The Crown's assumption appears to have been that there was no dispute that, barring a finding of unconstitutionality, the legislation required the appellants to admit the 11 individuals to membership.

[15]Be that as it may, the appellants say that the interpretation of the legislation and whether or not they are in compliance with it was always in contemplation in and relevant to this litigation. It was the appellants who raised the question of whether or not they were in compliance in response to the Crown's motion for injunction. It, therefore, had to be dealt with before the injunction application itself was addressed. The Crown and the interveners do not challenge the need to deal with the question and Hugessen J. certainly accepted that it was necessary to interpret the legislation and determine if the appellants were or were not in compliance with it.

[16]Courts do not normally make determinations of law as a condition precedent to the granting of an interlocutory injunction. However, that is what occurred here. In the unusual circumstances of this case, I think it was appropriate for Hugessen J. to have made such a determination.

[17]Although rule 220 [*Federal Court Rules, 1998*, SOR/98-106] was not expressly invoked, I would analogize the actions of Hugessen J. to determining a preliminary question of law. Subsections 220(1) and (3) read as follows:

220. (1) A party may bring a motion before trial to request that the Court determine

(*a*) a question of law that may be relevant to an action;

. . .

(3) A determination of a question referred to in subsection (1) is final and conclusive for the purposes of the action, subject to being varied on appeal.

[18]Although the appellants did not explicitly bring a motion under rule 220, the need to determine the proper interpretation of the Act was implicit in their reply to the respondent's motion for a mandatory interlocutory injunction. It would be illogical for the appellants to raise the issue in defence to the injunction application and the Court not be able to deal with it. There is no suggestion that the question could not be decided because of disputed facts or for any other reason. It was raised by the appellants who said it was relevant to the action. Therefore, I think that Hugessen J. was able to, and did, make a preliminary determination of law that was final and conclusive for purposes of the action, subject to being varied on appeal.

Does the Band's Membership Application Process Comply with the Requirements of the *Indian Act*?

[19]I turn to the question itself. Although the determination under appeal was made by a case management judge who must be given extremely wide latitude (see *Sawridge Band v. Canada*, 2001 FCA 338 (CanLII), [2002] 2 F.C. 346 (C.A.), at paragraph 11), the determination is one of law. Where a substantive question of law is at issue, even if it is decided by a case management judge, the applicable standard of review will be correctness.

[20]The appellants say there is no automatic entitlement to membership and that the Band's membership code is a legitimate means of controlling its own membership. They rely on subsections 10(4) [as am. by R.S.C., 1985 (1st Supp.), c. 32, s. 4] and 10(5) [as am. *idem*] of the *Indian Act* which provide:

10. . . .

(4) Membership rules established by a band under this section may not deprive any person who had the right to have his name entered in the Band List for that band, immediately prior to the time the rules were established, of the right to have his name so entered by reason only of a situation that existed or an action that was taken before the rules came into force.

(5) For greater certainty, subsection (4) applies in respect of a person who was entitled to have his name entered in the Band List under paragraph 11(1)(*c*) immediately before the band assumed control of the Band List if that person does not subsequently cease to be entitled to have his name entered in the Band List.

[21]The appellants say that subsections 10(4) and (5) are clear and unambiguous and Hugessen J. was bound to apply these provisions. They submit the words "by reason only of" in subsection 10(4) mean that a band may establish membership rules as long as they do not expressly contravene any provisions of the Act. They assert that the Band's code does not do so. The code only requires that if an individual is not resident on the Reserve, an application must be made demonstrating, to the satisfaction of the Band Council, that the individual:

. . . has applied for membership in the band and, in the judgment of the Band Council, has a significant commitment to, and knowledge of, the history, customs, traditions, culture and communal life of the Band and a character and lifestyle that would not cause his or her admission to membership in the Band to be detrimental to the future welfare or advancement of the Band (paragraph 3(a)(ii)).

[22]With respect to subsection 10(5), the appellants say that the words "if that person does not subsequently cease to be entitled to have his name entered in the Band List" mean that the Band is given a discretion to establish membership rules that may disentitle an individual to membership in the Band. They submit that nothing in the Act precludes a band from establishing additional qualifications for membership.

[23]The Crown, on the other hand, says that persons in the position of the individuals in this appeal have "acquired rights." I understand this argument to be that paragraph 11(1)(*c*) [as am. *idem*] created an automatic entitlement for those persons to membership in the Indian Band with which they were previously connected. The Crown submits that subsection 10(4) prohibits a band from using its membership rules to create barriers to membership for such persons.

[24]Hugessen J. was not satisfied that subsections 10(4) and (5) are as clear and unambiguous as the appellants suggest. He analyzed the provisions in the context of related provisions and agreed with the Crown.

[25]The appellants seem to object to Hugessen J.'s contextual approach to statutory interpretation. However, all legislation must be read in context. Driedger's [*Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983, at page 87] well-known statement of the modern approach to statutory construction, adopted in countless cases such as *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at paragraph 21, reads:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Hugessen J. interpreted subsections 10(4) and (5) in accordance with the modern approach and he was correct to do so.

[26]I cannot improve on Hugessen J.'s statutory construction analysis and I quote the relevant portions of his reasons, which I endorse and adopt as my own [at paragraphs 24-27 and 36]:

It is unfortunate that the awkward wording of subsections 10(4) and 10(5) does not make it absolutely clear that they were intended to entitle acquired rights individuals to automatic membership, and that the Band is not permitted to create pre-conditions to membership, as it has done. The words "by reason only of" in subsection 10(4) do appear to suggest that a band might legitimately refuse membership to persons for reasons other than those contemplated by the provision. This reading of subsection 10(4), however, does not sit easily with the other provisions in the Act as well as clear statements made at the time regarding the amendments when they were enacted in 1985.

The meaning to be given to the word "entitled" as it is used by paragraph 6(1)(*c*) is clarified and extended by the definition of "member of a band" in section 2, which stipulates that a person who is entitled to have his name appear on a Band List is a member of the Band. Paragraph 11(1)(*c*) requires that, commencing on April 17, 1985, the date Bill C-31 took effect, a person was entitled to have his or her name entered in a Band List maintained by the Department of Indian Affairs for a band if, *inter alia*, that person was entitled to be registered under paragraph 6(1)(*c*) of the 1985 Act and ceased to be a member of that band by reason of the circumstances set out in paragraph 6(1)(*c*).

While the Registrar is not obliged to enter the name of any person who does not apply therefor (see section 9(5)), that exemption is not extended to a band which has control of its list. However, the use of the imperative "shall" in section 8, makes it clear that the band is obliged to enter the names of all entitled persons on the list which it maintains. Accordingly, on July 8, 1985, the date the Sawridge Band obtained control of its List, it was obliged to enter thereon the names of the acquired rights women. When seen in this light, it becomes clear that the limitation on a band's powers contained in subsections 10(4) and 10(5) is simply a prohibition against legislating retrospectively: a band may not create barriers to membership for those persons who are by law already deemed to be members.

Although it deals specifically with Band Lists maintained in the Department, section 11 clearly distinguishes between automatic, or unconditional, entitlement to membership and conditional entitlement to membership. Subsection 11(1) provides for automatic entitlement to certain individuals as of the date the amendments came into force. Subsection 11(2), on the other hand, potentially leaves to the band's discretion the admission of the descendants of women who "married out."

. . .

Subsection 10(5) is further evidence of my conclusion that the Act creates an automatic entitlement to membership, since it states, by reference to paragraph 11(1)(*c*), that nothing can deprive acquired rights individuals [sic] to their automatic entitlement to membership unless they subsequently lose that entitlement. The Band's membership rules do not include specific provisions that describe the circumstances in which acquired rights individuals

might subsequently lose their entitlement to membership. Enacting application requirements is certainly not enough to deprive acquired rights individuals of their automatic entitlement to band membership, pursuant to subsection 10(5). To put the matter another way, Parliament having spoken in terms of entitlement and acquired rights, it would take more specific provisions than what is found in section 3 of the membership rules for delegated and subordinate legislation to take away or deprive Charter protected persons of those rights.

[27]I turn to the appellants' arguments in this Court.

[28]The appellants assert that the description "acquired rights" used by Hugessen J. reads words into the *Indian Act* that are not there. The term "acquired rights" appears as a marginal note beside subsection 10(4). As such, it is not part of the enactment, but is inserted for convenience of reference only (*Interpretation Act*, R.S.C., 1985, c. I-21, section 14). However, the term is a convenient "shorthand" to identify those individuals who, by reason of paragraph 11(1)(*c*), became entitled to automatic membership in the Indian Band with which they were connected. In other words, the instant paragraph 11(1)(*c*) came into force, i.e. April 17, 1985, these individuals were entitled to have their names entered on the membership list of their Band.

[29]The appellants say that the words "by reason only of" in subsection 10(4) do not preclude an Indian Band from establishing a membership code, requiring persons who wish to be considered for membership to make application to the Band. I acknowledge that the words "by reason only of" could allow a band to create restrictions on continued membership for situations that arose or actions taken after the membership code came into force. However, the code cannot operate to deny membership to those individuals who come within paragraph 11(1)(*c*).

[30]A band may enact membership rules applicable to all of its members. Yet subsections 10 (4) and (5) restrict a band from enacting membership rules targeted only at individuals who, by reason of paragraph 11(1)(*c*), are entitled to membership. That distinction is not permitted by the Act.

[31]The appellants raise three further objections. First, they say that their membership code is required because of "band shopping." However, in respect of persons entitled to membership under paragraph 11(1)(*c*), the issue of band shopping does not arise. Under paragraph 11(1)(*c*), the individuals in question are only entitled to membership in the band in which they would have been a member but for the pre-April 17, 1985 provisions of the *Indian Act*. In this case, those individuals would have been members of the Sawridge Band.

[32]Second, the appellants submit that the opening words of subsection 11(1), "commencing on April 17, 1985," indicate a process and not an event, i.e. that there is no automatic membership in a band and that indeed some persons may not wish to be members; rather, the word "commencing" only means that a person may apply at any time on or after April 17, 1985. I agree that there is no automatic membership. However, there is an automatic <u>entitlement</u> to membership. The words "commencing on April 17, 1985" only indicate that subsection 11(1) was not retroactive to before April 17, 1985. As of that date, the individuals in question in this appeal acquired an automatic entitlement to membership in the Sawridge Band.

[33]Third, the appellants say that the individuals in question have not made application for membership. Hugessen J. dealt with this argument at paragraph 12 of his reasons:

Finally, the plaintiff argued strongly that the women in question have not applied for membership. This argument is a simple "red herring". It is quite true that only some of them have applied in accordance with the Band's membership rules, but that fact begs the question as to whether those rules can lawfully be used to deprive them of rights to which Parliament has declared them to be entitled. The evidence is clear that all of the women in question wanted and sought to become members of the Band and that they were refused at least implicitly because they did not or could not fulfil the rules' onerous application requirements.

[34]The appellants submit, contrary to Hugessen J.'s finding, that there was no evidence that the individuals in question here wanted to become members of the Sawridge Band. A review of the record demonstrates ample evidence to support Hugessen J.'s finding. For example, by Sawridge Band Council Resolution of July 21, 1988, the Band Council acknowledged that "at least 164 people had expressed an interest in writing in making application for membership in the Band." A list of such persons was attached to the Band Council Resolution. Of the 11 individuals in question here, 8 were included on that list. In addition, the record contains applications for Indian status and membership in the Sawridge Band made by a number of the individuals.

[35]For these persons entitled to membership, a simple request to be included in the Band's membership list is all that is required. The fact that the individuals in question did not complete a Sawridge Band membership application is irrelevant. As Hugessen J. found, requiring acquired rights individuals to comply with the Sawridge Band membership code, in which preconditions had been created to membership, was in contravention of the Act.

[36]Of course, this finding has no bearing on the main issue raised by the appellants in this action, namely, whether the provisions entitling persons to membership in an Indian band are unconstitutional.

THE INJUNCTION APPLICATION

Standing

[37]I turn to the injunction application. The appellants say that there was no *lis* between the Band and the 11 persons ordered by Hugessen J. to be included in the Band's Membership List. The 11 individuals are not parties to the main action. The appellants also say that the Crown is not entitled to seek interlocutory relief when it does not seek the same final relief.

[38]I cannot accept the appellants' arguments. The Crown is the respondent in an application to have validly enacted legislation struck down on constitutional grounds. It is seeking an injunction, not only on behalf of the individuals denied the benefits of that legislation but on behalf of the public interest in having the laws of Canada obeyed. The Crown, as represented by the Attorney General, has traditionally had standing to seek injunctions to ensure that public bodies, such as an Indian band council, follow the law (see Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf (Aurora, Ont.: Canada Law Book, 1998), at paragraph 3.30; *Ontario (Attorney General) v. Ontario Teachers' Federation* (1997), 1997 CanLII 12182 (ON SC), 36 O.R. (3d) 367 (Gen. Div.), at pages 371-372). Having regard to the Crown's standing at common law, statutory authority, contrary to the appellants' submission, is unnecessary. Hugessen J. was thus correct to find that the Crown had standing to seek the injunction.

[39]I also cannot accept the argument that the Crown may not seek interlocutory relief because it has not sought the same final relief in this action. The Crown is defending an

attack on the constitutionality of Bill C-31 and is seeking an interlocutory injunction to require compliance with it in the interim. If the Crown is successful in the main action, the result will be that the Sawridge Band will have to enter or register on its membership list the individuals who are the subject of the injunction application. The Crown therefore is seeking essentially the same relief on the injunction application as in the main action.

[40]Further, section 44 [as am. by S.C. 2002, c. 8, s. 41] of the *Federal Courts Act*, R.S.C., 1985, c. F-7 , s. 1 (as am. *idem*, s. 14), confers jurisdiction on the Federal Court to grant an injunction "in all cases in which it appears to the court to be just or convenient to do so." The jurisdiction conferred by section 44 is extremely broad. In *Canada (Human Rights Commission) v. Canadian Liberty Net*, 1998 CanLII 818 (SCC), [1998] 1 S.C.R. 626, the Supreme Court found that the Federal Court could grant injunctive relief even though there was no action pending before the Court as to the final resolution of the claim in issue. If section 44 confers jurisdiction on the Court to grant an injunction where it is not being asked to grant final relief, the Court surely has jurisdiction to grant an injunction where it will itself make a final determination on an interconnected issue. The requested injunction is therefore sufficiently connected to the final relief claimed by the Crown.

The Test for Granting an Interlocutory Injunction

[41]The test for whether an interlocutory injunction should be granted was set out in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (H.L.) and adopted by the Supreme Court in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, 1987 CanLII 79 (SCC), [1987] 1 S.C.R. 110; and *RJR--MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311, where, at page 334, Sopinka and Cory JJ. summarized the test as follows:

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

[42]The appellants submit that Hugessen J. erred in applying a reverse onus to the test. Since, as will be discussed below, the Crown has satisfied the traditional test, I do not need to consider whether the onus should be reversed.

Serious Question

[43]In *RJR--MacDonald, supra*, at pages 337-338, the Court indicated that the threshold at the first branch is low and that the motions judge should proceed to the rest of the test unless the application is vexatious or frivolous.

[44]The appellants say that in cases where a mandatory injunction is sought, the older pre-*American Cyanamid* test of showing a strong *prima facie* case for trial should continue to apply. They rely on an Ontario case, *Breen v. Farlow*, [1995] O.J. No. 2971 (Gen. Div.) (QL), in support of this proposition. Of course, that case is not binding on this Court. Furthermore, it has been questioned by subsequent Ontario decisions in which orders in the nature of a mandatory interlocutory injunction were issued (*493680 Ontario Ltd. v. Morgan*, [1996] O.J. No. 4776 (Gen. Div.) (QL); *Samoila v. Prudential of America General Insurance Co. (Canada)*, [1999] O.J. No. 2317 (Sup. Ct.) (QL)). In *Morgan*, Hockin J. stated that *RJR-*

-MacDonald had modified the old test, even for mandatory interlocutory injunctions (paragraph 27).

[45]The jurisprudence of the Federal Court on this issue in recent years is divided. In *Relais Nordik Inc. v. Secunda Marine Services Ltd.* (1988), 24 F.T.R. 256 (F.C.T.D.), at page 9, Pinard J. questioned the applicability of the *American Cyanamid* test to mandatory interlocutory injunctions. On the other hand, in *Ansa International Rent-a-Car (Canada) Ltd. v. American International Rent-a-Car Corp.* (1990), 32 C.P.R. (3d) 340 (F.C.T.D.), at paragraph 15, MacKay J. accepted that the *American Cyanamid* test applied to mandatory injunctions in the same way as to prohibitory ones. Both of these cases were decided before the Supreme Court reaffirmed its approval of the *American Cyanamid* test in *RJR--MacDonald.* More recently, in *Patriquen v. Canada (Correctional Services)* (2003), 2003 FC 927 (CanLII), 238 F.T.R. 153 (F.C.), at paragraphs 9-16, Blais J. followed the *RJR--MacDonald* test and found that there was a serious issue to be tried in an application for a mandatory interlocutory injunction (which he dismissed on the basis that the applicant had not shown irreparable harm).

[46]Hugessen J. followed *Ansa International*, *supra*, and held that the *RJR--MacDonald* test should be applied to an interlocutory injunction application, whether it is prohibitory or mandatory. In light of Sopinka and Cory JJ.'s caution about the difficulties of engaging in an extensive analysis of the constitutionality of legislation at an interlocutory stage (*RJR--MacDonald*, at page 337), I think he was correct to do so. However, the fact that the Crown is asking the Court to require the appellants' to take positive action will have to be considered in assessing the balance of convenience.

[47]In this case, the Crown's argument that Bill C-31 is constitutional is neither frivolous nor vexatious. There is, therefore, a serious question to be tried.

Irreparable Harm

[48]Ordinarily, the public interest is considered only in the third branch of the test. However, where, as here, the government is the applicant in a motion for interlocutory relief, the public interest must also be considered in the second stage (*RJR--MacDonald, supra*, at page 349).

[49]Validly enacted legislation is assumed to be in the public interest. Courts are not to investigate whether the legislation actually has such an effect (*RJR-- MacDonald*, at pages 348-349).

[50]Allowing the appellants to ignore the requirements of the Act would irreparably harm the public interest in seeing that the law is obeyed. Until a law is struck down as unconstitutional or an interim constitutional exemption is granted by a court of competent jurisdiction, citizens and organizations must obey it (*Metropolitan Stores, supra*, at page 143, quoting *Morgentaler et al. v. Ackroyd et al.* (1983), 1983 CanLII 1748 (ON SC), 42 O.R. (2d) 659 (H.C.), at pages 666-668).

[51]Further, the individuals who have been denied membership in the appellant Band are aging and, at the present rate of progress, some are unlikely ever to benefit from amendments that were adopted to redress their discriminatory exclusion from Band membership. The public interest in preventing discrimination by public bodies will be irreparably harmed if the requested injunction is denied and the appellants are able to continue to ignore their obligations under Bill C-31, pending a determination of its constitutionality.

[52]The appellants argue that there cannot be irreparable harm because, if there was, the Crown would not have waited 16 years after the commencement of the action to seek an injunction. The Crown submits that it explained to Hugessen J. the reasons for the delay and stated that the very length of the proceedings had in fact contributed to the irreparable harm as the individuals in question were growing older and, in some cases, falling ill.

[53]The question of whether delay in bringing an injunction application is fatal is a matter of discretion for the motions judge. There is no indication that Hugessen J. did not act judicially in exercising his discretion to grant the injunction despite the timing of the motion.

Balance of Convenience

[54]In *Metropolitan Stores, supra*, at page 149, Beetz J. held that interlocutory injunctions should not be granted in public law cases, "unless, in the balance of convenience, the public interest is taken into consideration and given the weight it should carry." In this case, the public interest in seeing that laws are obeyed and that prior discrimination is remedied weighs in favour of granting the injunction requested by the Crown.

[55]As discussed above and as Hugessen J. found, there is a clear public interest in seeing that legislation is obeyed until its application is stayed by court order or the legislation is set aside on final judgment. As well, Bill C-31 was designed to remedy the historic discrimination against Indian women and other Indians previously excluded from status under the *Indian Act* and Band membership. There is therefore a public interest in seeing that the individuals in this case are able to reap the benefits of those amendments.

[56]On the other hand, the Sawridge Band will suffer little or no damage by admitting nine elderly ladies and one gentleman to membership (the Court was advised that one of the 11 individuals had recently died). It is true that the Band is being asked to take the positive step of adding these individuals to its Band List but it is difficult to find hardship in requiring a public body to follow a law that, pending an ultimate determination of its constitutionality, is currently in force. Even if the Band provides the individuals with financial assistance on the basis of their membership, that harm can be remedied by damages against the Crown if the appellants subsequently succeed at trial. Therefore, as Hugessen J. found, the balance of convenience favours granting the injunction.

CONCLUSION

[57]The appeal should be dismissed.

COSTS

[58]The Crown has sought costs in this Court and in the Court below. The interveners have sought costs in this Court only.

[59]In his reasons for order, Hugessen J. reserved the question of costs in favour of the Crown, indicating that the Crown should proceed by way of a motion for costs under rule 369 [*Federal Court Rules, 1998*]. He awarded no costs to the interveners. It is not apparent from the record that the Crown made a costs motion under rule 369 and in the absence of an order for costs and an appeal of that order, I would not make any award of costs in the Court below.

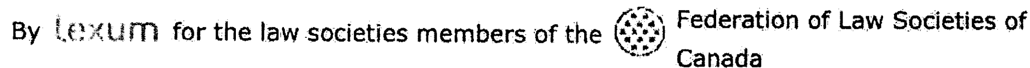
[60]As to costs in this Court, the Crown and interveners are to make submissions in writing, each not exceeding three pages, double-spaced, on or before seven days from the date of

these reasons. The appellants shall make submissions in writing, not exceeding 10 pages, double-spaced, on or before 14 days from the date of these reasons. The Court will, if requested, consider the award of a lump sum of costs inclusive of fees, disbursements, and in the case of the interveners, GST (see *Consorzio del Prosciutto di Parma v. Maple Leaf Meats Inc.*, 2002 FCA 417 (CanLII), [2003] 2 F.C. 451 (C.A.)).

[61]The judgment of the Court will be issued as soon as the matter of costs is determined.

Noël J.A.: I agree.

Malone J.A.: I agree.



Tab 13

In the Court of Appeal of Alberta

Citation: R. v. Barros, 2010 ABCA 116

Date: 20100415
Docket: 0703-0183-A
0803-0014-A
Registry: Edmonton

2010 ABCA 116 (CanLII)

Between:

Her Majesty the Queen

Appellant

\- and -

Ross Barros

Respondent

\- and -

Director of Public Prosecutions

Intervener

Restriction on Publication: By Court Order, information that may identify the person described in this judgment as the informer may not be published, broadcast, or transmitted in any manner. There is also a ban on publishing the contents of the application for the publication ban or the evidence, information or submissions at the hearing of the application. See the *Criminal Code*, s. 486.5.

Corrected judgment: A corrigendum was issued on April 19, 2010; the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Frans Slatter

Reasons for Judgment Reserved of The Honourable Mr. Justice Slatter
Concurred in by The Honourable Mr. Justice Watson

Dissenting Reasons for Judgment by The Honourable Mr. Justice Berger

Appeal from the Acquittals by
The Honourable Madam Justice J.B. Veit
Dated the 25th day of June, 2007 and
Dated the 21st day of December, 2007
(2007 ABQB 428, Docket: 050551845Q)

2010 ABCA 116 (CanLII)

Reasons for Judgment Reserved of
The Honourable Mr. Justice Slatter

2010 ABCA 116 (CanLII)

[1] The issue on this appeal is whether the respondent's attempts to identify a confidential police informer, and his subsequent use of the information he discovered, are criminal in nature.

Facts

[2] In March of 2005 Sgt. Brezinski of the Edmonton Police Service obtained a search warrant authorizing the search of the home of Irfan Qureshi. The information that justified the search warrant was obtained, in part, from a confidential police informer, the identity of whom is at the center of this appeal. During the search the police seized 1.5 kilograms of methamphetamine, 1.5 kilograms of cocaine, three handguns, and a bulletproof vest.

[3] As a result of the searches, drug and weapons charges were laid against Qureshi and others. Qureshi retained Mr. Sid Tarrabain, Q.C. to defend him. Mr. Tarrabain in return retained the respondent to assist in raising a defence. The respondent is a now retired 25-year veteran of the Edmonton Police Service and is in business as a private investigator.

[4] The record suggests that Qureshi was very interested in finding out the identity of the informer, although there is little direct evidence as to what he did to achieve that goal. The respondent said that someone in the Qureshi group had contacted a polygraph operator to test the members of the group, but the respondent did not identify who the member of the group was.

[5] The respondent also decided to discover the identity of the informer as a part of his retainer. He viewed this as a part of advancing "a full answer and defence" to the charges. In his view "that's what trials are about, trying to discover the source". In his opinion all defence counsel would attempt to identify the police informer, essentially as a matter of routine. (AR pp. E99-101, E116-7, E135, E152)

[6] The respondent's investigative technique was to attend a meeting of a number of Qureshi's associates. The respondent introduced himself, and indicated that he was working on Qureshi's defence. He invited all those attending to provide him with their cell phone numbers. Later on the respondent was able to obtain their cell phone records by an undisclosed method, the obvious purpose of which was to see if any of the associates had engaged in telephone calls with Sgt. Brezinski. (AR p. 79, l. 17-22) He attempted to eliminate possible candidates by comparing the disclosed criminal record of the informer with the records of members of the Qureshi group. (Exhibits 9 and 10, AR pp. E179-80) He joined in the effort to retain a polygraph operator (AR p. E106-7) and suggested that those who declined to provide a cell phone number might instead participate in a polygraph examination. All of this was said to be "purely voluntary", but it must have been apparent that a cloud of suspicion would fall over anybody who declined to "cooperate". As the respondent said: "It could just be a bluff" (AR p. E104), but its effect on the group was obvious.

is jeopardized, and the willingness of citizens to come forward with important information is compromised. ***Leipert*** sets out a public policy basis for the privilege that depends on secrecy; the whole privilege cannot be swept away by saying an accused has a private right to expose informers.

[47] My colleague makes reference (*infra*, para. 121) to a statement made by the Attorney General for British Columbia in its factum in the ***Basi*** appeal. This observation is not of assistance in disposing of this appeal. Firstly, concessions made by counsel in their briefs are not binding beyond the particular appeal in which the statements are made: ***T.L. v. Alberta (Director of Child Welfare)***, 2006 ABQB 104, 58 Alta. L.R. (4th) 23, 395 A.R. 327 at paras. 25-7. Secondly, the courts are not bound by admissions on points of law: ***V.W. v. D.S.***, [1996] 2 S.C.R. 108 at para. 17; ***R. v. Sappier***; ***R. v. Gray***, 2006 SCC 54, [2006] 2 S.C.R. 686 at paras. 62-4. Thirdly, the Attorney General for British Columbia cannot make admissions that bind the Attorney General for Alberta. Furthermore, the opinions of witnesses on points of law, such as whether a crime has been committed (as quoted by my colleague at para. 134) are inadmissable and irrelevant: ***R. v. Century 21 Ramos Realty Inc.*** (1987), 58 O.R. (2d) 737 (C.A.) at 752; ***Syrek v. Canada***, 2009 FCA 53, 307 D.L.R. (4th) 636, 387 N.R. 246 at paras. 28-30.

[48] In summary, there is no basis to conclude that an accused person has a positive or claim right to identify a confidential informer.

The Scope of the Privilege

[49] The respondent also suggested that the informer privilege is something that only exists inside the courtroom. It was said to be a part only of court procedure, and not binding on anyone outside the courtroom. Therefore what the accused does outside the courtroom does not engage the privilege. This argument incorrectly assumes that the informer privilege rule is primarily connected to trial fairness and procedure, whereas its roots are in broader considerations of public policy.

[50] Any such rule would make the informer privilege meaningless and ritualistic. It is artificial to suggest that information that cannot be spoken of in the courtroom, but can be freely discussed anywhere else, is "secret". Further, the whole point of the privilege is to protect the informer. The informer is not at risk of anything happening to him inside the courtroom; the risk lies entirely outside the courtroom. The whole point of the privilege is to prevent the informer's identity from getting into the hands of members of the community who would seek retribution against the informer. Apart altogether from the lack of any authority on the point, this position is illogical.

[51] The informer privilege is commonly referred to as a "privilege". Rules of privilege are generally rules of evidence, and so generally relate to an exception to the normal rules compelling production of relevant evidence, or to the inadmissability of evidence in judicial proceedings. The informer privilege has both of those characteristics. However, it is clear from the Supreme Court authorities on the subject that the informer privilege is more that just a rule of evidence, and has a wider societal reach relating to the effective investigation of crime. It combines evidentiary

2010 ABCA 116 (CanLII)

Tab 14

Alberta Supreme Court
Goodfellow v. Knight
Date: 1977-01-07

R. A. Coad, for plaintiff.

D. A. Graham, for defendants.

(Calgary S.C. 116178)

7th January 1977.

1977 CanLII 538 (AB QB)

[1] LAYCRAFT J.:—In an action for damages arising from a motor vehicle accident, the defendants seek to strike out that portion of the statement of claim by which the plaintiff purports in his action to represent the members of the law firm of which he is a member and the firm itself. The defendants argue that a representative action is invalid where the claim is for damages.

[2] In the statement of claim, the plaintiff sets out allegations of negligence against the defendants and gives particulars of personal injuries alleged to have been suffered by him and of personal damages resulting from them. Paragraph 1 states in part:

> "The Plaintiff sues in his own right and also sues on behalf of the law firm of Goodfellow, Pearce & MacKenzie, and John V. MacKenzie and Albert F. Pearce, the said Goodfellow, Pearce & MacKenzie, John V. MacKenzie and Albert F. Pearce having a common interest in the subject matter of the within action pursuant to the Rules of Court."

[3] This aspect of the action is amplified in para. 11, which states:

> "11. The Plaintiff on his own behalf, and as the representative of the law firm of Goodfellow, Pearce & MacKenzie, John V. MacKenzie and Albert F. Pearce, repeats the provisions of paragraphs 9 and 10, and claims on his own behalf and as the representative of the said law firm of Goodfellow, Pearce & MacKenzie, John V. MacKenzie and Albert F. Pearce special and general damages regarding the said problems as referred to caused to the Plaintiff and to the said law firm and business partners of the said law firm as a result of the accident and will be asking this Honourable Court to consider such problems in assessing the amount of special and general damages to be awarded to the Plaintiff and to the said law firm and to the said John V. MacKenzie and to the said Albert F. Pearce."

[4] The plaintiff filed with the statement of claim a document entitled "Consent of Interested Parties" by which his two partners named in the statement of claim and the firm itself "consent that the said action shall include" their claims. This document is not specifically contemplated by the Supreme Court Rules though the wording of it follows the language of R. 42, which provides:

"42. Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all."

[5] There is, of course, no doubt that under the provisions of R. 36 the firm and each of the persons whom the plaintiff claims to represent could have joined as plaintiffs in the action. Whatever advantages it was hoped to derive from this form of action, the joinder of the additional plaintiffs would appear to me to be much less cumbersome than the representative form of action which was chosen. Rule 36 provides:

"36. Claims by one or more plaintiffs against one or more defendants in respect of or arising out of the same transaction or occurrence or out of the same series of transactions or occurrences may be joined in the same action whether the plaintiffs claim to be entitled to relief jointly or separately or in the alternative, and whether the defendants are sought to be charged jointly or separately or in the alternative, and whether or not the relief or remedy against the several defendants is the same."

[6] It may first be observed that the plaintiff has not followed the usual practice of setting out in the style of cause that he is suing in a representative capacity. That practice is recognized both in England and in Ontario (*Re Tottenham; Tottenham v. Tottenham,* [1896] 1 Ch. 628 at 629; *Barton v. Hamilton* (1909), 13 O.W.R. 1118 (C.A.); *May v. Wheaton* (1917), 41 O.L.R. 369 at 372) and should be followed in this province.

[7] The wording of R. 42, which has been essentially unchanged since it appeared in the 1905 Alberta Rules of Court, is slightly different than that of the comparable rule in England and in other Canadian jurisdictions. The requirement for a representative action in Alberta is that "numerous persons have a common interest in the subject" of the action. The English rule (O. 16, R. 9) and the British Columbia rule (O. 16, R. 9 (M.R. 131)) require that "numerous persons have the same interest in one cause or matter". Ontario R. 75 enables a representative action "where there are numerous persons having the same interest".

[8] Notwithstanding the slightly different expression of the required conditions for a representative action, I am of the opinion that there is no difference in substance between the Alberta rule and those to which I have referred from other jurisdictions. The various terms have been used in the case law as being synonymous.

[9] Each of the rules appears to have been derived from the early Chancery practice in England. In *Bedford (Duke) v. Ellis,* [1901] A.C. 1, Lord Macnaghten said at p. 8 in referring to the Chancery practice:

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"Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent. To limit the rule to persons having a beneficial proprietary interest would be opposed to precedent, and not, I think, in accordance with common sense."

[10] In the same case, Lord Shand said at p. 14:

"The rule has been framed and adopted for a useful and important object — the saving of the multiplication of actions, with the attendant costs, in cases where one action would serve to determine the rights of a number of persons in a question with another party called as defendant. A series of different actions one after another by different plaintiffs is to be no longer necessary in cases where numerous persons have 'the same interest in one cause or matter,' for in such cases 'one or more of such persons may sue on behalf or for the benefit of all persons so interested.' The rule is obviously one of advantage not only to plaintiffs but to defendants also, in the way of saving multiplication of suits, and it is of much importance to note, as observed by my noble and learned friend Lord Macnaghten, that it only applies the practice of the Court of Chancery, of which he gives many instances, to all divisions of the High Court."

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[11] In *Bamber v. Bank of N.S.*, [1943] 2 W.W.R. 529, [1943] 4 DX.R. 526 (Alta. C.A.), Ford J.A. considered the scope of the Alberta rule. At p. 537 he said:

"Although there may be still some question as to how far, under our Rule 20, a judgment against a represented plaintiff is binding on him the Court should be careful to see that it is only in cases where there is a real common interest as well as a right common to all that a representative action should be allowed to proceed. See as to the binding effect of judgments in such actions the cases of *London Sewer Commrs. v. Gellatly* (1876), 3 Ch. D. 610 at 615-16, and *Re hart; Wilkinson v. Blades*, [1896] 2 Ch. 788 at 793, as to represented plaintiffs. See also *Barker v. Allanson*, [1937] 1 K.B. 463, as to represented defendants. See also 26 *Halsbury*, 2nd ed., p. 17.

"The general practice of the Court is, of course, that all parties seeking relief should be before the Court, but the rule permitting one plaintiff to sue on behalf of others having a common interest with him is peculiarly applicable to cases where a declaration of a right common to the plaintiff and those represented is sought.

"All persons may be said to have a common interest in the subject of an intended action, within the meaning of Rule 20, who would be benefited by the action succeeding though consequential relief will have to be sought in a new action after the common question is decided."

[12] In *A. E. Osler & Co. v. Solman*, 59 O.L.R. 368, [1926] 4 D.L.R. 345, Orde J.A. used the term "the same interest" as being synonymous with a "a common interest". At p. 349 he said:

"... the rule does not mean a like or similar interest. There must be a common interest in the sense that the plaintiff and all those whom he claims to represent will gain some relief by his success, though possibly in different proportions and perhaps in different degrees."

[13] In *Kroman's Electric Ltd. v. Schultes*, [1970] 2 O.R. 548 at 553, 11 D.L.R. (3d) 425, Pennell J. referred to the Ontario rule as requiring that there be "a common interest in

a common subject... a common grievance and that the relief sought is beneficial to them all".

[14] I therefore conclude that the decisions from Ontario, British Columbia and England are applicable to the interpretation of Alberta R. 42.

[15] Whether or not persons claiming damages have "a common interest in the subject" of an action in my view depends on whether the damages are to be assessed personally for each person sought to be represented or are in the nature of general damages for the class as a whole. While early authorities assert that no claim for damages may be advanced in a representative action, recent decisions in Canada permit the action where the damages are common to the class as a whole and are to be divided among its members.

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[16] In *Markt & Co. Ltd. v. Knight 88. Co. Ltd.; Sale & Frazar v. Knight 88. Co. Ltd.*, [1910] 2 K.B. 1021, the plaintiff purported to claim against a shipowner on his own behalf and on behalf of all other shippers of goods in a vessel which had been intercepted and sunk during the Russo-Japanese war. At p. 1040, Fletcher Moulton L.J. said:

> "It may be that the claims are alike in nature, and that the litigation in respect of them will have much in common. But they are in no way connected; there is no common interest. Defences may exist against some of the shippers which do not exist against the others, such as estoppel, set-off, &c, so that no representative action can settle the rights of the individual members of the class...
>
> "But the writs even as proposed to be amended fail to comply with Lord Macnaghten's interpretation of the rule in another and most essential particular. The relief sought is damages. Damages are personal only. To my mind no representative action can lie where the sole relief sought is damages, because they have to be proved separately in the case of each plaintiff, and therefore the possibility of representation ceases. It is true that in *Bedford (Duke) v. Ellis* [supra] there was the claim for damages, but that was only a personal claim by the named plaintiffs, and it was solely on that ground that the action was held to be well framed so far as damages were concerned. The claims here are necessarily claims for damages only, and therefore no representative action can be brought. To hold that a representative action can be brought in a case where the causes are mere independent actions for damages arising out of one and the same set of circumstances would be to confound r. 1 with r. 9, and, as I have said, the language of these two rules shews that they are intended to have wholly different applications."

[17] Rule 1 referred to by Fletcher Moulton L.J. was comparable to Alberta R. 36, and R. 9 is, as I have said, in substance the same as Alberta R. 42. This case has been followed to bar representative actions for damages in a number of other cases: *A. E. Osier & Co. v. Solomon*, supra; *Preston v, Hilton* (1920), 48 O.L.R. 172 at 179, 55 D.L.R. 647; *Turtle v. Toronto* (1924), 56 O.L.R. 252. The authorities have been analyzed and reviewed

in *Walker v. Billingsley,* 5 W.W.R. (N.S.) 363, [1952] 4 D.L.R. 490 (B.C.), and more recently in *Shaw v. Vancouver Real Estate Bd.,* [1972] 5 W.W.R. 726, 29 D.L.R. (3d) 774, affirmed [1973] 4 W.W.R. 391, 36 D.L.R. (3d) 250 (B.C.C.A.).

[18] More recent Canadian decisions have affirmed that the existence of a claim for damages does not necessarily bar a representative action. To return to the language of the rule, the test must be whether there is, among the persons sought to be represented, a common interest.

[19] In *Farnham v. Fingold,* [1973] 2 O.R. 132, 33 D.L.R. (3d) 156 (C.A.), Jessup J.A. stated that the *Markt* case cannot be taken as authority that all representative actions for damages are barred. In that case a representative action for damages was commenced on behalf of minority shareholders of a corporation claiming damages from a controlling group on the ground that they had in the sale of their shares accepted a benefit not available to all shareholders. The damages sought were for the class as a whole, being the gross amount of premium over market price received by the controlling shareholders with the prayer that it be distributed pro-rata. A chambers motion to strike out the statement of claim had been dismissed by Morand J. Although the order of Morand J. was varied on appeal, Jessup J.A. said at p. 136:

> "Rule 75 should be applied to particular cases to produce an expeditious but just result. Thus, where the members of a class have damages that must be separately assessed, it would be unjust to permit them to be claimed in a class action because the defendant would be deprived of individual discoveries, and, in the event of success, would have recourse for costs only against the named plaintiff although his costs were increased by multiple separate claims."

[20] This statement was adopted in *Naken v. General Motors of Can. Ltd.* (1975), 11 O.R. (2d) 389, 66 D.L.R. (3d) 205, where damages were sought for a class of persons each of whom owned a given model of automobile. Again, however, the damages sought were the same for each member of the class, being the alleged reduction in sale value of any car in the model group as compared to similar models of other makes of cars.

[21] In *Northdown Drywall & Construction Ltd. v. Austin Co. Ltd.* (1975), 6 O.R. (2d) 223, 52 D.L.R. (3d) 351, affirmed in part 8 O.R. (2d) 691, 59 D.L.R. (3d) 55, a union official sued on behalf of all members of a union local, alleging that the defendant had refused to let a unionized employer complete a contract with it so that the union members lost the benefit of employment on a particular construction project. Galligan J. refused to strike out the statement of claim on a chambers motion. In Divisional Court it was held that a class action is not an appropriate vehicle in which to claim lost wages, since the sum claimed is

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an accumulation of claims for personal relief and not a claim for the benefit of the class. The action was allowed to proceed insofar as it related to check-offs for ordinary union purposes and for pension, welfare and supplemental unemployment benefits.

[22] In my opinion even with the expanded role of the representative action illustrated by the recent Canadian cases, R. 42 does not authorize a representative action in the circumstances of this case. The damages sought are an accumulation of individual claims rather than damages payable to a class in general. An examination of the two paragraphs of the statement of claim quoted above shows that the court is being invited to consider the damages of each entity and person in the class for separate assessment.

[23] It may be doubted, moreover, whether the plaintiff, his two partners and their firm as a whole constitute a group of "numerous persons". Nothing in the rule indicates that the word "numerous" is to be taken in any sense other than its usual meaning as describing a group consisting of many individuals. The purpose of the rule is to avoid the inconvenience of having many parties to the action. In fact, naming each of the members of the firm as plaintiffs would in this case be a simpler procedure than the representative action which was commenced.

[24] Those portions of paras. 1 and 11 which relate to the representative action will therefore be struck out. The defendants will be entitled to costs in any event of the cause.

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Tab 15

CONSOLIDATION

CODIFICATION

Federal Courts Rules

Règles des Cours fédérales

SOR/98-106

DORS/98-106

Current to February 15, 2018

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Estates and trusts

112 (1) A proceeding may be brought by or against the trustees, executors or administrators of an estate or trust without joining the beneficiaries of the estate or trust.

Order binding on beneficiaries

(2) Unless the Court orders otherwise, beneficiaries of an estate or trust are bound by an order against the estate or trust.

Where deceased has no representative

113 (1) Where a party to a proceeding is deceased and the estate of the deceased is not represented, the Court may appoint a person to represent the estate of the deceased or order that the proceeding continue without representation of the estate.

Notice

(2) Before making an order under subsection (1), the Court may require that notice be given to all persons who have an interest in the estate of the deceased.

Representative proceedings

114 (1) Despite rule 302, a proceeding, other than a proceeding referred to in section 27 or 28 of the Act, may be brought by or against a person acting as a representative on behalf of one or more other persons on the condition that

(a) the issues asserted by or against the representative and the represented persons

(i) are common issues of law and fact and there are no issues affecting only some of those persons, or

(ii) relate to a collective interest shared by those persons;

(b) the representative is authorized to act on behalf of the represented persons;

(c) the representative can fairly and adequately represent the interests of the represented persons; and

(d) the use of a representative proceeding is the just, most efficient and least costly manner of proceeding.

Powers of the Court

(2) At any time, the Court may

Successions et fiducies

112 (1) Une instance peut être introduite par ou contre les fiduciaires, les liquidateurs, les exécuteurs testamentaires ou les administrateurs d'une succession ou d'une fiducie sans qu'il soit nécessaire de faire intervenir les bénéficiaires de la succession ou de la fiducie.

Bénéficiaires liés par le jugement

(2) L'ordonnance rendue contre la succession ou la fiducie lie les bénéficiaires, à moins que la Cour n'en ordonne autrement.

Absence de représentant

113 (1) Dans le cas où une partie à une instance est décédée et où la succession de celle-ci n'a pas de représentant, la Cour peut nommer une personne à titre de représentant de la succession ou ordonner la poursuite de l'instance sans qu'un représentant soit nommé.

Avis préalable

(2) Avant de rendre une ordonnance en vertu du paragraphe (1), la Cour peut exiger qu'un avis soit donné aux personnes qui ont un intérêt dans la succession de la personne décédée.

Instances par représentation

114 (1) Malgré la règle 302, une instance — autre qu'une instance visée aux articles 27 ou 28 de la Loi — peut être introduite par ou contre une personne agissant à titre de représentant d'une ou plusieurs autres personnes, si les conditions suivantes sont réunies :

a) les points de droit et de fait soulevés, selon le cas :

(i) sont communs au représentant et aux personnes représentées, sans viser de façon particulière seulement certaines de celles-ci,

(ii) visent l'intérêt collectif de ces personnes;

b) le représentant est autorisé à agir au nom des personnes représentées;

c) il peut représenter leurs intérêts de façon équitable et adéquate;

d) l'instance par représentation constitue la façon juste de procéder, la plus efficace et la moins onéreuse.

Pouvoirs de la Cour

(2) La Cour peut, à tout moment :

(a) determine whether the conditions set out in subsection (1) are being satisfied;

(b) require that notice be given, in a form and manner directed by it, to the represented persons;

(c) impose any conditions on the settlement process of a representative proceeding that the Court considers appropriate; and

(d) provide for the replacement of the representative if that person is unable to represent the interests of the represented persons fairly and adequately.

a) vérifier si les conditions énoncées au paragraphe (1) sont réunies;

b) exiger qu'un avis soit communiqué aux personnes représentées selon les modalités qu'elle prescrit;

c) imposer, pour le processus de règlement de l'instance par représentation, toute modalité qu'elle estime indiquée;

d) pourvoir au remplacement du représentant si celui-ci ne peut représenter les intérêts des personnes visées de façon équitable et adéquate.

Orders in representative proceeding

(3) An order in a representative proceeding is binding on the represented persons unless otherwise ordered by the Court.

Effet d'une ordonnance

(3) Sauf ordonnance contraire de la Cour, l'ordonnance rendue dans le cadre d'une instance par représentation lie toutes les personnes représentées.

Approval of discontinuance or settlement

(4) The discontinuance or settlement of a representative proceeding is not effective unless it is approved by the Court.

Désistement et règlement

(4) Le désistement ou le règlement de l'instance par représentation ne prend effet que s'il est approuvé par la Cour.

Style of cause

(5) Every document in a proceeding commenced under subsection (1) shall be prefaced by the heading "Representative Proceeding".

SOR/2007-301, s. 4.

Intitulé

(5) Dans une instance par représentation, la mention « Instance par représentation » est placée en tête des actes de procédure.

DORS/2007-301, art. 4.

Appointment of representatives

115 (1) The Court may appoint one or more persons to represent

(a) unborn or unascertained persons who may have a present, future, contingent or other interest in a proceeding; or

(b) a person under a legal disability against or by whom a proceeding is brought.

Nomination de représentants

115 (1) La Cour peut désigner une ou plusieurs personnes pour représenter :

a) une personne pas encore née ou non identifiée qui peut avoir un intérêt actuel, futur, éventuel ou autre dans une instance;

b) une personne n'ayant pas la capacité d'ester en justice contre laquelle une instance est introduite ou qui en prend l'initiative.

Who may be appointed

(2) The Court may appoint as a representative under subsection (1)

(a) a person who has already been appointed as such a representative under the laws of a province; or

(b) a person eligible to act as a representative in the jurisdiction in which the person to be represented is domiciled.

Choix du représentant

(2) Aux fins de la désignation visée au paragraphe (1), la Cour peut :

a) nommer la personne qui a déjà été nommée dans une province à titre de représentant légal;

b) nommer une personne apte à agir à titre de représentant dans le territoire où est domiciliée la personne qui doit être représentée.

Tab 16

No. 32793

December 4, 2008

Coram: Binnie, Fish and Abella JJ.

BETWEEN:

Sentinel Hill Alliance Atlantis Equicap Limited Partnership, Sentinel Hill Productions IV Corporation and Sentinel Hill Ventures Corporation

Applicants

- and -

Leader Media Productions Ltd.

Respondent

JUDGMENT

The application for leave to appeal from the judgment of the Court of Appeal for Ontario, Number C46267, 2008 ONCA 463, dated June 11, 2008, is dismissed with costs.

Le 4 décembre 2008

Coram : Les juges Binnie, Fish et Abella

ENTRE :

Sentinel Hill Alliance Atlantis Equicap Limited Partnership, Sentinel Hill Productions IV Corporation et Sentinel Hill Ventures Corporation

Demanderesses

- et -

Leader Media Productions Ltd.

Intimée

JUGEMENT

La demande d'autorisation d'appel de l'arrêt de la Cour d'appel de l'Ontario, numéro C46267, 2008 ONCA 463, daté du 11 juin 2008, est rejetée avec dépens.

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

2008 CanLII 63488 (SCC)

Leader Media Productions Ltd. v. Sentinel Hill Alliance
Atlantis Equicap Limited Partnership et al.

[Indexed as: Leader Media Productions Ltd. v. Sentinel Hill Alliance Atlantis Equicap Limited Partnership]

90 O.R. (3d) 561

2008 ONCA 463 (CanLII)

Court of Appeal for Ontario,
Rosenberg, MacFarland and Watt JJ.A.
June 11, 2008

Civil procedure -- Appeals -- Defendants permitted to introduce fresh evidence on appeal showing that trial judge fell asleep briefly at times during trial -- Fresh evidence not assisting defendants -- Defendants not raising issue of trial judge's inattentiveness with him at trial -- Defendants making calculated decision to await outcome of trial -- Defendants not permitted to raise trial judge's attention for first time on appeal.

Civil procedure -- Trial -- Trial judge's failure to give counsel opportunity to make oral submissions before releasing judgment not resulting in any substantial wrong or miscarriage of justice where counsel had opportunity to submit full written submissions.

The defendants appealed a judgment against them, arguing that the trial judge did not give sufficient reasons and did not hear oral argument before releasing his decision. The defendants also sought to introduce fresh evidence showing that the trial judge fell asleep at times during the trial.

Held, the appeal should be dismissed.

The trial judge's reasons for judgment contained the necessary findings of fact and adequately addressed the issues and defences raised by the defendants.

On the close of evidence at trial, it was agreed among counsel and the trial judge that the parties would file written argument and thereafter would attend before the trial judge for oral argument. The parties filed written submissions, but the trial judge released his judgment before they had an opportunity to make oral submissions. While it might have been preferable had the trial judge followed the original plan, on the facts of this case his failure to do so did not result in any substantial wrong or miscarriage of justice. Oral argument in this case was intended to address any questions of the trial judge. It was not primarily to give the parties an opportunity to make submissions, as they had already been given that opportunity through their written submissions.

The fresh evidence was admitted because it related to the validity of the trial process. However, the fresh evidence did not assist the defendants. At trial, the defendants deliberately did not raise with the trial judge their concern that he might have been sleeping. Even after the reasons for judgment were released and the defendants brought a motion for a mistrial, they did not base it on the drowsiness of the trial judge, or even raise the issue. Counsel was obliged to bring the trial judge's inattention home to him at the time. Not having done so, and having made a calculated decision to wait and see what happened, they could not now raise that inattention for the first time as a ground of appeal on either a substantive or contextual basis.

Cases referred to

R. v. Chan, [2007] A.J. No. 1522, 2008 ABCA 88; Vakauta v. Kelly (1989), 167 C.L.R. 568, 9 M.V.R. 193 (H.C. (Australia)), consd [page562]

Other cases referred to

Felker v. Felker, [1946] O.W.N. 368 (C.A.); FL Receivables Trust 2002-A (Administrator of) v. Cobrand Foods Ltd. (2007),

2008 ONCA 463 (CanLII)

85 O.R. (3d) 561 (C.A.); Lawson v. Lawson (2006), 81 O.R. (3d) 321, [2006] O.J. No. 3179, 214 O.A.C. 94, 29 R.F.L. (6th) 8, 150 A.C.W.S. (3d) 422 (C.A.); R. v. Rajaeefard (1996), 27 O.R. (3d) 323, [1996] O.J. No. 108, 87 O.A.C. 356, 104 C.C.C. (3d) 225, 46 C.R. (4th) 111, 29 W.C.B. (2d) 491 (C.A.); R. v. Widdifield (1995), 25 O.R. (3d) 161, [1995] O.J. No. 2383, 84 O.A.C. 241, 100 C.C.C. (3d) 225, 43 C.R. (4th) 26, 28 W.C.B. (2d) 72 (C.A.); Red Deer College v. Michaels, [1976] 2 S.C.R. 324, [1975] S.C.J. No. 81, 57 D.L.R. (3d) 386, 5 N.R. 99, [1975] 5 W.W.R. 575, 75 CLLC 579; Stathooles v. Mount Isa Mines Limited, [1997] 2 Qd. R. 106 (C.A.)

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APPEAL by the defendants from a judgment of Somers J., [2006] O.J. No. 4238, 152 A.C.W.S. (3d) 77 (S.C.J.) awarding the plaintiff damages.

Earl A. Cherniak, Q.C., for appellants.

Chris Paliare, for respondent.

The judgment of the court was delivered by

[1] MACFARLAND J.A.: -- This is an appeal from the judgment of Somers J. wherein he awarded the respondent damages in the sum of $1,065,571.40 together with prejudgment interest from December 31, 2001 to the date of judgment.

Overview

[2] The appellants are in the business of complex film financing and the respondent is a small Canadian movie studio. In April 2001, the appellants and the respondent agreed to complete certain transactions involving two movies called "Say Nothing" and "Phase 4".

[3] When the federal government changed its incentive scheme, the appellants ran into difficulty with their financing. They did not pay the respondent and took the position that the

contract was conditional only and that the conditions had not been fulfilled. The respondent disagreed and sued for the full amount.

[4] The trial judge found for the respondent on the basis that there simply was no such condition.

[5] The appellants appeal his decision to this court arguing that the trial judge did not give sufficient reasons and did not hear oral argument before releasing his decision. The appellants also move to submit fresh evidence showing that the trial judge was unable to follow much of the trial evidence.
[page563]
The Facts

[6] At the heart of this contractual dispute is a program of tax incentives instituted by the Canadian federal government to those engaged in the film industry in Canada and those who invest in that business.

[7] The corporate appellants are in the business of organizing, promoting and managing very complicated film financing arrangements or syndications. In the spring of 2001, the respondent became aware that some of the federal government's tax incentives could apply to its work and it consulted with the appellants.

[8] The film financing arrangement proposed by the appellants was as follows. Funds for the syndicates were raised from private investors, who bought units from the appellants in a "Master Limited Partnership" ("MLP"). The chief attraction from an investor's point of view was that almost the entire cost of the investment could be written off against current income.

[9] The MLP would own units in a number of "Production Limited Partnerships" ("PLP"). Each PLP was assigned to a specific film and would be responsible for incurring all of the film's expenses that fell into the category of "Non-Canadian Labour Expenditure" ("NCLE"). NCLE, in general terms, encompasses all expenses that do not relate to hiring Canadian

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labour.

[10] For the syndication to function, the appellants needed to have films willing to participate. Participating studios were paid a fee which was calculated as an agreed-upon percentage of the total NCLE incurred on the movie.

[11] On April 9, 2001, the appellants and the respondent signed an agreement in the form of a letter. This agreement contemplated film financing transactions for two movies wherein the respondent would receive a fee of six per cent of the NCLE on each movie.

[12] In the fall of 2001, the federal government announced changes to the tax incentive scheme and as a consequence the appellants had difficulty selling partnership units to investors. They could not raise enough money to close all the transactions they had hoped to on the basis of the six per cent fee. They contacted the respondent and proposed reducing the fee to 3.5 per cent. The respondent refused and commenced these proceedings for the full six per cent it contracted to receive.

[13] At trial, the appellants took the position that it was a condition of their agreement with the respondent that if the appellants were unable to raise sufficient money from the sale of partnership units to cover the six per cent fee owing to the [page564] respondent, the respondent would bear that loss. The respondent argued there was no such condition.

[14] The trial judge found that the contract did not contain this condition and granted judgment in favour of the respondent.

Analysis

[15] The appellants in their factum raise three grounds of appeal. Those three grounds are:

1. The insufficiency of the trial judge's reasons for judgment;
2. The failure by the trial judge to hear oral argument before releasing his reasons for judgment; and
3. The inability of the trial judge to follow much of the evidence led at trial.

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[16] The appellants' third ground of appeal is based on fresh evidence which is the subject of a motion before this court. In oral argument, counsel for the appellants conceded that this third "ground" is not really a separate, stand-alone ground of appeal, but rather is a factor that provides context for the other two grounds.

1. Sufficiency of reasons

[17] A trial judge is required to give reasons for his or her decision. As this court noted in Lawson v. Lawson (2006), 81 O.R. (3d) 321, [2006] O.J. No. 3179 (C.A.), at para. 9:

> It is the duty of a judge to give reasons for decision; it is an inherent aspect of the discharge of a judge's responsibilities. . . . The appellant is entitled to reasons that are sufficient to enable him to know why issues were decided against him. The reasons need to be adequate also so that he can bring a meaningful appeal and this court is able to properly review the Order. The reasons do not need to be perfect. Nor do they necessarily need to be lengthy. But, they must be sufficient to enable the parties, the general public and this court, sitting in review, to know whether the applicable legal principles and evidence were properly considered.

[18] In this case, the appellants complain that the trial judge's reasons do not contain the necessary findings of fact, nor do they address the issues and defences raised by the appellants. Specifically, the appellants argue that the trial judge did not address the following two arguments they made at trial:

1. The April 9, 2001 letter agreement was not a binding contract for the payment of money but was merely an agreement to complete certain other transactions. Further, the [page565] six per cent fee would only be payable if and when the transactions closed and the obligation to complete the transactions was conditional and dependent on:
   (i) the sale of sufficient units of the MLP to the public; and
   (ii) the respondent completing certain preliminary steps,

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including setting up corporations, handling those corporations' finances in a particular way, and providing related information to the appellants.

In the alternative, even if the contract did impose an unconditional obligation to pay the six per cent fee, the respondent knew that the appellants did not intend to undertake such an obligation, and the law will not permit one party to enforce a contractual term that it knows the other party had not agreed to.

2. In the further alternative, the respondent failed to mitigate its losses when it rejected the appellants' offer to pay a reduced commission of 3.5 per cent with the respondent reserving all its right to sue for the balance of 2.5 per cent.

[19] In my view, the trial judge adequately dealt with these issues in his reasons.

(i) The letter agreement was a binding contract for the payment of money and was not conditional on the sale of sufficient partnership units

[20] In his reasons, the trial judge clearly held that the letter agreement was a binding contract for the payment of money and that it was not conditional on the sale of sufficient partnership units. His explanation for these holdings is found in the following paragraphs of his reasons [at paras. 8, 11, 13, 15, 20]:

Clearly the April 9, 2001 agreement was intended by Sentinel Hill to be an operative document setting out the rules and guidelines within which it and its contracting parties should operate pending production of a formal written contract.

. . . . .

What the contract called for was that Sentinel Hill and Leader Media Productions Ltd. agreed "to complete the proposed transactions (the "Transactions") in respect of all theatrical motion picture and/or television productions principal photography for which will occur primarily in Canada during 2001 . . . materially on the basis described in

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the advance Income Tax Ruling (the "Ruling") dated December 13, 2000." [page566]

. . . . .

If one works one's way through the intricate obstacle course erected by the tax department, one can see that there are several "agreements" required in order to meet the various requirements of the department raised at certain stages. They are, however, in my view, peripheral to the main agreement which was to "complete the proposed transactions".

. . . . .

The money that the master limited partnership paid for the production limited partnership units would be used for a number of purposes, including payment of the co-ordination fee. It is likely that most of the production people on their side of this process understood that the money that was to pay their co-ordination fee would come from these payments. Certainly that was Mr. Liconti's evidence. It was the position of the defendant that the payment of their fee was contingent upon there being a successful sale at the other end, and that if there was no such successful sale, the loss would be borne by them. I see nothing in the agreement which makes this a condition to the producers. Certainly they understood that the payment was to be forthcoming out of the proceeds of the sale, but I see nothing that suggests that they were in agreement that they were to bear any losses that might be incurred if the sales were unsuccessful.

. . . . .

In my view, it was not a condition of the agreement between the plaintiff and any of the defendants that the plaintiff would be required to bear any losses caused by a reversal in the market.

[21] It is clear from these paragraphs that the trial judge considered the appellants' arguments and rejected them.

[22] Also, in my view, the trial judge adequately addressed the appellants' alternative argument that the law will not permit one party to enforce a contractual term that it knows

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the other party had not agreed to. In this respect, the appellants argued that the respondent knew and understood that the money to pay the six per cent fee was to come from the proceeds of the sale of partnership units. They place much emphasis on the following piece of testimony from Mr. Carlo Liconti, the principal witness for the respondent:

> Q. So you understood that the payment of the six percent fee was dependent upon investors purchasing these partnership units, correct?
>
> A. That is correct.

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[23] The appellants say this is clear evidence that the respondent knew and understood that the appellants' obligation to pay the six per cent fee was conditional on the sale of sufficient partnership units. The trial judge did not agree. Rather, he concluded that while the respondent understood the money to pay the fee would come from the sale of partnership units, there was nothing in the agreement to the effect that the respondent would bear the [page567] loss if sales were unsuccessful. This was a finding the trial judge was entitled to make on the record and is a complete answer to this argument.

(ii) The letter agreement was not conditional on the respondent completing certain preliminary steps

[24] The appellants also argued that their obligation to pay the six per cent fee was conditional on the respondent completing certain critical preliminary steps, including setting up corporations, handling the corporations' finances in a particular manner, and providing related information to the appellants.

[25] The evidence at trial was that all of the documents which the appellants required to close were in the appellants' hands by about December 10, 2001. Although the appellants argue that the respondent had failed to provide the necessary "cheque stock", their own witness admitted this was not required for closing. Further, in terms of completing certain preliminary steps, the respondent was simply following what was done when it had successfully closed an earlier production with the appellants called "The Red Door". The trial judge found that

proper documentation had been exchanged at that closing.

[26] While the trial judge did not make a specific finding that the necessary documentation had been provided, the uncontradicted evidentiary record showed that it had been.

(iii) The issue of mitigation was not triggered on these facts

[27] The appellants argue that the respondent failed to mitigate its damages by accepting their offer of a 3.5 per cent fee with a reservation of its right to sue for the balance.

[28] While the trial judge did fail to make any specific finding in relation to the appellants' mitigation argument, there was no merit to this argument and it is clear that the trial judge implicitly rejected it when he granted judgment in favour of the respondent for the full amount claimed.

[29] In my view, the principle of mitigation is not triggered in this case. On these facts, the respondent did not have an opportunity to reduce the appellants' liability. Regardless of whether the respondent accepted the appellants' offer and sued for the balance, or simply sued for the entire six per cent, the amount payable to the respondent remained the same. I accept the respondent's following submission made in its factum:

> The appellants argued at trial that, because the respondent refused to accept less than it was entitled to under the Contract, the respondent forfeited its entitlement to the amount offered. However, this is not what is [page568] required by the principle of mitigation. The controlling authority is Red Deer College v. Michaels, [See Note 1 below] in which the Supreme Court of Canada held that: "the defendant cannot be called upon to pay for avoidable losses which would result in an increase in the quantum of damages payable to the plaintiff" (emphasis added).

(Emphasis in original. Citation added)

[30] I would dismiss this ground of appeal.

2. Denial of opportunity to make oral argument

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[31] On the close of evidence it was agreed among counsel and the trial judge that the parties would file written argument and thereafter would attend before the trial judge for oral argument. The following exchange took place in the final minutes of the trial:

THE COURT: Well, what do you want to do about argument?

MR. PALIARE: Well, subject to what you say, Your Honour, what we propose is this that, picking up on your suggestion that we file with you written submissions, and if we could do that fairly quickly, and we would have between us an agreement as to the page length as well so that you don't end up with an epic from both of us.

THE COURT: All right.

MR. PALIARE: And that what we had hoped was, if this is okay with you, is to find a half day somewhere, even if it's in the early fall, where we can argue. Here is our thought, but I leave it to you, that we would get our written submissions in by a week Monday. It's a long weekend.

MS. ROSENTHAL: Tuesday

MR. PALIARE: So it would be the Tuesday then, that's July the 4th.

THE COURT: All right.

MR. PALIARE: My friend would have a week to respond which would be July the 11th. We would be able to get our reply in a week later, July the 18th and each of us would provide you with a maximum of 30 pages of written submissions and our reply would be eight pages, to a maximum of eight.

THE COURT: All right.

MR. PALIARE: But does that make sense?

THE COURT: Oh, yes.

MR. PALIARE: And that we would have that completed then by July the 18th and if we could then find -- we just thought it would [page569] be useful to have a half day somewhere in case you had some questions or -- I don't know when you're sitting, but we wouldn't want you to do it at a time you're not sitting.

THE COURT: I'll have to think about it. Are you both going

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away in July or either of you?

MR. PALIARE: I won't be away after July 18?

THE COURT: You will or won't.

MR. PALIARE: Will not. So I'm available in July. I'm away the week of August the 21st.

THE COURT: I'm going to be away all August.

MR. PALIARE: Okay.

[32] On July 14, 2006, the trial judge's secretary telephoned counsel and set the date of October 10, 2006 for oral argument. On October 6, 2006, four days before oral argument was scheduled, counsel were informed by the court office that the trial judge was ill in hospital and would be unable to hear oral argument as scheduled. It was agreed the matter would have to be adjourned to spring. On October 20, 2006, the trial judge issued his reasons for judgment without the parties having presented oral argument.

[33] The appellants argue that the failure to give counsel an opportunity to make argument is a denial of natural justice and entitles them to a new trial. The appellants rely on this court's decision in Felker v. Felker, [1946] O.W.N. 368 (C.A.), at p. 369. The Ontario Weekly Notes summarized the court's decision in Felker as follows:

> At the conclusion of the argument, the Court delivered judgment orally, allowing the appeal and directing a new trial, on the sole ground that the trial judge had pronounced judgment before according to counsel the right to present argument, and that the defendant had thus been deprived of her substantive right to have her case fully presented.

[34] In the present case, the appellants had the opportunity to make written submissions but argue those were subject to a page limit and submitted on the understanding that there would be an opportunity for oral argument.

[35] However, on the facts of this case, I am not convinced that the absence of oral argument has resulted in a substantial wrong or miscarriage of justice.

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[36] The cases relied on by the appellant all involve factual situations where the right to present argument -- in either oral or written format -- was denied entirely. However, this is not a situation where the appellants were denied entirely their right to present argument. In this case, the appellants were afforded the [page570] opportunity to file 30 pages of written argument. Also, the affidavit material filed on the mistrial application following receipt of the reasons for judgment does not disclose anything the appellants would have done differently or in addition had they been afforded the opportunity for oral argument.

[37] In my view, while it might have been preferable had the trial judge followed the original plan, on the particular facts of this case his failure to do so has not resulted in any substantial wrong or miscarriage of justice. The interchange between the trial judge and counsel indicates that in this case the purpose of oral argument was to address any questions of the trial judge. It was not primarily to give the parties an opportunity to make submissions as they had already been given that opportunity through their written submissions.

[38] As this court recently noted in FL Receivables Trust 2002-A (Administrator of) v. Cobrand Foods Ltd. (2007), 85 O.R. (3d) 561 (C.A.), at paras. 17 and 22:

> Not every error by a trial judge entitles an aggrieved party to a new trial. Section 134(6) of the Courts of Justice Act stipulates that this court should order a new trial only where "some substantial wrong or miscarriage of justice has occurred". This stringent standard reflects the underlying policy that new trials ordinarily are contrary to the public interest.
>
> . . . . .
>
> Second, and critically important, Robert Laba [the appellant] has not shown that if he had been given an opportunity to make closing argument, the result would have been different.

[39] If given the opportunity to present additional oral

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argument, I am not satisfied the result would have been different. I would dismiss this ground of appeal.

3. Trial judge's inability to follow the evidence (fresh evidence application)

[40] The appellants have moved in this court to admit fresh affidavit evidence showing that the trial judge was unable to follow the evidence because he fell asleep repeatedly during the trial. The fresh evidence consists of five affidavits authored by appellants' trial counsel and others. These affidavits suggest the trial judge fell asleep frequently, but for only very brief periods of time.

[41] During oral argument counsel for the appellants said that the subject matter of the fresh evidence application did not constitute a separate independent ground of appeal. Rather, he said it should be considered contextually in relation to the other two substantive grounds raised. [page571]

[42] The respondent says that the fresh evidence does not meet the R. v. Palmer test. It says this evidence was available at the time of trial and that the appellants decided, as a matter of tactics, not to raise it at trial and preferred instead to "wait and see how things played out".

[43] Despite the respondent's argument, I would admit the fresh evidence because it relates to the validity of the trial process. As the majority of this court said in R. v. Rajaeefard (1996), 27 O.R. (3d) 323, [1996] O.J. No. 108 (C.A.), at p. 325 O.R.: "Where the new evidence sought to be admitted is relevant to the validity of the trial process itself, rather than directed at a finding made at trial, it is admissible."

[44] In R. v. Widdifield (1995), 25 O.R. (3d) 161, [1995] O.J. No. 2383 (C.A.), at p. 169 O.R., this court explained that the criteria ordinarily applied to determine the admissibility of fresh evidence do not apply when the evidence challenges the validity of the trial process:

> The Palmer criteria, do not, however, apply to all situations where fresh evidence is offered on appeal. Those

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criteria reflect the balancing of competing considerations relevant to the interests of justice when fresh evidence is offered to attack a determination made at trial. The same criteria cannot necessarily be applied where, as here, the fresh evidence is offered for a different purpose. The material sought to be admitted here is not directed at a finding made at trial, but instead challenges the very validity of the trial process.

[45] However, even where the fresh evidence is admissible, on the particular facts of this case, in my view, it does not assist the appellants.

[46] At trial, the appellants deliberately did not raise with the trial judge their concern that he might have been sleeping. Instead they made a deliberate tactical decision to in effect -- as respondent's counsel put it -- "hedge their bets". Instead of confronting the trial judge, after discussions among appellants' counsel (including a senior litigator at the firm who remained at the office and was not directly involved in the trial per se), they made a deliberate decision not to raise the issue. As Mr. Bradley Sherman put it in his affidavit, they decided to "wait and see how things played out". Presumably, if the trial result was in their favour they would do nothing; if not, they would have this additional evidence to use as a basis for appeal arguing that they were denied the right to a fair trial.

[47] Even after the reasons for judgment were released, the appellants did not base their motion for a mistrial on the drowsiness of the trial judge nor did they even raise the issue. The mistrial motion was based solely on the fact that the appellants had [page572] been denied the opportunity to make oral argument in addition to written argument. Only in this court, for the first time, is the issue raised that the trial judge was inattentive to the evidence.

[48] There appears to be little case law on point. In fact, the parties have only drawn the court's attention to two similar cases. The first is a case decided by the Australian Queensland Court of Appeal. The second is a recent decision

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from the Alberta Court of Appeal which was only released several weeks after this appeal was argued.

[49] In the Queensland Court of Appeal case, Stathooles v. Mount Isa Mines Limited, [1997] 2 Qd. R. 106 (C.A.), the allegations were that the trial judge had dozed off or slept during part of the evidence. In making its decision, the court stressed the fact that the alleged drowsiness was not raised with the trial judge at any time during the trial, and dismissed the appeal. Macrossan C.J. noted at p. 111 Qd. R.: [See Note 2 below]

> A broad discretion does exist for an appellate court to order a new trial in civil cases where a first trial has been unfair ... In civil, as in criminal cases, the discretion can be exercised when the first trial has resulted in a miscarriage of justice.
>
> . . . . .
>
> The exercise of the discretion to order a new trial on the basis that a miscarriage of justice has occurred may require a wide view to be taken of the circumstances but it is necessary to remember that our adversarial system requires parties to proceedings to accept responsibility for their own actions deliberately and consciously taken. Decisions taken by parties with a full awareness of relevant matters can strongly influence the way in which the discretion in cases of an alleged miscarriage of justice will be exercised.

[50] Macrossan C.J. then went on to quote from a joint judgment of the High Court of Australia in the case of Vakauta v. Kelly (1989), 167 C.L.R. 568, 9 M.V.R. 193 (H.C. (Australia)), at p. 572 C.L.R.:

> [A] party who has legal representation is not entitled to stand by until the contents of the final judgment are known and then, if those contents prove unpalatable, attack the judgment on the ground that, by reason of those earlier comments, there has been a failure to observe the requirement of the appearance of impartial judgment. By standing by, such a party has waived the right subsequently to object. The

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reason why that is so is obvious. In such a case, if clear objection had been taken to the comments at the time when they were made or the judge had then been asked to refrain from further hearing the matter, the judge may have been able to correct the wrong impression of bias which had been given or alternatively may have refrained [page573] from further hearing. It would be unfair and wrong if failure to object until the contents of the final judgment were known were to give the party in default the advantage of an effective choice between acceptance and rejection of the judgment and to subject the other party to a situation in which it was likely that the judgment would be allowed to stand only if it proved to be unfavourable to him or her.

[51] The appellant's argument in Stathooles was that the determination of the case turned on the credibility of witnesses and that the judge had been especially inattentive during the cross-examination of Stathooles, yet made a finding adverse to him. It was argued that the conclusion reached may have been different had there been no failure on the part of the trial judge to observe and listen to that witness throughout his testimony. In reaching a conclusion, Macrossan C.J. noted, at pp. 112-13 Qd. R.:

The lack of reaction here by counsel fully aware of the situation is of importance from a different point of view. It cannot be accepted that there is an entitlement to do nothing at the time, hold the point in reserve until the decision is given and then, since it has proved to be adverse to the appellants, seek to set it aside.

. . . . .

In the present case, if what is alleged to have occurred is sufficient to constitute a significant defect in the proceedings, it should have been drawn to the attention of the trial judge at the time it occurred. To experienced counsel there should have been no difficulty other than perhaps some slight embarrassment in being required to draw the judge's attention to the concern that was felt that he may be missing an important feature of the evidence. Experienced professional advocates may be called on to

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display conduct which will need to be more robust than that in their day to day practice in the courts. There should have been no fear that what needed to be done could not have been handled with the customary courtesy that should, and usually does, prevail between judge and counsel in the hearing of cases.

[52] The second case, R. v. Chan, [2007] A.J. No. 1522, 2008 ABCA 88, was only released by the Alberta Court of Appeal after this appeal was heard. In this case, during the sentencing hearing, court staff noticed that the trial judge appeared to be sleeping during the appellant's testimony. The judge was awakened and adjourned the proceedings. The appellant then applied for a mistrial.

[53] During argument on the mistrial, the trial judge advised that he had fallen asleep because of a medical condition. The appellant then filed an affidavit alleging that the trial judge's posture while sleeping was the same as it had been during critical points of the trial. The trial judge refused to grant a mistrial, stating that lawyers are obligated to raise inattentiveness in a [page574] judge when they notice it. He directed another judge to deal with sentencing. The appellant appealed.

[54] Although the Court of Appeal ultimately allowed the appeal on other grounds, it rejected the appellant's inattentiveness argument for the same reasons discussed above. Speaking for the court, Ritter J.A. stated [at paras. 19-20]:

> We conclude that Nicholas has failed to demonstrate that he suffered prejudice at the trial stage of these proceedings. The trial judge fell asleep during the testimony at the sentencing stage of the trial, several months after all evidence relating to Nicholas' guilt had been adduced. An accused person must, at a minimum, show a real danger of prejudice before judicial inattentiveness, that is sleeping, will call for the results of his trial to be set aside. (for authority, see Cesan v. Director of Public Prosecutions (CTH), [2007] NSWCCA 273 at paras. 190ff) In this case, Nicholas' affidavit accomplishes, at most, speculation that

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the trial judge's similar posture during the trial must mean he was asleep.

Nicholas' affidavit does not identify exactly when he noticed this posture, so it is impossible to determine whether any crucial issues were being dealt with at the time. Moreover, it is incumbent upon counsel to immediately draw a trial judge's inattentiveness to his attention, so as to permit replacement testimony or other corrective procedures during the course of the trial. It is not enough, nor is it appropriate, to note the inattentive episode and then hold it on reserve in the event the result at trial was less than what is hoped for. We do not suggest that is what occurred here, but the effect is the same, whether the withholding of the concern was advertent or inadvertent.

[55] In my view, the same reasoning must apply here. While appellants' trial counsel was not experienced (this was her first trial), the record discloses that she did consult with senior litigation counsel in her firm about the judge's inattention. Together they made the decision to do nothing about it at the time but to, as respondent's counsel put it, "roll the dice".

[56] Counsel was obliged to bring the trial judge's inattention home to him at the time. Not having done so, and having decided to wait and see what happened, they cannot now raise that inattention for the first time as a ground of appeal on either a substantive or contextual basis. I would dismiss this ground of appeal.

[57] In the result, I would dismiss the appeal.

[58] Costs to the respondent are fixed in the sum of $35,000 inclusive of disbursements and GST.

Appeal dismissed.

Notes

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Note 1: [1976] 2 S.C.R. 324, [1975] S.C.J. No. 81.

Note 2: Pincus J.A. and White J. both concurred witht he reasons of Macrossan C.J., and both wrote concurring reasons.

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Tab 17

Federal Court of Appeal Cour d'appel fédérale

Date: 20170428

Docket: A-473-15

Citation: 2017 FCA 88

2017 FCA 88 (CanLII)

CORAM: PELLETIER J.A.
STRATAS J.A.
WEBB J.A.

BETWEEN:

HIGH-CREST ENTERPRISES LIMITED

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Halifax, Nova Scotia, on November 9, 2016.

Judgment delivered at Ottawa, Ontario, on April 28, 2017.

REASONS FOR JUDGMENT BY: WEBB J.A.
CONCURRED IN BY: PELLETIER J.A.
DISSENTING REASONS BY: STRATAS J.A.

should consider offering brief reasons out of fairness and to facilitate later appellate review of the matter: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869.

[101] Following reassignment, the new judge is in charge of the case. It is for that judge, not the Chief Justice, to receive submissions from the parties concerning how the case should proceed, for example whether the case should be reheard or whether existing material (including transcripts) should be used in whole or in part: *D'Amico v. Wiemken*, 2010 ABQB 785, 47 Alta. L.R. (5th) 414; *Parmar v. Bayley,* 2001 BCSC 1394, 19 C.P.C. (5th) 366.

[102] A dissatisfied party must object to a procedural flaw as soon as possible and must maintain that objection, otherwise the party will be taken to have waived the concern: *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, [2010] 2 F.C.R. 488 at para. 48; *Johnson v. Canada (Attorney General)*, 2011 FCA 76, 414 N.R. 321 at para. 25; *Telus Communications Inc. v. Telecommunications Workers Union*, 2005 FCA 262, 257 D.L.R. (4th) 19 at paras. 43-49; *Leader Media Productions Ltd. v. Sentinel Hill Alliance Atlantis Equicap Limited Partnership*, 2008 ONCA 463, 90 O.R. (3d) 561.

[103] This means that to the extent the Chief Justice confers with the parties, as happened here, a party should register any procedural fairness objection at that time. This gives the Chief Justice a chance to remedy any procedural deficiency. A dissatisfied party can also register the procedural fairness objection before the new judge. If the dissatisfied party does none of these things and registers the objection only in the appellate court, the dissatisfied party will likely be taken to have waived the procedural deficiency.

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D. Application of these principles to this case

[104] In this Court, the appellant raises the issue of jurisdiction, the first of the three issues. It submits that the Chief Justice does not have the power to reassign the case to a new judge: appellant's memorandum of fact and law, paras. 80-82. The appellant did not raise this below. But that does not matter because this concerns subject-matter jurisdiction: see para. 84, above. It can raise this here.

[105] However, I reject the appellant's submission. For the reasons set out above, the Chief Justice did have the power to reassign.

[106] I turn now to the second question, the Chief Justice's exercise of discretion to reassign. The appellant does not challenge this: see para. 94 above. Thus, we need not consider this. I would simply note, without commenting one way or the other, that the Chief Justice appeared to be concerned about the time that had elapsed and, perhaps mindful of the mission of his Court, expressed regret to the parties that the Court had "failed" them.

[107] In this Court, the appellant raises the third question, procedural fairness. It says that the Chief Justice acted in a procedurally unfair manner: appellant's memorandum of fact and law, paras. 33(c) and 35.

[108] The issue of the content of procedural fairness in this sort of situation is one of first impression. However, I agree with the appellant that there was procedural unfairness in this case.

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[109] The Chief Justice was not forced to reassign due to the original judge's death. And there is no evidence of incapacity. There is only delay. This was a situation where the Chief Justice had a discretion to exercise. The exercise of discretion mattered to the parties: they had already argued the case before the original judge and justifiably expected it would be decided by that judge. They should have been asked to make submissions.

[110] But the Chief Justice did not ask for submissions. Instead, he summoned the parties to a conference call and simply announced his decision to reassign. The only hint as to a reason was the Chief Justice's comment that the case had not been "resolved in a timely, efficient and effective fashion." Had the parties been invited to make submissions, they might have wanted the original judge continuing notwithstanding the delay. That would have been something significant for the Chief Justice to consider.

[111] There was further unfairness. The Chief Justice announced two options to the parties concerning how the new judge would go about deciding the case. He did not invite submissions. And this was a matter for the new judge, not the Chief Justice, to consider. Later, the respondent wrote, wanting to explore another option. In response, the Chief Justice held a second conference call. He shut the respondent down without inviting any submissions.

[112] Despite the procedural unfairness, the appellant does not succeed. The appellant did not object in a timely way. In fact, after the Chief Justice announced that a new judge would decide the case, the appellant said he was fine with that. Only after the new judge decided the case against the appellant did it object.

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[113] This is too late. This is a textbook case of waiver: see the authorities at para. 102 above.

E. Postscript

[114] I wish to offer some brief comments on some aspects of my colleague's reasons.

[115] My colleague refers to a number of cases from other jurisdictions where the issue of reassignment has arisen, using them as solid precedents against the Chief Justice's decision to reassign. These cases are of limited value. While they might be of use in identifying criteria that might bear upon the exercise of discretion to reassign, the weight to be accorded to the various criteria depends on the precise circumstances of each case.

[116] Much also depends on the context in which the cases are decided and the nature of the cases themselves. Cases where the liberty of the subject is at stake, such as criminal cases, cases where there is substantial oral evidence and significant credibility issues such that a rerun of the case might be unfair, and cases where the validity of a public administrative decision is in issue may call for more caution when a Chief Justice is considering whether to reassign.

[117] The same can be said for the legislative provisions in other jurisdictions. They speak only to the law in those jurisdictions and shed no light on the jurisdiction of a Chief Justice of the Tax Court.

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