

FEDERAL COURT OF APPEAL

BETWEEN:

IZABELA POPOVA

Appellant

and

**THE EMPIRE LIFE INSURANCE
COMPANY, AND MAUREEN WHEELER,
MANAGER OF THE GROUP LIFE
AND DISABILITY CLAIMS**

Respondents

MEMORANDUM OF FACT AND LAW OF THE APPELLANT
[Re: Appeal of the Orders of Justice Roger Hughes dated April 2, 2014]

PART I – FACTS

Overview

1. All legal tasks with regard to the Appellant’s involvement in the above noted litigation, including drafting, preparing and filing documents, have been carried out by Dimitre Popov on behalf of and with the written authorization of the Appellant (Applicant in the first instance), Izabela Popova, who is Dimitre Popov’s daughter.

Affidavit of Dimitre Popov dated January 31, 2014, Appeal
Book of the Appellant (“AB”), Tab 1, pages 7-10

Authorization Letter of Izabela Popova dated January 27, 2014, AB, Tab 1, page 14

Affidavit of Izabela Popova dated January 30, 2014, AB, Tab 1, pages 18 and 19

2. The quoted amount for legal representation (appeals not included) of Ms. Popova by one law firm is **\$32,939**. The awards which may be applicable to the Appellant Popova are limited to **\$5,000** (*Nammo v. TransUnion of Canada Inc.*).

Affidavit of Dimitre Popov dated January 31, 2014, AB, Tab 1, page 9 at para 4

Litigation Budget dated December 6, 2013, AB, Tab 1, page 12

3. The Appellant is a fulltime employee with no legal knowledge and experience that would be of assistance to her in this legal action. Appellant's inability (1) to cope with the Court's hundreds of rules that she cannot understand, (2) to act within court-imposed time constraints, and (3) to defend her claim in opposition to a knowledgeable, trained and experienced lawyer and his legal team – all acting for the Respondents – makes it impossible for her to proceed as a self-represented claimant. Therefore, at no time did Ms. Popova ever consent or agree, directly or indirectly, to act as a self-represented litigant in this matter. The only practical and available alternative to the Appellant to seek remedy for suffering through the justice system is representation by her father.

Affidavit of Izabela Popova dated January 30, 2014, AB, Tab 1, pages 18 and 19

Notice of Motion dated January 31, 2014, AB, Tab 1, "The grounds for the motion" at page 5

4. Following the investigation into the complaint filed by Izabela Popova (the "Applicant" or "Appellant") against the Empire Life Insurance Company (the

“corporate Respondent” or “Empire”) under the *Personal Information Protection and Electronic Documents Act* [PIPEDA], the office of the Privacy Commissioner of Canada (the “Privacy Commissioner” or “Commissioner”) wrote in its “report of findings” dated October 31, 2013, “we have concluded that the matter is **well-founded** and **conditionally resolved**.”

Affidavit of Dimitre Popov dated January 31, 2014, AB,
Tab 1, page 9 at para 6

Letter of the Office of Privacy Commissioner of Canada,
dated October 31, 2013, AB, Tab 1, page 16

5. The Applicant’s father filed on December 16, 2013 an application (file T-2067-13) with the Federal Court. The application was commenced under section 14 of PIPEDA against Empire and its employee, Maureen Wheeler, Manager of the Group Life and Disability Claims (the “individual Respondent” or “Wheeler”), (collectively the “Respondents”), for remedy sought on the ground of suffering arising out of the Respondents’ contravention of PIPEDA while the Applicant was applying for long-term disability benefits claim made under an insurance policy.

A. Applicant’s motion for leave to represent the Applicant

6. On January 31, 2014, the Applicant’s father brought a motion in writing on the Applicant’s behalf for an order granting him leave to act on behalf of and as a representative of the Applicant in this proceeding.

Notice of Motion dated January 31, 2014, AB, Tab 1,
pages 4-6

The Applicant's representative submitted

7. In light of the fact that the Applicant has no legal knowledge, training and experience, depriving her of the right to representation and instead making her a self-represented litigant will make her extremely disadvantaged and vulnerable to the senior and experienced lawyer representing the Respondents.

8. Further, Dimitre Popov respectfully submitted that an order against the motion for leave to represent the Applicant in the circumstances of this particular case, would
 - (a) preclude the Applicant from seeking remedies through the justice system for the reason that no reasonable or average person would seek remedies on the condition that they have to pay their solicitor \$32,939 (as much as 6 times the amount of the possible remedy);
 - (b) serve as encouragement for the Respondents to continue with their improper and legally unacceptable conduct and practices – resulting in more members of the public being harmed (given the nature of the corporate Respondent's business);
 - (c) be in contravention of the Applicant's right "to the equal protection and equal benefit of the law" guaranteed by Canadian Charter of Rights and Freedoms.

Applicant's Motion Record dated January 31, 2014, "Points in Issue," AB, Tab 1, pages 21-25 at paras 6-16

B. Order of Prothonotary Milczynski

9. In a decision, dated February 26, 2014, the Prothonotary denied the order sought to grant Dimitre Popov leave to act on behalf of and as a representative of the Applicant. No reason for the decision in the Order has been provided.

Order of Prothonotary Milczynski dated February 26, 2014,
AB, Tab 4, pages 75, 76 and 77

C. Applicant's appeal of Prothonotary Milczynski's Order

10. By Notice of Motion dated March 10, 2014, Dimitre Popov appealed Prothonotary Milczynski's Order. In his motion materials, he argues *inter alia*, that:

- (a) the Prothonotary's denial of the Applicant's motion made it impossible for the self-represented Applicant to continue in this proceeding due to her lack of legal knowledge, experience, understanding of the rules, inability to meet the Court's demands and time deadlines, and inability to handle the extreme stress associated with the proceeding;

Applicant's Motion Record, Vol. 1, dated March 10, 2014,
AB, Tab 6 and 6A, pages 79-99

Applicant's Written Representations in Reply to the
Respondents' Motion Record to the Applicant's Appeal dated
March 28, 2014, AB, Tab 9, pages 230-233 at paras 9-15

Case Law the Applicant relies on within the Applicant's
Written Representations in Reply dated March 28, 2014, AB,
Tab 9, pages 235, 236, and 238-243

D. The ruling on the Applicant’s appeal of the Prothonotary’s Order

11. The Honourable Justice Roger Hughes (the “Motion Judge”) of the Federal Court issued, with regard to the Applicant’s appeal by motion, two separate orders in one day – both dismissing the motion in its entirety.

E. Currently before the Court

12. Currently before the Federal Court is an application (file T-2067-13) filed by the Appellant (Applicant in the first instance) seeking remedies for damages under section 14 of PIPEDA. The application is held in abeyance pending the Federal Court of Appeal’s determination of two appeals from two interlocutory orders stemming from a single motion made within application T-2067-13. Before the Federal Court of Appeal are two appeals (in files A-197-14 and A-198-14) subsequently consolidated in A-197-14.

PART II – ISSUES

13. The issue on this appeal is whether the Motion Judge erred in dismissing the Applicant’s appeal of the Prothonotary’s Order; or in other words, whether the Appellant should be put in such a disadvantaged and vulnerable position that would decide the case in favour of the Respondents without the case being heard and determined on its merits;

PART III – SUBMISSIONS

A. Introduction: Whether the Administration of the Court is brought into disrepute

Madam Prothonotary Martha Milczynski

14. In the Responding Motion Record to the Applicant's Motion Record for leave to be represented by her father, the leading lawyer for the Respondents, Mark Cavanaugh, also filed his own affidavit and used it as evidence to support his own arguments against the Applicant's motion.

Affidavit of Mark Cavanaugh dated February 10, 2014 within the Responding Motion Record of the Respondents, AB, Tab 2, pages 32-35

"Factum" presented by Mark Cavanaugh within the Responding Motion Record of the Respondents dated 10, 2014, Tab 2A, pages 49-51

15. Pursuant to the *Federal Courts Rules*, a solicitor **must seek leave** of the Court if he or she intends to present an argument based on his or her own affidavit – Rule 82, for the sake of convenience, quoted hereinafter.

"Use of solicitor's affidavit

82. Except with leave of the Court, a solicitor shall not both depose to an affidavit and present argument to the Court based on that affidavit."

- Rule 82, *Federal Courts Rules*, SOR/98-106,

16. Madam Prothonotary Martha Milczynski denied the Applicant's motion, dated January 31, 2014, and issued an order in favour of the Respondents, making the Applicant a self-represented litigant.

17. There is no explanation offered by Prothonotary Milczynski as to:
- (a) Why she allowed an affidavit to be filed and exploited in violation of Rule 82 of the *Federal Courts Rules*; and
 - (b) Why she issued an order based on an affidavit and arguments presented before her in contravention of that rule.

Order of Prothonotary Milczynski dated February 26, 2014,
AB, Tab 4, pages 75, 76 and 77

18. With respect to the leave granted in the Prothonotary's order, "leave is granted to the Applicant's father, Dimitre Popov to assist the Applicant," it should be noted that (i) it was neither sought by the Applicant nor by the Respondents, (ii) can not substitute the leave sought for representation, and (iii) permission from the court for assistance from a third party in such circumstances is not required. For that reason, I understand that Madam Prothonotary Milczynski has overstepped her authority and has taken advantage of the fact that neither the Applicant nor her representative are legal professionals and thus lack legal knowledge.

Order of Prothonotary Milczynski dated June 14, 2004

19. With reference to a legal proceeding (Docket: T-791-04), Dimitre Popov filed a motion with the court seeking leave to represent the named corporate defendant on the grounds of special circumstances in the sense that:

- (a) The corporate defendant was a one-person start-up company – in a field unrelated to the business of the Plaintiff – which never had the opportunity to generate any revenue (not even a single penny); and
- (b) The rough estimate for representation of the corporate Defendant by a lawyer was between \$100,000 and \$150,000.

23. Subsequently, Madam Prothonotary Martha Milczynski denied Dimitre Popov's motion stating:

In the case before me, other than a bald assertion by the individual Defendant, there is no evidence that 24ViaCom Inc. cannot afford a lawyer.

[...]

There is also no evidence of the company's inability to raise funds necessary to pay for legal representative.

[...]

Finally, I also accept the submissions of the Plaintiff, not disputed by Mr. Popov, that Mr. Popov may appear as both witness and advocate in the proceeding and that it is desirable to avoid such situations.

20. As it should have been expected, the order of Madam Prothonotary Milczynski decided the case in favour of the Plaintiff despite the fact that its claim, "*By reason of the activities of the Defendants as aforesaid, the Defendants have made profits and will continue to profit and the Plaintiff has suffered and will continue to suffer loss,*" had never been established, even when its head office had been urged to do so.

21. As a result of financial inability for representation by a lawyer, Dimitre Popov and his one-person start-up company lost the case by default and were ordered to pay the Plaintiff \$4,633.00 (order dated March 16, 2005): Court File: T-791-04

Pain and suffering

22. In the course of defending his one-person company and himself, Dimitre Popov (a) was under severe stress and had many sleepless nights, (b) went into depression which prevented him from dealing with his everyday activities, (c) experienced speech impairment, (d) considered offering his kidney for sale and paying with the money for a lawyer to represent his company as it was the only option (Order of Prothonotary Milczynski) to argue against the Plaintiff's false allegations.

23. In the current proceeding, in the Appellant's motion of January 31, 2015 before Prothonotary Milczynski, the Appellant submitted (reasoned and emphasized) that an order denying the motion would force the Appellant to withdraw her application due to the fact that she would be placed in such a disadvantaged legal situation that it would predetermine the final determination of the case in favour of the Respondents.

Applicant's Motion Record dated January 31, 2014, "Points in Issue," AB, Tab 1, para 6 and 16 at page 21, 24 and 25

B. Public interest at the heart of this proceeding

24. The Appellant's intention in this proceeding is to deter the Respondents and others from future misconduct and violations of the law as demonstrated in the Appellant's "Notice of Application," – for the sake of convenience quoted below:

THE APPLICANT MAKES APPLICATION FOR:

[...]

5. an Order for damages, including damages for humiliation that the Applicant has suffered, against the individual Respondent, Maureen Wheeler, in the amount

this Honourable Court deems just and appropriate in the circumstances;

6. **punitive, aggravated and exemplary damages for the Respondents' conduct in acting in bad faith and persistence in disobeying their legal obligations mandated by the PIPED Act, in the amount sufficient to deter the Respondents from further PIPEDA violations, to be paid to this Honourable Court or United Way Centraide Canada or the Applicant;**

[Emphasis added]

Appellant's "Notice of Application" dated December 16, 2013 (in file T-2067-13) at paras 3, 5 and 6, at page 1 and 2

C. **Sacrificing for the interest of all (the common good)**

25. Since the commencement of this proceeding, the Appellant's representative has spent more than 1,000 (one thousand) hours of unpaid labour on the legal case. He is well aware that the longer his involvement in this proceeding, the longer and more serious his health and financial suffering.

26. A few months ago, while anxiously working late on a document with a filing deadline on the next day, Dimtre Popov began to feel numbness spreading on the left side of his face. After a registered nurse from Telehealth Ontario subjected him to a test over the phone, she urged him to go, without delay, to the Emergency for having the symptoms of stroke (the event is on a medical record and can be proved). For fear of an order on a motion against the Appellant, he chose to finish the document and file it in time – which he did.

27. The ongoing worsening in the development of this proceeding traumatizes all members of Dimitre Popov's family. His 31-year marriage is sometimes jeopardized. The emotional and mental suffering caused by this proceeding alone exceeds the

suffering Dimitre Popov has endured throughout his nearly 60-year life (not including the proceeding in the Federal Court in 2004). The driving force behind Dimitre Popov is his strong persuasion that standing up for the Rule of Law is in the interest of justice, our society, and the common good.

D. The burden of costs awarded

28. With reference to two motions concerning the content of the appeal book, the Honourable Mr. Justice Scott issued two interlocutory orders. Although Dimitre Popov strongly disagree with these two orders (as a matter of law and fact), pursuant to them the Appellant will be responsible for paying at least \$1,661.94 to the Respondents' solicitors – \$1,411.94 claimed for their 6-hour work on one motion record and \$250 for the motion in which the Appellant's representative, Dimitre Popov, asked for the recusal of Mr. Justice Scott.

29. Dimitre Popov assumes all responsibility for the outcome stemming from his legal work conducted in good faith. Unfortunately, Dimitre Popov's financial situation – no savings, owning no property, with two credit cards both nearly drained and currently with no income – makes him unable to meet the monetary obligation imposed by Justice Mr. Scott. The only reasonable option, in his view, is to seek funding from the public through social media and someone willing to fund a book concerning his experience with the court.

E. Wasteful use of taxpayers' dollars and Court's resources

30. The refusal of Madam Prothonotary Martha Milczynski to grant the Appellant permission to be represented by her father (a) has caused the production of documents

totaling approximately 4,000 pages, (b) has caused 5 judges to review 5 motion records and subsequently write orders or directions on them; and (c) has caused this appeal. The cost of all of this is believed to be tens of thousands of dollars at the expense of taxpayers: for no good reason and not in the interest of justice.

In the words of the Honourable Mr. Justice Stratas, here is his position on the importance of efficiency and minimization of costs (quoting):

[13] Additional principles guide this Court in the exercise of its plenary jurisdiction to manage and regulate proceedings. As long as no party is unfairly prejudiced and it is in the interests of justice – vital considerations always to be kept front of mind – this Court should exercise its discretion against the wasteful use of judicial resources. The public purse and the taxpayers who fund it deserve respect. As well, cases are interconnected: one case sits alongside hundreds of other needy cases. Devoting resources to one case for no good reason deprives the others for no good reason. [Emphasis added]

F. Standard of review: this Court should consider the motion *de novo*

31. In *Merck & Co., Inc. v. Apotex Inc.*, 2003 FCA 488 (CanLII), [2004] 2 F.C.R. 459 (C.A.), the Federal Court of Appeal set out the standard of review of discretionary orders made by the court below. It directed:

“... [A] judge should logically determine first whether the questions are vital to the final issue: it is only when they are not that the judge effectively needs to engage in the process of determining whether the orders are clearly wrong. The test would now read:

“Discretionary orders of prothonotaries ought not to be disturbed on appeal unless:

a) the questions raised in the motion are vital to the final issue of the case, or

b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.”

Merck & Co., Inc. v. Apotex Inc., 2003 FCA 488 (CanLII),
[2004] 2 F.C.R. 459 (C.A.)

32. In *Canada v. Aqua-Gem Investments Ltd.*, 1993 CanLII 2939 (FCA), [1993] 2 F.C. 425 (C.A.), at para. 97, MacGuigan J.A. described questions that are vital as **“questions vital to the final issue of the case, i.e. to its final resolution”**.

[Emphasis added]

33. This Court should therefore first determine whether the questions are vital to the final issue of the case when considering the subject of the order.

G. Justice Hughes erred in determining the matter was not vital

34. Justice Hughes wrote in one of the two Orders (order number 1) that he dismissed the Applicant’s appeal of the Prothonotary’s Order upon determining that, “the matter is not vital to the determination of the issues, therefore the standard of appeal is different;”

Order of Justice Hughes (Order 1) dated April 2, 2014, AB,
Tab 10, pages 246-248

Whether the matter and the questions raised in the motion were vital to the final resolution of the case

35. As set out in *Merck & Co., Inc. v. Apotex Inc.*, 2003 FCA 488 (CanLII), [2004] 2 F.C.R. 459 (C.A.), this Court should therefore first determine whether the questions are vital to the final issue of the case when considering the subject of the order.

36. In the case at bar, we respectfully submit that the question this Court should ask itself is whether the Appellant's representation by her father is vital for the final resolution of the Application. The "vitality" test must be determined on a case by case basis and if it is met, the judge hearing the appeal must exercise his or her discretion *de novo*.

37. First, it was submitted in the motion to the Motion Judge, as it was in the motion to the Prothonotary, that if the Applicant was not permitted to be represented by her father and instead was made to be self-represented, **it would be impossible** for the Applicant to continue in this proceeding due to (1) her lack of adequate legal knowledge, (2) skills, (3) experience, (4) understanding of the rules, and (5) inability to meet the Court's demands and time deadlines.

Affidavit of Dimitre Popov dated January 31, 2014, Appeal Book of the Appellant ("AB"), Tab 1, pages 7-10

Affidavit of Izabela Popova dated January 30, 2014, AB, Tab 1, paras 3-5 at page 19

Applicant's Motion Record dated January 31, 2014, "Points in Issue," AB, Tab 1, pages 21-25 at paras 6-16.

Applicant's Motion Record dated March 10, 2014, (Appeal under Rule 51 of the *Federal Courts Rules* from the Order of Prothonotary Martha Milczynski dated February 26, 2014), AB,

Tab 6, para 4 at page 83;

Tab 6A, para 12 at page 93-94

38. Second, it was also submitted in the motion to the Motion Judge, as it was in the motion to the Prothonotary, that representation of the Applicant by a lawyer **was not an option** for the reasons that no reasonable or average person would seek remedies limited to \$5,000, "in the most egregious situations" (Nammo v. TransUnion of Canada Inc.), on the condition that they have to pay their lawyer \$32,939 (as much as 6 times the amount of the maximum possible remedy).

Affidavit of Dimitre Popov dated January 31, 2014, AB,
Tab 1, page 9 at para 4

Litigation Budget dated December 6, 2013, AB, Tab 1,
page 12

39. Third, it was also respectfully submitted in the motion to the Motion Judge, as it was in the motion to the Prothonotary, that for the reasons noted above, a denial of the Applicant's motion for leave for representation by her father will force the Applicant to discontinue her Application which would consequently deprive the Applicant from her right to the equal benefit of the law guaranteed by the Charter.

Affidavit of Izabela Popova dated January 30, 2014, AB,
Tab 1, paras 3-5 at page 19

Affidavit of Dimitre Popov dated January 31, 2014, AB,
Tab 1, page 8 and 9 at paras 3(e) and 7.

Applicant's Motion Record dated January 31, 2014, "Points in Issue," AB, Tab 1, pages 21-25 at paras 6-16.

Applicant's Written Representations in Reply to the Respondents' Motion Record to the Applicant's Appeal dated February 18, 2014, AB, Tab 3, para 7(b) at page 63

Applicant's Motion Record dated March 10, 2014, (Appeal under Rule 51 of the *Federal Courts Rules* from the Order of Prothonotary Martha Milczynski dated February 26, 2014),
AB,

Tab 6, para 4 at page 83;

Tab 6A, para 12 at page 93-94

40. There is nothing in the two separate orders made by the Motion Judge identifying the criterion or legal test he had applied to conclude the matter was not vital.

Order of Justice Hughes (Order 1) dated April 2, 2014, AB,
Tab 10, pages 246-248

Order of Justice Hughes (Order 2) dated April 2, 2014, AB,
Tab 11, pages 249-250

41. Further, there is nothing in the orders of the Motion Judge suggesting that his finding is in accordance with the direction provided by the Federal Court of Appeal in *Merck & Co., Inc. v. Apotex Inc.*, 2003 FCA 488 (CanLII), [2004] 2 F.C.R. 459 (C.A.):

“... [A] judge should logically determine first whether the questions are vital to the final issue.”

42. Neither the Motion Judge nor the Prothonotary have ever expressed disagreement with the Applicant’s representative’s submissions that making the Applicant to continue in the proceeding unrepresented, in the sense of having to establish her claim in opposition to the Respondents’ seasoned lawyer helped by his legal team would place the Applicant in such a disadvantaged situation that would predetermine the outcome of the case in favour of the Respondents; consequently, would compel Applicant to discontinue her application against the Respondents so as to avoid further mental and financial suffering

The “vitality” test

43. We unreservedly agree with Madam Justice Sandra Simpson’s consideration when determining whether the question before the prothonotary in the case *Apotex Inc. v. Sanofi-Aventis*, 2010 FC 1209 (CanLII) was vital. She wrote:

“[31] In view of these cases, I must next consider whether the question before the Prothonotary in this case can be said to be vital.

[32] On this issue, I have concluded that questions dealing with the presence or absence of a defendant will be vital if something essential is taken from a plaintiff if defendant is excluded. [...] I therefore conclude that the removal of the defendants is a vital matter. Accordingly, the

Decision not to dismiss the Apotex Claim against Sanofi France and Sanofi Germany will be reviewed *de novo*.”

Apotex Inc. v. Sanofi-Aventis, 2010 FC 1209 (CanLII)

44. In the case at bar, by contrast, the questions raised before the Motion Judge were more than vital. The questions were decisive to the final resolution of the case in view of the fact that pitting the unskilled Applicant who lacks adequate legal knowledge and experience in a contest against the Respondents’ seasoned lawyer and his legal team will, of course, predetermine the outcome of the case.

45. The Orders of the Motion Judge effectively deprive the Appellant of her right to have her application for judicial relief heard by the court.

46. It is vital that the Appellant, as an ordinary citizen, be allowed to exercise her rights guaranteed by the Charter: “*Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination.*”

47. It is vital that justice be served and the *Federal Courts Rules* be applied in accordance with the Court’s governing principle, namely Rule 3.

48. It is also vital that the Appellant be represented by her father for the reasons that (1) it is the only practical and available option for her to have her application heard by the Court while seeking remedy for her alleged suffering, (2) it will allow the Court to determine the application on its merits in the most expeditious and least expensive way, and (3) it will secure compliance with the principles of procedural equality and fairness without which justice cannot be served.

H. The orders are clearly wrong

49. As is set out by the Federal Court of Appeal in *Merck & Co., Inc. v. Apotex Inc.*, 2003 FCA 488 (CanLII), [2004] 2 F.C.R. 459 (C.A.), it is only if this Court finds that the “vitality” test is not met, it must then determine whether “*the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.*”

Reasons for order

50. In the reasons in support of the Orders dismissing the Appellant’s appeal of the Prothonotary’s Order, the Motion Judge further wrote:

- (a) “the matter is not vital to the determination of the issues, therefore the standard of appeal is different;”
- (b) “the Court does not permit non-lawyers to represent parties in a proceeding;”
- (c) “the Applicant has not shown a proper basis, such as being a minor child or suffering a serious disability whereby a litigation representative could be appointed.”
- (d) “the Order under appeal is reasonable.”
- (e) “the Order sought has already been dealt with by Prothonotary Milczynski dated February 26, 2014 which Order is under appeal.
THIS COURT ORDERS that: The motion is dismissed as redundant in view of Prothonotary Milczynski’s Order aforesaid.”

Whether the Appellant’s motion to the Motion Judge was redundant

51. First, the right to appeal an order of a prothonotary to a judge is provided by the *Federal Courts Rules, SOR/98-106*.

“Appeals of Prothonotaries’ Orders

Appeal

51. (1) An order of a prothonotary may be appealed by a motion to a judge of the Federal Court.”

Federal Courts Rules, SOR/98-106, Rule 53

52. Second, the Order of the Prothonotary was appealed by a motion to the Motion Judge in accordance with Rule 51(1) of the *Federal Courts Rules*. For that reasons, in our view, the finding of the Motion Judge that the Appellant’s motion was “redundant” is clearly wrong.

Whether the Appellant has shown a proper basis

53. There is nothing in the Order of the Motion Judge indicating or suggesting what rule or provision he had considered that caused him to determine that “the Applicant has not shown a proper basis, such as being a minor child or suffering a serious disability whereby a litigation representative could be appointed.”

54. The Motion Judge erred in dismissing the Appellant’s motion for that reason due to the fact that “special circumstances” on the basis of which the Court may vary a rule or dispense with compliance with any of its rules are wide-ranging and therefore not limited to the reason given by him.

55. The correct legal principles that should have been applied, in our view, to the Appellant’s motion are repeated here for the sake of convenience:

Federal Courts Rules, SOR/98-106

General principle

3. These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.”

[Emphasis added]

Representation of Parties

Parties under legal disability or acting in representative capacity

“121. Unless the Court in special circumstances orders otherwise, a party who is under a legal disability or who acts or seeks to act in a representative capacity, including in a representative proceeding or a class proceeding, shall be represented by a solicitor.”

[Emphasis added]

Varying rule and dispensing with compliance

55. In special circumstances, in a proceeding, the Court may vary a rule or dispense with compliance with a rule.

[Emphasis added]

Parties

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

[. . .]

(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.

[Emphasis added]

Federal Courts Rules, SOR/98-106, Rule 3, 121, 55, 114(1)(b),(c), and (d)

56. First, it was established before the Motion Judge and the Prothonotary that the Appellant's father was duly authorized, by written authorization, by the Appellant to act on behalf of and as a representative of the Appellant in this proceeding.

57. Second, it was also established, and never disputed, that the Appellant's father would be able, as a representative, to fairly and adequately represent the interests of his daughter.

58. Third, it was also established and readily apparent from the facts before the Motion Judge and the Prothonotary that the use of a representative proceeding would be the just, most efficient and the least costly manner of the proceeding.

Special circumstances

59. In the present case, we respectfully submit that the question this Court should also ask itself is whether special circumstances exist that warrant dispensing with compliance with Rule 121.

60. The "special circumstances" test must be determined on a case by case basis and if it is met, the Court should vary or dispense with compliance with Rule 121 to the extent to secure the just determination of the proceeding on its merits.

"Special circumstances" test

61. As set out above, an order making the unskilled and lacking adequate legal knowledge Appellant to establish her claim as a self-represented litigant in opposition to a seasoned lawyer and his legal team representing the Respondents, **will**

- (a) place the Appellant in a gross disadvantageous legal situation contrary to the principles of procedural equality and fairness;
- (b) prejudice the Appellant so severely that justice cannot be done;
- (c) predetermine the case in favour of the Respondents;
- (d) cause the Appellant irreparable harm;
- (e) effectively force the Appellant to immediately withdraw her application so as to avoid further suffering, mental anguish, and financial loss;
- (f) effectively deprive the Appellant from her guaranteed by the Charter right to the equal benefit of the law;
- (g) effectively prevent the Appellant from her right to have her application for judicial relief heard by the court and determined on its merits; and
- (h) effectively deprive the Appellant from her citizen's legal right to seek remedy through the justice system for suffering caused, allegedly, by the Respondents.

62. It is clear from the above-noted that the Appellant's legal situation precisely meets the definition of "special circumstance:"

Special circumstances means situations where a party to a proceeding is in an unfortunate or disadvantageous situation that is so prejudicial that justice between the parties cannot be done.

63. In the case before him, the Motion Judge erred in failing to recognize, consider and apply the Appellant's special circumstances that were readily apparent from the facts.

64. Further, the Motion Judge also erred in failing to consider and apply the Court's governing principle defined in Rule 3 of the *Federal Courts Rules*.

65. Viewed in light of the foregoing, it is clear that ample special circumstances exist that warrant (1) dispensing with compliance with Rule 121 and (2) the Appellant's representation by her father.

Whether the court permits non-lawyers to represent parties

66. Another reason stated by the Motion Judge to support the dismissal of the Appellant's appeal to him was that he had determined that "the Court does not permit non-lawyers to represent parties in a proceeding."

67. We respectfully disagree with the Motion Judge's determination in light of Rules 121, 55, and 3. Rule 121 provides that a party, who acts or seeks to act in a representative capacity, shall be represented by a solicitor, "unless the Court in special circumstances orders otherwise." Again, the special circumstances were readily apparent from the facts and the evidence properly presented before the Motion Judge and the Prothonotary, but both erred in failing to consider and apply them in accordance with Rule 55 and Rule 3 of the *Federal Courts Rules*

Whether the Order of the Prothonotary was reasonable

68. The last reason (in the order addressed by the writer of this document) stated by the Motion Judge to support the dismissal of the Appellant's appeal from an Order of the Prothonotary was that, "the Order under appeal is reasonable." We respectfully

disagree with such determination for the reasons that, in view of the writer, an order that:

- (a) places a party with a pre-existing disadvantage in a situation of gross disadvantage;
- (b) puts the adversary party with pre-existing advantage in a position of further advantage liable to decide the legal dispute in its favour;
- (c) is inconsistent with the *Federal Courts Rules*, the principles of fundamental justice, the principles of procedural equality and fairness, and the Charter;
- (d) causes irreparable damages to the Appellant and her representative;
- (e) is so prejudicial to the Appellant that justice between the parties cannot be done;

is clearly unreasonable.

Representing the public interest

69. In his role as a representative for the Appellant, the Appellant's father would be enabled to defend or represent the public interest, at large, in view of the fact that

- (a) the Respondents' business is to provide services to the public – the Appellant's application is based on the Respondents' alleged misconduct and violation of the law while they were carrying out business; and

- (b) the Court can issue an order deterring the Respondents from improper or illegal practices solely if the Appellant is given an opportunity to establish her application before it.

70. An Order dismissing the Appellant's motion for representation by her father will allow the Respondents to evade responsibility for an alleged violation of the law and harm caused to the Appellant. Such outcome will be an event with potentially harmful consequences to the public.

71. If representation of the Appellant by a solicitor is the only option to fair proceeding, that means (as it was set out above) that the Appellant has to pay for such representation as much as 6 times the amount of the maximum possible monetary remedy the Court may award to the Appellant for her suffering and damages caused by the Respondents.

72. If this is the case, in all likelihood, the Respondents will continue to harm with impunity members of the public because of the knowledge and confidence that the sheer cost of combating them through the legal system protects them from reprisals.

73. Clearly, the public interest requires an order granting the Appellant leave for representation by her father, unless the Court, on its own motion, appoints a lawyer in order to protect the public interest.

Issues of prejudice

74. In light of the order of Prothonotary Milczynski and the order of Justice Hughes, this Court, in my view, should consider in any event that both the Prothonotary and Justice Hughes erred in failing to consider the fact that:

- (a) There would be NO prejudice to the Respondents if the Appellant were permitted representation by her father. Moreover, even if represented by her father (a non-lawyer – a lay-person without legal education and training), the Appellant would still be in a situation so disadvantageous that is likely to decide the proceeding in favour of the Respondents represented by a seasoned lawyer;
- (b) The Appellant would be grossly prejudiced if made to personally establish her claim in opposition to a seasoned lawyer assisted by another experienced lawyer.

Further, it should be noted, however, that these facts were not disputed by the Prothonotary and Mr. Justice Hughes nor were they argued by the Respondents' lawyers.

Procedural equality issues

75. As it has long been recognized by legal professionals, in a proceeding where one of the parties is represented, the other party is equally entitled to representation – **the right of representation is meant to ensure procedural equality and fairness.**

76. If the Appellant is not permitted representation by her father, and instead is made to continue in the proceeding unrepresented and face a trained and experienced lawyer helped by his legal team, **she would be immediately and fundamentally disadvantaged.**

77. I am confident that this Court will agree with a prominent law professor according to whom adversarialism is about “combat”, and **the disadvantage suffered by the unrepresented person facing a trained lawyer is in similarity to pitting an unarmed peasant in a contest against an armed gladiator.**

78. If the Appellant is not allowed representation, she will be doomed to lose her case and thus forced to immediately withdraw her application.

The right to be heard

79. The dismissal of the Appellant’s motion in the circumstances is clearly a case of indirect denial of the Appellants right to be heard.

80. The opportunity to be heard is a fundamental requirement of the adjudicative process. When a decision-maker denies a party the right to be heard, it is an error of law. As the Court of Appeal held, *“[i]f the duty of fairness is breached in the process of decision-making, the decision in question must be set aside.”*

Globe and Mail v. Canada (A.G.), [2010] 2 S.C.R. 592 at paras. 73-75, PBOA

Sketchley V. Canada (Attorney General), 2005 FCA 404 at paras. 53-54, PBOA

I. Closing submissions

81. We trust that this Court will agree, in view of the forgoing, that the reasons given by the Motion Judge in the orders dismissing the Appellant's motion are predicated on incorrect premises – incorrect legal principle or misapprehension of the facts.

82. It is also in our view that the Motion Judge erred by improperly focusing solely on one or two rules and erred by failing to take into account correct legal principles, principles of natural justice, jurisprudence, and the evidence before him.

83. For the foregoing reasons, we respectfully submit that the Orders of the Motion Judge dismissing the Appellant's appeal from an Order of the Prothonotary are clearly wrong and are based upon a wrong principle or upon a misapprehension of the facts.

84. Finally, we respectfully submit that this appeal meets the set out by the Federal Court of Appeal standard of review of discretionary orders made by the court below.³ For that reason and the reasons set out above, the Decision to dismiss the Appellant's motion for leave to be represented by Dimitre Popov should be reviewed *de novo*.

³ *Merck & Co., Inc. v. Apotex Inc.*, 2003 FCA 488 (CanLII), [2004] 2 F.C.R. 459 (C.A.)

PART IV – ORDER SOUGHT

85. For the forgoing reasons, the Appellant requests that the Order of the Motion Judge be set aside and the matter be reviewed *de novo* by this Court.

86. We further request costs of the motion and the motion below.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

October 25, 2015



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PART V – AUTHORITIES

A. Status and Regulations

1. *Federal Courts Rules*, SOR/98-106, Rule 3, 121, 55, 114(1)(b),(c), and (d)

B. Authorities and Secondary Sources

2. *Merck & Co., Inc. v. Apotex Inc.*, 2003 FCA 488 (CanLII), [2004] 2 F.C.R. 459 (C.A.)
3. *Canada v. Aqua-Gem Investments Ltd.*, 1993 CanLII 2939 (FCA), [1993] 2 F.C. 425 (C.A.), at para. 97
4. *Globe and Mail v. Canada (A.G.)*, [2010] 2 S.C.R. 592 at paras. 73-75
5. *Sketchley V. Canada (Attorney General)*, 2005 FCA 404 at paras. 53-54