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No Limits Sportswear Inc. v. 0912139 B.C. Ltd., 2015 BCCA 193

Areas of Law: Litigation Privilege; Communications; Non-Adversarial Relationship

~Litigation privilege should protect communications between formerly adverse parties that have settled their dispute and are cooperating against a remaining co-defendant, even if the formal pleadings have not been amended to reflect that fact~

CLICK HERE TO ACCESS THE JUDGMENT

Before Saxx Apparel was purchased by the Appellant, No Limits Sportswear Inc., it engaged in investment discussions with Respondents Sean Ellis and Glen Kirk (with KE Imports Ltd., the "KE Respondents") and their then-associate Respondent Dustin Bigney. The Respondents, 0912139 B.C. Ltd., Pakage Holdings Inc., Keyhole Technologies Inc., Dustin Bigney, Desmond Price, Scott Hannan, Pakage Apparel Inc., and Gregg Alfonso (the "Pakage Respondents") and the KE Respondents did not ultimately invest in the Saxx product, but subsequently began manufacturing a competing product. The Appellant brought a claim for breach of contract and confidentiality against the Respondents. Sometime before the underlying action was commenced, the Pakage and KE Respondents had a falling out. Shortly after Mr. Ellis was served with notice of the Appellant's action, he contacted the Appellant's counsel to say that the KE Respondents were in an adverse position to the Pakage Respondents in separate litigation, and to suggest cooperation in the Appellant's action. The KE Respondents and the Appellant entered a standstill agreement, whereby the Appellant agreed not to pursue its claims against the KE Respondents while those

No Limits Sportswear Inc. v. 0912139 B.C. Ltd., (cont.)

parties discussed settlement options, litigation tactics, and strategies. After the creation of the standstill agreement, the KE Respondents provided the Appellant with a collection of documents to be used as potential evidence in the Appellant's action. Mr. Ellis obtained access to these documents by contacting one Mr. Lawrence, who worked at MyPakage, and requesting administrative access. He did not inform Mr. Lawrence that he was no longer associated with MyPakage. The Pakage Respondents sought additional disclosure pursuant to Rules 7-1(13), (14), and (17), and the chambers judge made a number of disclosure orders. The order challenged on appeal was that the Appellant must produce all correspondence and records of correspondence with Mr. Kirk and Mr. Ellis in relation to the litigation in its possession, and all documents, including unlisted documents provided to the Appellant by Mr. Kirk and Mr. Ellis. The chambers judge found that litigation privilege can never apply to parties who are "named" as adverse in interest in the style of cause, that litigation privilege would not apply

to the documents sought by the Pakage Parties, and that, even if litigation privilege could apply in this context, the conduct of Mr. Ellis and Mr. Kirk should not be condoned "such that they need or should have the protection of privilege".

APPELLATE DECISION

The appeal was allowed. The Appellant argued that the chambers judge erred by conflating the order to disclose the non-relevant Pakage emails and the standstill agreement with the order to disclose the communications between the KE Respondents and the Appellant regarding settlement possibilities and trial strategies. The chambers judge's reasons did not support a finding that these communications would not be privileged. The Appellant also submitted that the chambers judge erred in concluding that litigation privilege can never apply between parties that are nominally adverse on the pleadings but are, in fact, negotiating toward settlement. The Pakage Respondents argued that the Appellant asserted litigation privilege over documents that were surreptitiously and improperly taken without authorization, that the documents may include solicitor-client communications belonging to them. The Court of Appeal reviewed the chambers judge's reasons and found that her analysis was largely not directed at the issue on appeal. She found that the correspondence, records, and documents did not fall within the narrow exception of litigation privilege, but this finding appeared to refer to non-relevant emails. The Pakage Respondents could not point to any convincing evidence of prejudice caused by any alleged misconduct on the part of the Appellants or the KE Respondents, and without such prejudice there is no negation of the privilege that would otherwise attach to the correspondence. Finally, litigation privilege should protect communications between formerly adverse parties that have settled their dispute and are cooperating against a remaining co-defendant, even if the formal pleadings have not been amended to reflect that fact.

COUNSEL COMMENTS

No Limits Sportswear Inc. v. 0912139 B.C. Ltd., 2015 BCCA 193

Counsel Comments provided by
Bob Cooper, Counsel for the Respondent Gregg Alfonso

"The law relating to privilege, in particular relating to its content, limits, and circumstances under which it is waived or lost, continues to evolve. The decision in No Limits Sportswear can be placed in the context of the court's efforts to bring more nuance and flexibility to the consideration of the different forms of privilege and the different circumstances in which claims of privilege will not be allowed to stand.


Bob Cooper

The underlying claims in the action are breach of confidence and breach of contract. The plaintiff, No Limits, had distribution rights to a brand of specialty men's underwear marketed as "SAXX". They sued the defendants, who had a competing brand of underwear, marketed as "My Pakage", alleging that the Pakage defendants had misused confidential information belonging to No Limits in developing their product and bringing it to market. Shortly after the action was started, two of the defendants, Ellis and Kirk, approached No Limits and offered to cooperate with them against the interests of the other Pakage defendants. Ellis and Kirk had initially been part of the My Pakage business but alleged that they had been improperly squeezed out of the business by the other Pakage defendants. Ellis and Kirk entered into a Standstill and Confidentiality Agreement with No Limits pursuant to which they provided a large volume of information about Pakage and its business to No Limits. Ellis, Kirk and No Limits also specifically agreed to cooperate against the interests of the Pakage defendants on matters such as litigation tactics and strategies. The Confidentiality Agreement was intended to be confidential and only came to light after its production was ordered as a result of a series of interlocutory applications.

COUNSEL COMMENTS

No Limits Sportswear Inc. v. 0912139 B.C. Ltd., (cont.)

During the course of providing assistance to No Limits, Ellis and Kirk, in addition to providing documents to which they had direct access, obtained passwords to email accounts belonging to My Pakage and used those passwords to directly access documents from the My Pakage email files. These documents were included in the documents provided to No Limits. There continues to be an issue over whether Ellis and Kirk had the right to access these email accounts. Ellis and Kirk claim that they had that right and the Pakage defendants claim that that access was improper.

The instructive features of this decision are in the court's treatment of two issues. First, whether No Limits, Kirk and Ellis were adverse in interest to each other. Second, whether any privilege that could be claimed over their communications was lost due to their misconduct in failing to disclose the agreement that they had made and by Ellis and Kirk accessing My Pakage emails. In its treatment of both of these issues the court demonstrated a reluctance to waive privilege over communications which form the basis for litigation strategies and an insistence on looking to the specific facts of the case to reach its conclusion.

In considering whether No Limits, Ellis and Kirk were adverse in interest and therefore could not claim privilege over their communications, the court looked past the pleadings to the actual bargain that those parties had made. When the action was commenced Ellis and Kirk were defendants and clearly adverse in interest to No Limits. They remained as named defendants until the claims against them were eventually discontinued before trial. The court did not accept the proposition that adversity was to be determined by the pleadings and found instead that from the date that the Confidentiality Agreement was made, No Limits, Ellis and Kirk had "settled their dispute" and were no longer adverse in interest. In doing so the court reinforced the proposition that claims related to privilege must be assessed and determined in the factual context of each case.

In dealing with the claim of waiver by misconduct, the court continues to distance itself from the line of authority which holds that a failure to immediately disclose an agreement between nominally adverse parties to settle their dispute or to cooperate against other defendants is a serious form of misconduct which can lead to striking the claims or defences of the parties to those agreements. The court in No Limits does not deal directly with the proposition in *Bilfinger Berger* that "it is necessary to disclose immediately any

COUNSEL COMMENTS

No Limits Sportswear Inc. v. 0912139 B.C. Ltd., (cont.)

agreement which affects the parties' position in a way that is different from that revealed by the pleadings". The court agreed that a party must not prejudice another party through misleading statements or silence, such that the pleadings suggest two parties are adverse in interest when in fact they are cooperating. However, the court was not convinced that on the evidence that there was any misconduct on the part of No Limits or any prejudice resulting to the Pakage defendants from the failure to disclose the Standstill and Confidentiality Agreement. In a similar way, the court declined to deal with the allegation that Ellis and Kirk had improperly accessed the documents from My Pakage and drew a distinction between the manner in which the documents were obtained and the subsequent communication between No Limits, Ellis and Kirk relating to those documents. Referring to the latter, the court found no evidence to support a claim of misconduct in those communications.

On balance, the message to be taken from this decision is that it will not be sufficient to rely only on broadly-based principles relating to the law of privilege to establish waiver. It is necessary to contextualize claims relating to privilege by tying them to the specific facts at issue."

JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd., 2015 BCCA 200

Areas of Law: Jurisdiction; *Forum non conveniens*; Presumption of Territorial Competence

~The inquiry with respect to s. 10(e)(i) of the Court Jurisdiction and Proceedings Transfer Act *concerns the existence of circumstances that connect performance of the contract to the forum~*

CLICK HERE TO ACCESS THE JUDGMENT

The central issue in this appeal was whether the British Columbia Supreme Court had territorial competence to decide a dispute between the Appellant Bank of Nanjing Co. Ltd. and the Respondent JTG Management Services Ltd. The Respondent had entered an agreement with Nanjing Overseas Wood Co. Ltd. for the sale of a custom order of lumber. In July 2011, Nanjing Overseas caused the Appellant to issue an irrevocable export letter of credit in favour of the Respondent. The Appellant provided the letter of credit to the Royal Bank of Canada ("RBC") as an advising bank, and RBC then delivered the letter of credit to the Respondent's bank, the Bank of Montreal ("BMO"),

in Toronto. The letter of credit designated BMO as the "advise through" bank, and BMO acted as the Respondent's agent. Under the letter of credit, the Appellant promised and undertook to pay the Respondent an amount of up to US$2,010,000 upon presentation of certain required documents. In October 2011, the Respondent provided the required documents to BMO, which in turn presented the documents to the Appellant and demanded acceptance and payment of US$742,875.29. The Appellant indicated that it would not honour the presentation, citing a discrepancy between the volume of lumber, the packing list, and the invoice. The Respondent maintained that there was no discrepancy, but revised the documents and presented them a second time to the Appellant. The Appellant refused the second presentation. In November 2011 the Appellant informed the Respondent that it had received an order of the Chinese Court freezing the required documents, and Nanjing Overseas commenced proceedings in China against the Respondent, arising out of the sales agreement. The Respondent brought an action against the Appellant, alleging that it suffered loss and damage in BC as a result of the alleged breach by the Appellant under the letter of credit. The Appellant applied for the stay or dismissal of that action, pleading that China was the more appropriate forum. The chambers judge found that territorial competence was presumed to exist under s.10 of the *Court Jurisdiction and Proceedings Transfer Act* (*CJPTA*), noting that the matter concerned a business carried on in BC and that there was an arguable case that the contractual obligations at issue were to be substantially performed in BC. Even if the presumption was not established, the chambers judge found that the facts as pleaded established an arguable case that there was a real and substantial connection to BC and that the Appellant had not shown that it was plain and obvious the court did not have jurisdictional competence. She noted that a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding. After considering the factors set out in s. 11(2) of *CJPTA* and by the BC Supreme Court in *The Original Cakerie Ltd. v. Renaud*, she held that the court should not decline its jurisdiction.

JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd., (cont.)

APPELLATE DECISION

The appeal was dismissed. The Appellant argued that the chambers judge erred by relying on assessments of facts that were unsupportable or contradicted in the pleadings and evidence, in order to find a presumption of territorial competence under s. 10(e)(i) of *CJPTA*. It also submitted that she erred in applying the wrong test for a presumption under s. 10(h) and ignoring factors that demonstrated the section did not apply. The Respondent conceded that the chambers judge erred in applying s. 10(h), but submitted that the error did not undermine the order. The Appellant further alleged that the chambers judge relied on irrelevant or incorrectly stated facts to find a real and substantial connection to BC, and erred in finding that *forum non conveniens* should not apply by relying on incorrectly assessed facts. The Appellant took the position that the presentation of the required documents, as the relevant performance under the letter of credit, was the proper area of focus in determining a real and substantial connection, and that this performance was to take place in Nanjing, China. The Appellant argued that other factors, such as the locations of the "advise through" bank or the negotiation by the beneficiary were irrelevant to the analysis. The Respondent maintained that the central issue was whether it has an arguable case that the contractual obligations under the letter of credit were, in the language of s. 10(e)(i), "to a substantial extent" to be performed in BC. The Court of Appeal noted that the performance specified under the letter of credit was payment by the Appellant against presentation of the required documents. The Court found it clear that the obligations under the letter of credit were to be performed "to a substantial extent" in BC. On the question of *forum non conveniens*, the Court confirmed that the decision not to decline jurisdiction is a discretionary one and found that none of the errors alleged by the Appellant were sufficient to establish that China was clearly the more appropriate forum.

COUNSEL COMMENTS

JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd., 2015 BCCA 200

Counsel Comments provided by
Andrew Nathanson and Jennifer Francis,
Counsel for the Respondent


Andrew Nathanson


Jennifer Francis

"The Court of Appeal's decision in *JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd.*, 2015 BCCA 200 ("*JTG*") is most notable for its contribution to the developing understanding of when our courts will have presumed territorial competence under s. 10(e)(i) of the *Court Jurisdiction and Proceedings Transfer Act* ("*CJPTA*") in contractual disputes with international dimensions.

We would emphasise four features of the court's analysis.

First, the decision reminds us that territorial competence is not a zero sum proposition. Courts of more than one state or jurisdiction may properly assert territorial competence over a dispute. This is particularly true in cases involving international commerce. The Bank's position on appeal was that only the courts of China could exercise territorial competence over the dispute. JTG's position was that the courts of both British Columbia and China could do so. The court agreed with JTG, with Kirkpatrick J.A. observing at para. 37, "[i]t is entirely possible to have an international contractual arrangement whereby both parties to the contract perform obligations "to a substantial extent" in their home jurisdictions".

Second, *JTG* exemplifies the difficulties faced by defendants who seek to mount jurisdictional challenges. Not only may more than one court properly assert territorial competence, but the arguable

COUNSEL COMMENTS

JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd., (cont.)

case standard applies to the proof of jurisdictional facts on which the assumption of jurisdiction depends. While the court has a discretion, now found in s. 11 of the *CJPTA*, to displace the forum selected by the plaintiff, the alternative forum must be clearly[1] more appropriate to oust the plaintiff's choice. However, "in international commerce, frequently there is no single forum that is clearly[1] the most convenient or appropriate for the trial of the action, but rather several which are equally suitable alternatives". *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78 at para. 75.

Third, there are still relatively few cases that explain s. 10(e)(i) of the *CJPTA*. *JTG* provides further guidance on when the presumption of territorial competence based on B.C. performance of a contract will apply.

As the court explained, s. 10(e)(i) requires the court to look at the contract in its entirety and the nature of the obligations to be performed. The inquiry "concerns the existence of circumstances that connect performance of the contract to the forum".

The focus is on the past, but is at the same time forward-looking: the court looks to the "expectations of the parties as to performance" at the time the contract was made. This is reflected in the words of the statute: the proceeding must concern contractual obligations that "*were to be performed* in British Columbia" [emphasis added]. This tense has been described as "future in the past". We will leave it to others more practised in grammar to debate the point.

Fundamentally, though, as Kirkpatrick J.A. put it, s. 10(e)(i) "requires the Court to engage in a preliminary interpretive inquiry to determine the limited question of the jurisdiction (or jurisdictions) where the parties intended the contract to be performed".

Fourth and finally, *JTG* contains a useful reminder that in contracts, a form of private ordering, the parties have substantial autonomy to decide these jurisdictional questions for themselves. If the Bank had wanted to ensure any dispute under the letter of credit was decided in a Chinese court, regardless of where the contract was to be performed, it could have included an exclusive forum selection clause. By the same token, contracting parties who want to ensure that our courts have territorial

1 Section 11 of the CJPTA does not include the term "clearly".

COUNSEL COMMENTS

JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd., (cont.)

competence can bargain for a British Columbia choice of law clause, which engages the presumption of territorial competence in s. 10(e)(ii) of the *CJPTA*. There are often, of course, practical constraints on either party's ability to secure such protections. This is particularly so in the case of an export letter of credit, where the terms are not typically the subject of negotiation between the issuing bank and the beneficiary."

COUNSEL COMMENTS

JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd., 2015 BCCA 200

Counsel Comments provided by
Ross McGowan, Counsel for the Appellant

"The appeal court was asked to reverse the Trial court decision that found jurisdictional competence in favour of the British Columbia Courts for a letter of credit issued by Nanjing Bank, (located in China) and JTG, a lumber exporter located in British Columbia. The trial court decision had found both territorial competence under the Court Jurisdiction and Proceedings Transfer Act, and had declined to exercise the Court's discretion under a forum non conveniens test to have the dispute determined in China. Nanjing Bank appealed the lower court ruling due to several foundational errors in the reasoning of the trial court decision pertaining the process for payment under the LC. The Court of Appeal posited:

> "[32] The issue can be further distilled to the following proposition: in which jurisdiction should the dispute be decided – the one in which, it is alleged, the decision to breach the contract was made (China); or the one in which, it is alleged, the actual breach occurred (British Columbia)?"

The Court of Appeal found that in cases involving international commerce, more than one court may properly assert jurisdiction over the parties' dispute. This conclusion flows from the practical realities of doing business across jurisdictions, which may mean that the obligations arising under an international commercial contract are performed by the parties in each of their respective jurisdictions. Therefore, the domestic jurisdictions of the issuing bank and the beneficiary to a letter of credit may well have a lawful basis in asserting territorial competence. Under British Columbia law, the question is then further refined to consider whether the obligations to be performed under the LC contract are 'to a substantial extent' to be performed within the jurisdiction of the court being asked to assume jurisdiction of the dispute. In the case of an international LC, the Court noted that the obligations could well be performed 'to a substantial extent' in multiple jurisdictions and in the case of this LC, it would have been possible to say that the obligations were to a substantial extent to be performed in both B.C. and China. Thus, the Court found jurisdictional competence for the B.C. courts.

COUNSEL COMMENTS

The Court went on to consider some of the alleged errors made by the Trial court in its application of the forum non conveniens test. To displace the presumption that the initial choice of forum ought to be displaced, the party raising forum non conveniens must still establish that there is a clearly more appropriate alternative forum. Thus, even though one could reasonably assert arguable errors, they were not enough to invoke the Court of Appeal's authority to overturn the exercise of discretion or find that China was clearly more appropriate as an alternative forum for this LC.

Thus, while the Court of Appeal reached these conclusions through a more rigorous analysis of the questions of jurisdiction than was done by the Trial court, it was insufficient to displace the plaintiff's choice of forum for the jurisdiction of the dispute.

Simply put:

a) The Court of Appeal found that the preparation of the Required Documents was, from the outset of the LC, reasonably contemplated by the LC contract and the preparation of the Required Documents were both reasonably expected to be performed in British Columbia and by that measure was a substantial part of the contract, even though another substantial part of the contract, being examination of the Required Documents was to take place in China. In consequence there were at least two jurisdictions with a substantial connection to the LC contract, China and British Columbia;

b) The parties could have, but did not, include an 'exclusive jurisdiction' clause in the LC. If the parties had wanted all disputes to be addressed in a particular jurisdiction or pursuant to a particular process it was open to the to do so; and

c) While there were arguably errors in the approach of the Trial court in its analysis and application of the forum non conveniens, the standard of judicial review when intervening on the discretionary application of a finding of the 'most convenient forum' was not sufficient to hold that the trial court was clearly wrong.

Jurisdiction Clauses and International Commerce

This decision highlights the importance for commercial parties to consider whether to include a choice of law, exclusive choice of law, jurisdiction or exclusive jurisdiction clause in their international payments contracts. Obviously multiple factors must be considered on such choice of law and jurisdiction that touch on both the enforceability of such clauses in some jurisdictions or situations, and the commercial palatability of such clauses for the clients and their customers that seek to engage payments services from their choice of financial institutions."

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A.A.A.M. v. British Columbia (Children and Family Development), 2015 BCCA 220

Areas of Law: *Family Law Act*; Best Interests of the Child; Guardians

~It is unfair to say that a parent does not regularly care for a child for the purposes of determining guardianship under s. 39(3)(c) of the Family Law Act*, when the Director of Adoption and the courts control that parent's access to the child~*

CLICK HERE TO ACCESS THE JUDGMENT

The Appellant, M, is the biological father of a child born on December 8, 2009. The Appellant was not in a marriage-like relationship with the child's mother, and the child's birth registration form indicated that the father was "unknown". On December 18, 2009, the mother signed a consent to adoption, making the Respondent Director of Adoption the child's guardian. Following a DNA test that proved he was the child's biological father, the Appellant became registered on her birth certificate. The Respondent placed the child with a couple in Alberta who had adopted her half-sister, and who were to act as her "caregivers" pending her adoption. Five months after she was placed for adoption, the Appellant sought custody of the child under the *Family Relations Act*. After

A.A.A.M. v. British Columbia (Children and Family Development), (cont.)

that *Act* was repealed he sought to be recognized or appointed as the guardian, or one of two guardians, of the child under the *Family Law Act* (*FLA*). Under the terms of the *FLA*, only guardians may have parental responsibilities or make certain major decisions affecting the child. In the years preceding the trial, the Appellant had some limited access to the child. At trial, the judge found that the child's mother's consent to adopt was valid. She also found that the Appellant was not the child's guardian despite being a parent, because he could not be said to be a person who "regularly cares for the child" within the meaning of s. 39(3)(c). The trial judge concluded it was not in the child's best interests to appoint the Appellant as a guardian under s. 51. While the Appellant had taken great strides as a parent and clearly loved the child, he was not well-suited to make significant decisions for her. He allowed his reaction to what he perceived as ill-treatment or injustice towards him to interfere with his ability to give top priority to the child's best interests. The Appellant was in Canada on a student visa which was due to expire, and his employment and financial situation was unclear. The trial judge also considered it relevant that the Appellant was facing a charge for a potentially serious criminal offence at the time of the close of the trial. She did find it in the child's best interests to have contact with her father, and permitted the Appellant to see the child once every six weeks for 2.5 hours in her home community, accompanied by an approved adult.

A.A.A.M. v. British Columbia (Children and Family Development), (cont.)

APPELLATE DECISION

The appeal was allowed. The Appellant argued that the trial judge erred in finding that the written consent signed by the child's mother on December 18, 2009 was a valid consent pursuant to the *Adoption Act* and that the Respondent was accordingly a guardian of the child. He also submitted that the judge erred in finding the Appellant could not be a guardian under s. 39(3)(c) of the *FLA*, and that she erred in refusing to appoint him as a guardian under s. 51. The Court of Appeal was not persuaded that the written consent was invalid. Madam Justice Newbury for the majority went on to consider the other grounds of appeal. The *FLA* provides at s. 39(3)(c) that a parent who has never resided with the child is not the child's guardian unless the parent regularly cares for the child. The majority found that the trial judge's ruling on the s. 39(3)(c) question was unfair. The Appellant had no access when there was no court order in place, because he was not permitted to have access by the Respondent, and the child had been moved to Alberta. Although the Appellant himself had been relatively unresponsive to the Respondent's inquiries, the majority found that Ministry workers, the Respondent, and the courts controlled how often and how long the Appellant was allowed to have contact with and care for the child. Therefore, they should not now be heard to say that the contact was not "regular" or sufficient. In the majority's view, the Appellant met the criterion under s. 39(3)(c) and should be recognized as a co-guardian with the Respondent. The trial judge's order was set aside and an order granted declaring the Appellant a guardian of the child. The Respondent remains a guardian and the Appellant's guardianship is subject to the condition that he and the Respondent attempt to reach an agreement concerning rights and responsibilities.

Mr. Justice Groberman would have dismissed the appeal. He found that in interpreting s. 39(3)(c), one must bear in mind that the focus of Part IV of the *FLA* is on the child's best interests and not parental rights. The facts of the case disclosed a very limited history of the Appellant actually being a caregiver for

A.A.A.M. v. British Columbia (Children and Family Development), *(cont.)*

the child, and for the most part he was only a visitor to the child when he saw her. The question of whether a parent regularly cares for a child is one of mixed fact and law, and the trial judge's determination of the matter was entitled to deference. There was also no basis on which the Court could properly interfere with the trial judge's determination on the s. 51 question.

COUNSEL COMMENTS

A.A.A.M. v. British Columbia (Children and Family Development), 2015 BCCA 220

Counsel Comments provided by
Mary E Mouat, Q.C., Counsel for the Respondent

"I wish to make it clear that the comments and opinion outlined herein are my opinion alone and not attributable to my client, the Provincial Director of Adoption, Her Majesty the Queen in Right of the Province of BC or the Attorney General of the Province of BC.


Mary Mouat, Q.C.

The BC Court of Appeal decision raises, in my view, a number of interesting issues. However, the two that stand out are the interpretation of section 39(3) of the *Family Law Act* and the implications for institutional guardians.

The former act, the *Family Relations Act*, did not grant guardianship to a birth father who had not lived with and was not married to the birth mother. Under the *Family Law Act*, while parents of a child are generally presumed to be a child's guardian, if a parent has never lived with his or her child, that parent is only a guardian if:

a) There is a surrogacy or assisted reproduction agreement;

b) The parent and all the child's guardians agree; or

c) The parent regularly cares for the child.

The Ministry of Justice explanation for "regularly cares for a child" at section 39(3)(c), in the White Paper was: "this may occur where a child is born in a short relationship where the parent did not live together, but both parents have been involved in the child's life". Section 39(3)(c) recognizes the fact of a dating relationship producing a child.

The purpose of section 39(3)(c) is to allow the Court to declare or recognize guardianship without consideration of a child's best interests. It is implicit that if a parent regularly cares his or her child, it is in the child's best interest to recognize and declare that relationship.

COUNSEL COMMENTS

A.A.A.M. v. British Columbia (Children and Family Development), (cont.)

A parent who does not fall under section 39 still has the opportunity to be a guardian and can only become a guardian by Court order and with a consideration of the child's best interests.

The bulk of the early interpretation of the *Family Law Act* flow from the Provincial Court and while the Provincial Court cases that were cited by counsel in this case examined the concept of "regularly cares for", it was a retrospective fact finding: what was the care prior to the application to Court.

The Court of Appeal notes in this case that "the intention of the Legislature was to refer to a parent who has demonstrated a continuing willingness to provide for the child's ongoing needs…certainly it connotes something more than simply 'visiting' the child, even at regular intervals." [Paragraph 63].

Evidence as to "willingness to parent" is much different than proof that prior to the application, there was the fact of regular care.

As the Director of Adoption as guardian and the Court controlled how often the Appellant was able to have contact, the Court of Appeal found it would be inherently unfair for the Director of Adoption and the Court to use that control to preclude a finding that the appellant had regularly cared for the child.

While the facts of this case are unique, does it now flow that a parent's mere intentions to "regularly parent" a child may be enough to have a parent declared a guardian?

Turning to the issue of institutional guardianship, while the declaration that the Appellant is a guardian in this case doesn't preclude O's adoption, something that is in fact contemplated in the appellate decision [paragraph 68], it does raise the issue of how an institutional guardian could be a co-guardian with a non-institutional guardian.

Specifically, how does an institutional guardian exercise guardianship responsibilities with another non-institutional guardian?

How are the distinct legislative goals of the Director of Adoption – to place a child for adoption and to assist in the completion of that adoption and the goals of the Appellant who wants to continue as guardian to be reconciled?

COUNSEL COMMENTS

A.A.A.M. v. British Columbia (Children and Family Development), (cont.)

The *Adoption Act* is a complete code that sets out the role and mandate of the Director of Adoption. When there is a voluntary relinquishment adoption, as there was in this case, the Director of Adoption is authorised and required to seek to place children for adoption; she is not authorized or provided with a mandate to co-parent a child.

Further, by virtue of section 24 of the *Adoption Act*, once the guardian's consent to adoption has been provided, the Director of Adoption is guardian and the Public Guardian and Trustee becomes the child's property guardian. The existence of this third guardian of the child is not addressed in the decision.

The Court of Appeal noted the Director of Adoption's argument that it "was 'both inherently and practically impossible' for her to share guardianship responsibilities with an individual…" [Paragraph 40]. However, it appears that as the Appellant only sought to receive third party information and to communicate with the child, it was not thought necessary to address that argument [paragraph 69].

While I would have preferred to have had Mr. Justice Groberman's dissent as the majority decision, that is not the case. As the Appellant's challenge to the Director of Adoption's guardianship has been dismissed, the most important consideration, the child's best interests, will be the only focus in any future applications."

Community Association of New Yaletown v. Vancouver (City), 2015 BCCA 227

Areas of Law: Municipal Law; Procedural Fairness; Zoning; Land Exchange

~Citizens have a right to be given sufficient information to come to an informed opinion about the merits of rezoning, and to express that opinion, but more than this is not required for a local government to meet its duty of procedural fairness~

CLICK HERE TO ACCESS THE JUDGMENT

The Appellant Brenhill Developments Limited owns 1077-1099 Richards Street ("1099"), across the street from 508 Helmcken Street ("508"), where Jubilee House is located. Jubilee House is an affordable housing building, and is in disrepair. Brenhill approached the Appellant City of Vancouver, suggesting that it would construct a replacement for Jubilee House at 1099 and, once that was completed, turn it over to the City for lease to a managing society. In exchange for this, the City would transfer 508 to Brenhill and close an adjacent lane. Brenhill then planned to build a 36-storey tower at 508, containing 448 units, a two-storey preschool, and retail space. The City's technical staff negotiated a Land Exchange Contract and related agreements with Brenhill. The City's Development Permit Board issued a development permit for the new Jubilee House and City Council enacted a rezoning bylaw for 508 to accommodate the proposed development. The Respondent, the Community Association of New Yaletown, sought judicial review of the development permit and the rezoning bylaw. In its petition, it sought declarations that the City had breached the rules of procedural fairness by failing to disclose relevant documents, including the Land Exchange Contract, at its public hearing, by accepting written submissions after the date of the public hearing, and by failing to provide proper notice of the amendment of the Downtown Official Development Plan ("DODP"). It also sought declarations that the Land Exchange Contract unlawfully fettered City Council's discretion and that the rezoning was inconsistent with the DODP. The chambers judge found the essential question in the petition to be whether the City provided enough information to the public, in an understandable form, to fairly evaluate the pros and cons of the proposed development. He found that residents were not given an opportunity to express their views on the merits of the entire plan,

Community Association of New Yaletown v. Vancouver (City), *(cont.)*

that the information provided was technical and opaque, and that the dollar values given for the components of the land exchange were arbitrary. He stated that the public was entitled to an explanation more like the one given to the court in the petition. He quashed the 508 rezoning bylaw, the 1099 development permit, and the DODP amendment.

Community Association of New Yaletown v. Vancouver (City), (cont.)

APPELLATE DECISION

The appeals were allowed. The chambers judge was alleged to have erred in law in interpreting the scope of the public hearing to extend beyond the 508 rezoning, in finding the disclosure before the public hearing to be deficient, in quashing the 1099 development permit on the basis of defects he identified with the public hearing, and in quashing the DODP amendment on the basis of a title in the public notice. He was also alleged to have erred in fact in finding that interested persons were prevented from commenting on the overall land exchange plan at the public hearing. Shortly before the appeals were heard, a new development permit was issued and a new rezoning bylaw adopted, prompting the Respondent to move to quash the appeals as moot. The Court held that it is arguable that certain benefits will flow to Brenhill if the appeals are allowed, so they are not moot. Even if they were moot, the Court found that the appeals raised issues of general importance concerning the disclosure that must be made prior to public hearings, and so should be heard. In considering the appeal on its merits, the Court noted that municipalities "wear several hats" even in the implementation of a single plan, such as exercising business functions to acquire

Community Association of New Yaletown v. Vancouver (City), *(cont.)*

a property and then legislative functions when regulating the development and use of the property. The Court found the chambers judge was in error when he concluded that the issue at the public hearing was not whether 508 could be rezoned, but whether the sacrifice the residents and general public were expected to accept was worth the trade-off. The public hearing was only in respect of the rezoning of 508, and no such hearing was required with respect to the City's business transactions. The judge also erred analytically by not considering the adequacy of disclosure as a matter of procedural fairness. The analysis was *per incuriam*, as the judge did not refer to the leading case on the matter. The level of disclosure suggested by the chambers judge was far broader than that required for public hearings under the *Vancouver Charter*. Citizens were allowed to comment on matters other than the rezoning of 508 at the public hearing, even though the City was under no obligation to allow such comments, and the chambers judge made a palpable and overriding error in concluding otherwise. The chambers judge also erred in failing to give separate consideration to the approval and issuance of the 1099 development permit.

Reynolds v. M. Sanghera & Sons Trucking Ltd., 2015 BCCA 232

Areas of Law: Tort Law; Personal Injury; Past and Future Loss of Earning Capacity; Cost of Care

~Where a plaintiff has functional limitations after an accident, the issue to be determined is whether those limitations would result in a real and substantial possibility of a reduction in their earning capacity in future~

CLICK HERE TO ACCESS THE JUDGMENT

The Respondent, Mr. Reynolds, sustained soft tissue injuries in a multi-vehicle accident in 2009. He also suffered anxiety, sleep disorder, vertigo and headaches following the accident. The Respondents, M. Sanghera & Sons Trucking Ltd., Harnek Singh Sanghera, John Doe and Insurance Corporation of British Columbia, admitted liability in the accident. At the time of the trial to determine damages, the Appellant's symptoms had continued unabated for five years and the trial judge considered it unlikely that he would see much improvement. The judge also concluded that the effects of the injuries had a severe impact on the Respondent's life, and that they compromised the amount of work he would be able to do. The judge found that the Respondent would continue to suffer at a high level for the foreseeable future. The Respondent was self-employed, owning and operating an aromatherapy business with his spouse. The business was organized through a closely held corporation. The trial judge based his award on the Respondent's evidence that he could only work about half of his pre-accident hours and that his output was about 50% of what it was previously. The trial judge acknowledged that the Respondent's business had grown following the accident, but accepted his evidence that his diminished capacity to work had resulted in lost income. The judge considered the cost of paying a full time employee to cover work the Respondent could no longer do in calculating his award. The judge awarded a total of $646,969.38 in non-pecuniary damages, past loss of earnings, future loss of earning capacity, past and future loss of homemaking and handyman capacity, special damages, and costs of future care. He dismissed the Respondent's claim for the cost of Pilates classes as a future cost of care. The Appellants appealed mainly on the basis that as the income to the Respondent's business had increased significantly following the accident, he had not proven to the

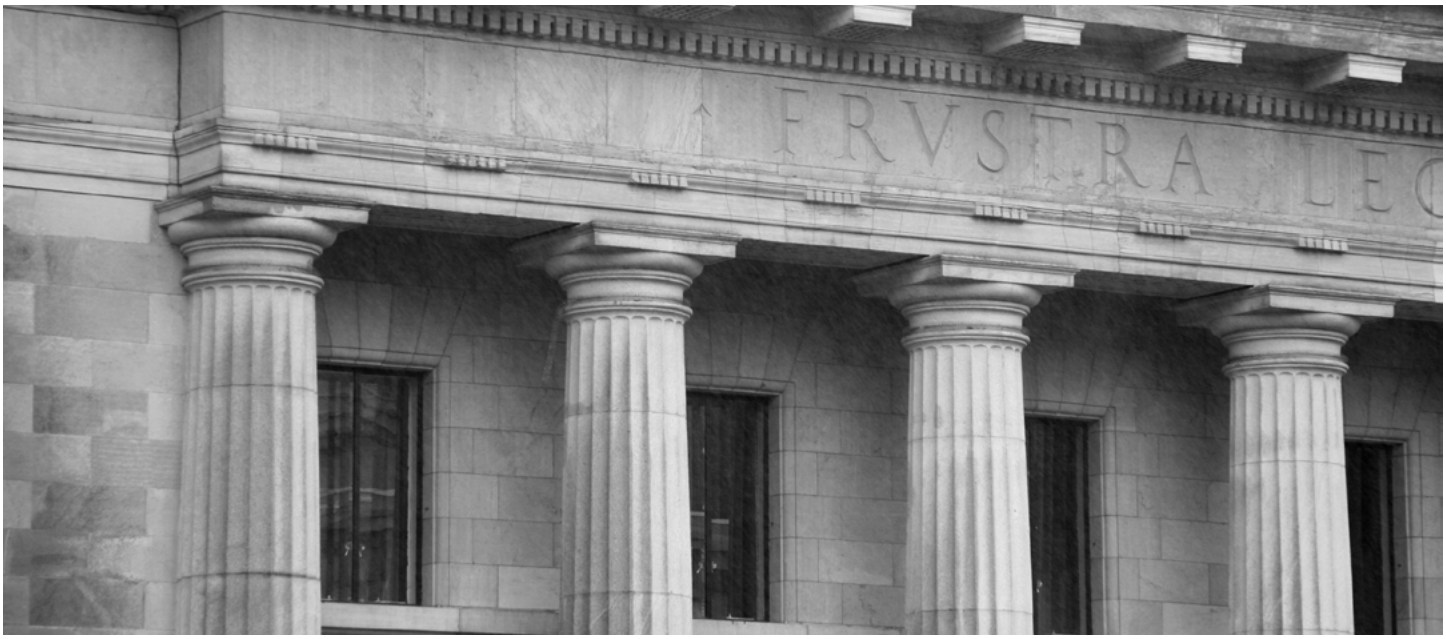
requisite standard that he had lost income or the capacity to earn in the future. The Respondent cross-appealed on the valuation of damages for past and future housekeeping and handyman capacity, on the reduction of his damages for past income loss to account for income tax implications, and on the dismissal of his claim for the cost of Pilates classes.

APPELLATE DECISION

The appeal was allowed and the cross-appeal allowed in part. The Court of Appeal noted that it was not in dispute that the Respondent had functional limitations after the accident, but the issue was whether those limitations would result in a real and substantial possibility of a reduction in his earning capacity in future. The Appellants argued that the judge misapprehended the evidence with respect to the Respondent's post-accident work hours, as the Respondent testified that after the accident he worked full time hours but felt that he worked at one-half capacity. There was also little evidence with respect to whether the Respondent had in fact hired a full time employee to offset his limited capacity. The Court of Appeal agreed with the Appellants that the judge mischaracterized this evidence. The Respondent had not testified that he had difficulty filling the increase in customer orders, meeting increased demand for his product, or capitalizing on opportunities to grow his business. The Court did find that there was sufficient evidence for the judge to conclude that the Respondent proved that he could not physically perform some of the essential tasks associated with his business. The question was whether the judge appropriately quantified the value of that limitation. Upon reviewing the business's actual income before and after the accident, the Court held that there was no evidentiary basis for the trial judge to conclude, as he did, that the business's profits would have more than doubled but for the Respondent's reduced capacity. Although the judge's assessment of damages attracts deference, the award was so inordinately high that it reflected an erroneous estimate of the damage. The Court set aside the award of $300,000 for future loss of earning capacity and replaced it with an award

Reynolds v. M. Sanghera & Sons Trucking Ltd., *(cont.)*

of $125,000. With respect to the cross-appeal, the Court found no palpable and overriding error in the judge's dismissal of the claim for the cost of Pilates classes. However, the Court agreed with the Respondent that the judge should not have discounted the awards on account of the Respondent's spouse's interest in the home property, and allowed the cross-appeal of the valuation of the past loss of renovations capacity by increasing the award to the full amount claimed by the Respondent. The Court allowed the cross-appeal regarding past loss of landscaping capacity, but not to the full amount claimed. The cross-appeals with respect to the award for future loss of housekeeping capacity and with respect to the reduction of damages to account for income tax implications were dismissed.



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