

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

THE REGIONAL MUNICIPALITY OF WATERLOO

Applicant

and

PERSONS UNKNOWN AND TO BE ASCERTAINED

Respondents

ABBREVIATED BOOK OF AUTHORITIES

(Motion in Writing)

February 2, 2026

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TAB 1

[First Capital Realty Inc. v. Centrecorp Management Services Ltd.](#)

Ontario Judgments

Ontario Superior Court of Justice

Divisional Court - Toronto, Ontario

J.M. Wilson, M.R. Dambrot and J.C. Murray JJ.

Heard: October 15, 2009.

Judgment: October 20, 2009.

Court File No. 272/09

[2009] O.J. No. 4492 | 83 C.P.C. (6th) 310 | 258 O.A.C. 76 | 2009 CarswellOnt 6914 | 2009 CanLII 75631

Between First Capital Realty Inc., Appellant, and Centrecorp Management Services Limited, Respondent

(31 paras.)

Case Summary

Civil litigation — Civil evidence — Admissibility — Relevancy — Facts directly in issue — Procedure — Exclusionary rules — Prejudice — Hearsay rule — Application of rule — Documentary evidence — Affidavits — Statements on information or belief — Appeal from motion judge's order allowed — Motion's judge reversed Master's decision allowing appellant to present affidavit after cross-examinations on pending motion had been completed — Appellant had brought pending motion to require respondent to produce particular party for examination — Master found appellant's counsel had been unaware of evidence beforehand and evidence was relevant — Motion's judge erred in re-hearing matter and substituting her own decision rather than applying discretionary standard of review — Motion's judge ruled evidence was prejudicial to respondent even though respondent did not argue prejudice before Master.

Appeal from motion judge's order. The motion judge's order reversed the Master's order allowing the appellant to present affidavit evidence once cross-examinations on pending motion had been completed. The parties were in a dispute over who the respondent should present for examination. The appellant had brought the pending motion to seek an order requiring the respondent to produce a particular party. The Master's order was to allow the appellant to file an affidavit and two documents giving evidence about that party's position with the respondent. The Master found that the appellant's counsel had no knowledge of the evidence earlier and admitting the evidence would further the interests of justice. The respondent successfully appealed that order before the motion's judge. The appellant argued that the motion's judge had applied the incorrect standard of review, applied the Rules of Civil Procedure incorrectly, erred in finding the respondent would be prejudiced by the order and in finding the affidavit to be hearsay.

HELD: Appeal allowed.

There was no doubt that deference was to be given to the Master's decision. The motion's judge erred in essentially re-hearing the matter and substituting her own view. The motion's judge erred in finding that the respondent was prejudiced by the admission of the evidence when the respondent had not argued prejudice before the Master. The documents identified the source and the associate stated her belief the information was true, so the Master was incorrect in finding that the evidence was hearsay.

Statutes, Regulations and Rules Cited:

Rules of Civil Procedure, Rule 1.04, Rule 39.02(2), Rule 62.02(4)(b)

Counsel

Arlen K. Sternberg, for the Appellant.

Marguerite Ethier, for the Respondent.

The judgment of the Court was delivered by

J.M. WILSON J.

The Appeal

1 The appellant, First Capital Realty Inc. ("First Capital"), appeals with leave of Low J. from the order of Roberts J. dated March 16, 2009 ("the Order"). The Order reversed the interlocutory order of Master Hawkins dated November 12, 2008. The order of Master Hawkins permitted First Capital, pursuant to rule 39.02(2) of the Rules of Civil Procedure, *R.R.O. 1990, Reg. 194*, to deliver a brief affidavit after cross-examinations on a pending motion had been completed ("the Master's Order").

Background

2 The parties disagreed on who should be the party presented for discovery on behalf of Centrecorp Management Services Inc. ("Centrecorp"). In May 2008, First Capital commenced a motion to compel the attendance of Terry Coughlin as the corporate discovery representative of Centrecorp ("the Attendance Motion"). The Attendance Motion was originally returnable September 30, 2008 before Master Hawkins. It has not yet been argued. The outstanding issues on the Attendance Motion are: (1) whether Coughlin is a director, officer, or employee of Centrecorp; and (2) if so, whether he is the appropriate discovery witness. The Attendance Motion will be heard by Master Hawkins regardless of the results of this appeal.

3 The day before the Attendance Motion was scheduled to be heard, the parties became embroiled in an ancillary dispute that is the subject matter of this appeal. First Capital sought to file a further affidavit in support of the motion to compel the attendance of Coughlin, and Centrecorp opposed this request ("the Affidavit Motion").

The Affidavit Motion

4 The master heard the Affidavit Motion on September 30, 2008. First Capital sought leave to file the supplementary affidavit pursuant to rule 39.02(2) of the Rules of Civil Procedure. That rule provides:

39.02(2) A party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing or conduct an examination under rule 39.03 without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of an affidavit or a transcript of an examination conducted under rule 39.03.

5 The two documents in dispute were attached to an affidavit of the associate lawyer who had filed the original affidavit in support of the Attendance Motion.

6 The first document was a letter written by counsel for Centrecorp, dated January 26, 2005, in which counsel responded to questions from First Capital corporate counsel about the status of Coughlin and others within Centrecorp. The letter confirmed that Coughlin was Executive Vice President of Centrecorp. The second disputed document was attached to the letter. This document which was a Certificate of Incumbency dated January 26, 2005, signed by Robert Green, President of Centrecorp, in which Green certified at that time that Coughlin held the position of Executive Vice President.

7 The master permitted First Capital to file the further affidavit attaching the two documents and explaining why they had not been included in the original affidavit material, notwithstanding the completion of cross-examinations in the pending motion.

8 He concluded in a brief endorsement that the correspondence attached to the affidavit was very relevant to the issue of Coughlin's role with Centrecorp, and that in the interests of justice the further affidavit could be filed. He accepted the explanation that lead counsel was unaware of these documents, or had forgotten about them at the time the initial affidavit material was prepared.

9 Centrecorp appealed the master's decision on the Affidavit Motion, and the matter was heard by Roberts J. In lengthy reasons, the motions judge reversed the decision of the master. First Capital sought leave to appeal the interlocutory decision of Roberts J. Leave to appeal was granted by Low J. pursuant to rule 62.02(4)(b) of the Rules of Civil Procedure.

Grounds of Appeal

10 First Capital raises the following issues in this appeal.

1. Did the motions judge err in applying an incorrect standard of review to the Master's decision?
2. Did the motions judge err in applying the rule 39.02(2) criteria, especially the "reasonable explanation" criterion?
3. Did the motions judge err in determining that there would be non-compensable prejudice to Centrecorp?
4. Did the motions judge err in determining that the explanation of lead counsel, proffered through an associate's affidavit, was inadmissible hearsay?

Standard of Review

11 There is no dispute that the standard of review that ought to have been applied by the motions judge in reviewing the Master's Order, as outlined in *Zeitoun v. Economical Insurance Group* (2008), 91 O.R. (3d) 131 (Div. Ct.), is the test stipulated in *Housen v. Nikolaisen* [2002] 2 S.C.R. 235, and in *Equity Waste Management of Canada v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321 (C.A.).

12 The same standard of review applies to this court reviewing the decision of the motions judge. *Housen v. Nikolaisen* at paras. 8, 10, 36 and 37, confirms that the standard of review on a question of law is correctness, and on findings of fact is palpable and overriding error. A question of mixed fact and law generally engages the palpable overriding error standard, unless the question of law is extricable from the facts, in which case the standard of review on the question of law is correctness.

Analysis

13 The case law under rule 39.02(2) confirms the criteria to consider in determining whether a party should be granted leave to respond to a matter raised on cross-examination:

- 1) Is the evidence relevant?
- 2) Does the evidence respond to a matter raised on the cross-examination, not necessarily raised for the first time?
- 3) Would granting leave to file the evidence result in non-compensable prejudice that could not be addressed by imposing costs, terms, or an adjournment?

First Capital Realty Inc. v. Centrecorp Management Services Ltd.

- 4) Did the moving party provide a reasonable or adequate explanation for why the evidence was not included at the outset?

See: Brock Home Improvement Products Inc. v. Corcoran (2002), 58 O.R. (3d) 722 (S.C.) at paras. 8-9 and Nolan v. Canada (Attorney General) (1997), 38 O.R. (3d) 722 at 727-8 (Gen. Div.).

14 A flexible, contextual approach is to be taken in assessing the criteria relevant to rule 39.02(2), having regard to the overriding principle outlined in Rule 1.04 of the Rules of Civil Procedure that the rules are to be interpreted liberally to ensure a just, timely resolution of the dispute. An overly rigid interpretation can lead to unfairness by punishing a litigant for an oversight of counsel. See: Arfanis v. University of Ottawa (2004), 7 C.P.C. (6th) 371 (Ont. S.C.) at paras. 8 and 15; BFC Construction Group Inc. v. Ontario Realty Corp. (2001), 17 C.P.C. (5th) 288 (S.C.) at para. 24; Nolan v. Canada (Attorney General).

15 The master correctly and succinctly considered the rule 39.02(2) criteria, excluding the issue of prejudice, as no allegation of prejudice was advanced.

16 He concluded that the documents in question were highly relevant, and responded to issues raised during the cross-examinations. It was in the interests of justice to allow the further affidavit to be filed in these circumstances. Counsel provided an explanation that was accepted by the master for why these documents were not originally attached to the first affidavit, as counsel was unaware of their existence, or had forgotten about them. Any delay in bringing this material forward was adequately explained in the circumstances.

17 The appellant alleges that, although the motions judge correctly identified the appropriate deferential test for a review of a discretionary interlocutory order of a master, she failed to apply the test.

18 Instead of hearing the appeal, the motions judge in this instance essentially reheard the matter. She substituted her discretion for that of the master, including canvassing issues that were not raised before the master. Specifically, the issue of non-compensable prejudice was not raised before the master.

19 We conclude that the motions judge erred in law in failing to apply the deferential standard of palpable and overriding error to review the discretionary, fact-driven decision of the master.

20 In our view, the motions judge erred in her conclusions reached in several other respects.

21 The motions judge concluded that to allow the production of the documents would cause non-compensable prejudice to Centrecorp. These documents were prepared and produced by counsel for Centrecorp in response to questions asked by the appellant's counsel. No issue of prejudice was raised before the master. There could be no non-compensable prejudice to Centrecorp producing its own document prepared by its counsel. As well, terms were agreed to by counsel if the supplementary affidavit was to be filed to overcome any potential prejudice.

22 The parties agreed in written submissions provided to the master that if the order to file the supplementary affidavit was granted, the parties would be entitled to cross-examine on the associate's supplementary affidavit and any responding affidavit material filed by Centrecorp, and that First Capital would pay costs.

23 Given this agreement, the conclusion by the motions judge that there was noncompensable prejudice as a result of the Master's Order is not supportable.

24 The master accepted as reasonable the explanation for any delay in bringing forward the two documents based upon the evidence before him. The motions judge erred in both substituting her view with respect to delay, and in elevating the reasonable explanation for the delay to a near-dispositive requirement. All four criteria established by the case law should be weighed evenly in determining in light of the facts of each case whether it is appropriate to grant leave under rule 39.02(2).

25 On the hearsay issue, the motions judge was incorrect. The associate attached two relevant documents to her affidavit to complete the record. The affidavit based upon information and belief identified the source of the information and stated her belief that it was true, and was properly admitted by the master as part of the record. Rule 39.01 permits affidavits to be filed on information and belief in these circumstances.

26 Similarly, the motions judge's reliance on the "best evidence" rule in determining that the explanation for the delay should have been set out in an affidavit by lead counsel is misplaced. The courts have long since rejected any strict application of this principle (see e.g. R. v. Papalia, [\[1979\] 2 S.C.R. 256](#)). It was not necessary for lead counsel to prepare the affidavit, be cross-examined and recuse himself from arguing the Affidavit Motion in these circumstances. The conclusions of the motions judge on this issue were highly technical and in our view incorrect.

27 The Rules of Civil Procedure are meant to promote both fairness and the search for truth. They are not meant to encourage the adversarial game of cat and mouse, with technical but impractical arguments.

28 The reasons of the motions judge in the application of the law to the facts of this case disclose several palpable and overriding errors with respect to the issues of mixed fact and law, and contain errors in the interpretation of the legal issues.

29 We reiterate the importance of a deferential test for a motions judge to intervene in an interlocutory decision made by a master, as outlined in Zeitoun. The importance of the deferential test is further enhanced in this case, as the issue considered by the master was only a preliminary issue to an interlocutory order. The result of the motions judge granting the appeal has been a delay in the proceeding of over a year, with extensive legal costs incurred by both parties.

30 For these reasons, the order of the motions judge is set aside, and the decision of the master is affirmed. The parties are agreed that the associate's affidavit may be filed, subject to the parties respecting the terms agreed to in their letter dated January 27, 2009.

31 The parties have reached an agreement as to costs, for the appeal before the motions judge, the motion for leave to appeal and for this appeal.

J.M. WILSON J.
M.R. DAMBROT J.
J.C. MURRAY J.

TAB 2

 **Knowles (c.o.b. Special Events Marketing) v. Arctic Glacier Inc.**

Ontario Judgments

Ontario Superior Court of Justice

L.C. Leitch J.

Heard: January 20, 2011.

Judgment: January 28, 2011.

Court File No. 10-CV-14457

[2011] O.J. No. 388 | 2011 ONSC 682 | 2011 CarswellOnt 396 | 197 A.C.W.S. (3d) 19

Between Louise Knowles c.o.b. as Special Events Marketing, Plaintiff, and Arctic Glacier Inc., Keith Corbin and Reddy Ice Holdings Inc., Defendants

(67 paras.)

Counsel

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Dana M. Peebles, for the Defendant Arctic Glacier Inc.

Paul J. Martin, for the Defendant Reddy Ice Holdings Inc.

REASONS FOR JUDGMENT

L.C. LEITCH J.

- 1 Arctic Glacier Inc. ("Arctic") moves for an order striking portions of an affidavit of Mr. Andrew Morganti, counsel for the plaintiff, filed in support of the plaintiff's motion for certification of this action as a class proceeding ("Arctic's motion").
- 2 Reddy Ice Holdings Inc. ("Reddy") supports Arctic in its motion.
- 3 The plaintiff moves for an order granting leave to file two affidavits in support of its motion for certification (the "plaintiff's motion").
- 4 Arctic's motion and the plaintiff's motion were both heard January 20, 2011.
- 5 The parties were advised by fax on January 21, 2011 that:
 1. The plaintiff's motion is allowed and the plaintiff is granted leave to deliver the affidavit of Mr. McNulty sworn on December 28, 2010 and the Supplementary Affidavit of Mr. Morganti sworn on December 22, 2010 for use at the certification hearing.
 2. The reference in Mr. Morganti's affidavit sworn June 7, 2010 to the Alberta civil judgment and the related attachment is struck out.

6 This notification was necessary to allow the parties to conduct a cross-examination of Mr. McNulty on January 25, 2011, so that the certification motion could be heard commencing January 31, 2011 as scheduled.

7 The following are the reasons for the above noted orders.

Background Facts

8 In its statement of claim issued March 30, 2009, the plaintiff alleged a conspiracy in Canada respecting packaged ice by Arctic, a Canadian company which produces packaged ice in Canada and the United States. The claim referenced Reddy, an American company which produces packaged ice only in the United States.

9 In February 2010, Arctic's U.S. subsidiary and Mr. Keith Corbin, a former employee of Arctic's subsidiary, pled guilty and were sentenced on criminal anti-trust charges respecting activity in Michigan with Home City Ice. In the sentencing hearing, Mr. Martin McNulty, a former employee of Arctic's U.S. subsidiary, sought a compensation order. He filed a "supplementary declaration" in that proceeding, which raises a contentious issue on this motion (the "McNulty declaration").

10 The plaintiff issued a replacement statement of claim on March 1, 2010, which added Reddy and Mr. Keith Corbin as defendants.

11 The plaintiff filed a motion for certification on June 8, 2010. They also filed four affidavits in support of the motion for certification: one from the plaintiff, two from a damage expert and one from Mr. Morganti (the "first Morganti affidavit").

12 The parties worked towards the certification hearing scheduled for January 31, 2011 in accordance with a timetable established at a case conference June 9, 2010.

13 On October 28, 2010 Arctic served this motion to strike portions of Mr. Morganti's affidavit, some of which referenced exhibits.

14 Reddy and Arctic served their responding records to defend the motion for certification on November 5 and November 11.

15 On November 26, 2010, the plaintiff agreed that Arctic's motion would be argued on December 20, 2010.

16 The plaintiff served its reply record for certification December 1, 2010, containing an additional affidavit from its expert.

17 Arctic served its record respecting this motion and its factum on December 12 and 13, 2010.

18 Cross-examinations on the affidavits filed on the certification motion were completed December 13 and 16, 2010. The defendants cross-examined the plaintiff and the plaintiff's expert. The plaintiff conducted no cross-examinations on the affidavit material filed in response to the certification motion.

19 On December 15, 2010, plaintiff's counsel informed the Court it wished to schedule a motion to dismiss the action against Mr. Corbin on December 20. The plaintiff's motion record was served December 17.

20 On December 16, plaintiff's counsel advised the defendants they would be filing an amended claim and serving additional material for the certification motion.

21 At a case conference on December 17, 2010 the plaintiff took the position that the additional material to be filed was significant to this motion and sought an adjournment of Arctic's motion. Arctic's motion was adjourned for

hearing to January 20, 2011. A further case conference was held December 20, 2010, which established a timetable relating to the plaintiff's motion. Cross-examinations, if required, were scheduled: January 4, 2011 for Mr. Morganti and January 25, 2011 for Mr. McNulty. The action against Mr. Corbin was dismissed on December 20, 2010.

22 On December 22, 2010, the plaintiff filed and served a supplementary affidavit of Mr. Morganti in support of the certification motion (the "second Morganti affidavit").

23 On December 23, 2010, the plaintiff filed an amended statement of claim asserting a breach of the *Competition Act*, [R.S.C. 1985, c. C-34](#) as amended against Arctic, Reddy and corporate co-conspirators, co-packers and distributors of Arctic's packaged ice.

24 On December 28, 2010, the plaintiff filed and served an affidavit of Mr. McNulty for use on the certification motion (the "McNulty affidavit").

25 Also on December 28, the plaintiff served the plaintiff's motion seeking leave to file the second Morganti affidavit and the McNulty affidavit because they were filed after cross-examinations were completed.

Relevant Provisions of the Rules

26 Arctic's motion engages the following rules: Rule 4.06(2), Rule 25.11 and Rule 39.01(4):

4.06(2) An affidavit shall be confined to the statement of facts within the personal knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in court, except where these rules provide otherwise.

25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

- (a) may prejudice or delay the fair trial of the action;
- (b) is scandalous, frivolous or vexatious; or
- (c) is an abuse of the process of the court.

39.01(4) An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit.

27 The plaintiff's motion engages Rule 39.02(2):

39.02(2) A party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing or conduct an examination under rule 39.03 without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of an affidavit or a transcript of an examination conducted under rule 39.03.

28 Although the plaintiff elected not to conduct any cross-examination it raised no issue that Rule 39.02(2) was not applicable and brought its motion for leave.

The Contentious Portion of the first Morganti Affidavit

29 The plaintiff conceded that certain documents would be excluded from the first Morganti affidavit, however, four aspects remain in contention.

30 The McNulty declaration was attached, as an exhibit, to the first Morganti affidavit. Arctic's position, as clearly set out in its factum, was that the highly contentious "evidence" contained in the McNulty declaration should have been filed by Mr. McNulty himself. Furthermore, Mr. Morganti had not complied with Rule 39.01(4) and because of that breach, the McNulty declaration should be struck under Rule 25.11 as an abuse of process.

31 However, Arctic also noted that even if Mr. Morganti complied with Rule 39.01(4), he did not provide adequate support for filing that hearsay evidence (See *Children's Aid Society of Huron-Perth v. H.(C)*., [2008] W.D.F.L. 3415 at paras. 28-30 (Ont. S.C.J.)), nor did he provide any of the required assurances as to reliability (See *Isakhani v. Al-Saggaf*, [2007 ONCA 539](#) at paras. 38-40 (C.A.))

32 Essentially, Arctic's position was that the McNulty declaration should not be admitted because it contained hearsay evidence, there was no proof Mr. McNulty was unavailable and counsel had not complied with Rule 39.01(4) (a conclusion to that effect was reached in *Dobbie v. Arctic Glacier* (August 24, 2010; unreported, Ont. S.C.J.)).

33 The second issue related to evidence about U.S. criminal investigations and prosecutions against Mr. Corbin, Reddy and a subsidiary of Arctic (the "U.S. criminal proceedings").

34 The third issue arises because Mr. Morganti has filed a copy of a decision from an Alberta court respecting a proceeding against Arctic for interference with a regional ice competitor (the "Alberta judgment").

35 The fourth issue relates to a copy of a distributorship agreement between Arctic and a B.C. packaged ice company, which contains a covenant not to compete with Arctic in the U.S. (the "Polar Bear agreement"), which is also attached to Mr. Morganti's first affidavit.

36 With respect to the second, third and fourth contentious issues, Arctic's position is that this evidence is irrelevant and prejudicial to a fair hearing of the motion for certification.

The Evidence in the Second Morganti Affidavit

37 In his second affidavit, Mr. Morganti deposes the following at para. 3:

Through inadvertence, I may not have fully indicated the source of my information and belief on the matters set out in my June 7, 2010 affidavit. Additionally, to the extent that my previous affidavit does not contain reference to statements of fact within my personal knowledge, I verily believe them to be true based on my information and belief.

38 He also deposes in para. 5 that he referred in some detail in his first affidavit to Mr. McNulty's evidence respecting the U.S. criminal proceedings and referred to the McNulty declaration. He sets out in his second affidavit that Arctic had brought a motion to strike portions of his first affidavit, including portions relating to Mr. McNulty's evidence on the basis that it in part constitutes contentious hearsay evidence. As a result, he had contacted Mr. McNulty, who had agreed to provide direct evidence in the action, and had signed a declaration affirming his supplementary declaration. He also deposed that he was attempting to obtain an affidavit from Mr. McNulty that met the requirements of Rule 4.06, but that he was away from the office on holidays, and he anticipated that Mr. McNulty's affidavit based on his declaration would contain the information set out in the declaration.

The Evidence in Mr. McNulty's Affidavit

39 Mr. McNulty swore an affidavit December 28, 2010, which was intended to be supplemental to, and confirmatory of, the declaration he swore on December 19, 2010.

40 He deposed that he had personal knowledge of the matters in the affidavit. He referenced the "supplementary declaration" which was attached as an exhibit and deposed that he continued to believe all his statements in that declaration are true.

41 He deposed that he was familiar with the allegations in the plaintiff's amended statement of claim and in particular, the incorporation of his "supplemental declaration."

Disposition

42 Arctic submits that there are no facts in the second Morganti affidavit and the McNulty affidavit unknown to or unavailable to the plaintiff on June 8, 2010 when the first Morganti affidavit was served, or before December 13 when the cross-examinations commenced.

43 Arctic emphasizes that the plaintiff has offered no explanation for their late service of the second Morganti affidavit and the McNulty affidavit.

44 Arctic submits that it would be a fundamental breach of procedural fairness to admit the late affidavits, emphasizing the provisions of Rule 39.02(2).

45 In my view, Arctic's motion to strike the portion of the first Morganti affidavit that referenced the supplementary declaration had merit. Indeed, the plaintiff recognized the merit of that motion and obtained direct evidence from Mr. McNulty in the form of the McNulty affidavit. The evidence attributed to Mr. McNulty in the first Morganti affidavit was highly contentious evidence going to the heart of the issues and I agree with Arctic that without affidavit evidence from Mr. McNulty the best evidence would be missing from the certification motion. Mr. McNulty was indeed a centrepiece for the plaintiff and ought to have been front and centre.

46 With respect to the issue of the McNulty declaration, I feel it is appropriate to first assess the merits of the plaintiff's motion for leave to file the McNulty affidavit.

47 I agree with Arctic that the purpose of Rule 39.02(2) is to ensure that opposing parties know the case advanced by the moving party prior to cross-examinations: see *1013952 Ontario Inc. v. Sakinofsky*, [\[2009\] O.J. No. 4096](#) (S.C.J.).

48 I also agree with Arctic that in *Brock Home Improvement Products Inc. v. Corcoran* [\(2002\), 58 O.R. \(3d\) 722](#) at para. 9 (S.C.J.) Stinson J. interpreted the words "ought to be permitted to respond" in Rule 39.02(2) as "imposing a burden on a party who seeks leave to show more than an absence of non-compensable prejudice to the opposite party," which requires a "satisfactory explanation for its failure to include the proposed additional evidence as part of its pre-cross-examination case."

49 This line of reasoning was adopted in *Catalyst Fund Limited Partnership II v. IMAX Corp.*, [\[2008\] O.J. No. 873](#) (S.C.J.).

50 Arctic observes that there is no evidence filed by the plaintiff to explain why the proposed new affidavits were not part of its original motion record.

51 On the plaintiff's motion, the plaintiff is not seeking to respond to a matter raised on cross-examination. Rather, it is seeking to cure a deficiency in the first Morganti affidavit. That is, I do not consider the McNulty affidavit as setting out additional evidence. It is not a clear instance of case splitting as was found in *News Datacom Ltd. v. Love*, [2004 MBCA 98](#) where the Manitoba Court of Appeal, applying an identical rule, refused leave. *News Datacom* was followed in *Catalyst*. The present circumstances are different from those before the Court in *Catalyst* where the moving party was seeking leave to conduct examinations pursuant to Rule 39.03 after it had already conducted its cross-examinations. Leave was not granted in that case because it was apparent well in advance of the cross-examinations that the parties who the moving party was seeking to examine might have relevant information and there was no satisfactory explanation for why it did not seek that information prior to the cross-examinations.

52 At para. 13 in *First Capital Realty Inc. v. Centrecorp Management Services Ltd.* [\(2009\), 258 O.A.C. 76](#), the Divisional Court set forth criteria to consider on a motion under Rule 39.02(2):

The case law under Rule 39.02(2) confirms the criteria to consider in determining whether a party should be granted leave to respond to a matter raised on cross-examination:

- 1) Is the evidence relevant?
- 2) Does the evidence respond to a matter raised on the cross-examination, not necessarily raised for the first time?
- 3) Would granting leave to file the evidence result in non-compensable prejudice that could not be addressed by imposing costs, terms, or an adjournment?
- 4) Did the moving party provide a reasonable or adequate explanation for why the evidence was not included at the outset?

See: *Brock Home Improvement Products Inc. v. Corcoran* (2002), 58 O.R. (3d) 722 (Ont. S.C.J.) at paras. 8-9 and *Nolan v. Canada (Attorney General)* (1997), 38 O.R. (3d) 722 (Ont. Gen. Div.).

53 In considering the issues in the plaintiff's motion I am also guided by the following comments by the Divisional Court at para. 14:

A flexible, contextual approach is to be taken in assessing the criteria relevant to rule 39.02(2), having regard to the overriding principle outlined in Rule 1.04 of the *Rules of Civil Procedure* that the rules are to be interpreted liberally to ensure a just, timely resolution of the dispute. An overly rigid interpretation can lead to unfairness by punishing a litigant for an oversight of counsel. See: *Arfanis v. University of Ottawa*, 7 C.P.C. (6th) 371 (Ont. S.C.J.) at paras. 8 and 15; *BFC Construction Group Inc. v. Ontario Realty Corp.* (2002), 17 C.P.C. (5th) 288 (Ont. Master) at para. 24; *Nolan v. Canada (Attorney General)*.

54 The Divisional Court in *First Capital* further observed that all criteria should be weighed evenly in light of the facts of each case in determining whether it is appropriate to grant leave under Rule 39.02(2).

55 It is clear that the McNulty affidavit is highly relevant. The granting of leave to file the evidence does not result in non-compensable prejudice that could not be addressed by imposing costs, terms or an adjournment. The parties have a cross-examination of Mr. McNulty scheduled for January 25, 2011. I note that in *First Capital* it was observed that the agreement of the parties in that case for cross-examination on the supplementary affidavit rendered unsupportable the conclusion by the motions judge that there was non-compensable prejudice.

56 The fact that Mr. Corbin has already been examined does not create prejudice which would deny the granting of leave on the plaintiff's motion. As Arctic itself observed, the McNulty declaration is integral to the plaintiff's claim. Finally, in my view, considering the curative nature of the Morganti affidavit and the McNulty affidavit I am satisfied that Mr. Morganti's statements in his second affidavit respecting his inadvertence are adequate.

57 In these circumstances, I am satisfied that granting the plaintiff's motion for leave promotes both fairness and the search for the truth, the purpose of our rules of procedure as observed by the Divisional Court in *First Capital* at para. 27.

58 I turn next to Arctic's motion. In its supplementary factum filed after the plaintiff's motion was brought, Arctic took the position that even if the plaintiff was granted leave to file the second Morganti affidavit and the McNulty affidavit, those affidavits did not correct the deficiencies in the first Morganti affidavit and were inadmissible.

59 With respect to the McNulty affidavit, Arctic submits that the McNulty declaration created to obtain an award of compensation in an unrelated criminal proceeding against a subsidiary of Arctic in another jurisdiction, was filed only with scandalous intent and its prejudicial nature wholly outweighs any probative effect it may provide to the plaintiffs on the upcoming certification motion and that it should be struck out.

60 In my view, it is impossible to conclude on this motion that the contents of the McNulty affidavit are irrelevant and of marginal probative value to the certification motion such that there is an abuse of court process.

61 I turn next to deal with Arctic's submissions respecting the first and second Morganti affidavit - that is, that the three categories of evidence described above are inadmissible, even taking into account the amended claim.

62 With respect to the Alberta judgment, I am of the view that it should be expunged. The evidence and findings of fact in that judgment cannot be imported into the evidence in this case by merely attaching that judgment to Mr. Morganti's affidavit.

63 The main submission of Arctic is that the documentation respecting the U.S. criminal proceeding addressed a conspiracy with Home City Ice in Michigan, a different conspiracy than the conspiracy which is the subject of the amended claim.

64 Similarly, Arctic's position with respect to the Polar Bear agreement is that it is unrelated to the conspiracy alleged in the factum.

65 On the other hand, the plaintiff submits that the defendants are artificially limiting the concept of relevance to Canadian references and the alleged conspiracy is international in scope. It also submits that it is important to take into account that an assessment of the merits is not undertaken on certification and that it is only required to have some basis in fact to support the certification requirements. Further it submits that the Polar Bear agreement is relevant because it reflects a form of market control over supply of packaged ice, which is raised by the extent of the non-competition clause contained in the agreement.

66 In my view, as with the McNulty affidavit, it is impossible to conclude on this motion that the evidence relating to the U.S. criminal proceeding and the Polar Bear agreement are irrelevant and of marginal probative value to the certification motion such that they should be excluded. The evidence relating to the U.S. criminal proceedings and the Polar Bear agreement involve subsidiaries of the named defendants, which is distinct from the circumstances before the court in *Chopik v. Mitsubishi Paper Mills Ltd.* (2002), 26 C.P.C. (5th) 104 (Ont. S.C.J.), where numerous paragraphs of the plaintiff's affidavits were struck because they related to separate proceedings in Canada and the United States. The conspiracies cited in those affidavits, however, were proceedings respecting companies unrelated to the named defendants, and sometimes to different products.

67 I conclude that Rule 25.11 is not offended by the inclusion of the evidence in contention on this motion.

L.C. LEITCH J.

TAB 3

**Bloorview Childrens Hospital Foundation v. Bloorview MacMillan Centre, [2001]
O.J. No. 1701**

Ontario Judgments

Ontario Superior Court of Justice

Croll J.

Heard: April 12, 2001.

Judgment: May 2, 2001.

Court File No. 00-CV-189217

[2001] O.J. No. 1701 | 8 C.P.C. (5th) 329 | 105 A.C.W.S. (3d) 48

Between Bloorview Childrens Hospital Foundation, applicant, and Bloorview MacMillan Centre, respondent And between Bloorview MacMillan Centre, applicant by counter-application, and Bloorview Childrens Hospital Foundation, Robert Armstrong, Lynda Bowles, Christine Featherstone, Julie Hannaford, Robert Haslam, Winnifred Herrington, Margie Huycke and Daune MacGregor, respondents by counter-application

(24 paras.)

Case Summary

Practice — Evidence — Affidavits — Time for filing.

Application by the Centre for leave to file an affidavit. The Foundation had commenced an application seeking among other things to amend its charitable objects to permit its funds to be used for purposes other than those that directly benefitted the Centre. The application was commenced in May 2000. The Centre brought a counter-application in June 2000. Cross-examination on all affidavits by both parties had taken place. The affidavit in question clarified the size of a bequest that the Centre had received and contradicted information contained in an affidavit filed by the Foundation. The Centre argued that the affidavit was relevant to the question of whether the Foundation should be able to amend its charitable objects.

HELD: Application dismissed.

While the information in the two affidavits differed, the quantum of the bequest did not have any particular relevance to the issues raised.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 39.02(2).

Counsel

Malcolm M. Mercer, for Bloorview Childrens Hospital Foundation, applicant, respondent by counter-application. Michael W. Kerr, for Bloorview MacMillan Centre, respondent, applicant by counter-application. Nicholas J. Hedley, for Office of the Public Guardian and Trustee.

CROLL J. (endorsement)

1 The Bloorview MacMillan Centre (the "Centre") seeks leave to file the affidavit of Alfred Dickson Billes, sworn December 21, 2000, (the "Billes affidavit"). Leave is required as the Centre has already conducted cross-examinations on the affidavits delivered by the Bloorview Childrens Hospital Foundation (the "Bloorview Foundation").

2 The Public Guardian and Trustee supports the Centre's motion.

Background

3 The Centre is a public hospital created in 1996 by the amalgamation of the Bloorview Childrens Hospital and the Hugh MacMillan Rehabilitation Centre.

4 The Bloorview Foundation was established on December 31, 1982. The objects of the Bloorview Foundation are as follows:

- (a) Subject to the Charitable Gifts Act to establish, hold, invest and otherwise administer one or more funds and to apply all or any part of the income and capital thereof:
 - (1) Primarily to apply the funds for the benefit of the patients of Bloorview Childrens Hospital, including capital expenditures.
 - (2) Secondly,
 - (i) to use the funds for the improvement of patient care or other charitable activities related to disabled young persons carried on by hospitals, organizations or other persons, which are registered charities, related to the health of disabled persons in Canada; and
 - (ii) to apply funds to the advancement of health care education including research related to disabled persons in Canada.
- (b) to be the fund receiving body of Bloorview Childrens Hospital.

5 The Bloorview Foundation has brought an application for, among other things,

- (a) direction and approval with respect to the payment by it of grants in accordance with a proposed distribution;
- (b) a declaration that the assets of the Bloorview Foundation are owned by it and not by the Centre;
- (c) an order approving its application for supplementary letters patent, which amends its charitable objects, and changes its name to the Child Development Foundation; and
- (d) direction and approval with respect to the payment by it to the capital fund of the Centre in the amount of \$6.5 million.

6 The Centre has brought a counter-application. The grounds advanced in the counter-application include the claim that

- (a) the Bloorview Foundation has received virtually all of its funds directly from the Bloorview Childrens Hospital, or indirectly from donors to the hospital, and that
- (b) those funds were impressed with the trust that they be held and disbursed in accordance with the primary object as set out in the letters patent of the Bloorview Foundation, or are impressed with a trust in favour of the Centre and its patients.

7 The application was commenced by the Bloorview Foundation in May 2000. The counter-application was brought by the Centre in June 2000. The Billes affidavit was sworn and served on December 21, 2000, but not filed. Cross-examination on all affidavits delivered by the Bloorview Foundation and by the Centre has taken place.

The Billes Affidavit

8 Alfred Dickson Billes is an Executor of the Estate of his late father John Billes. In his will dated June 3, 1955, John Billes made significant bequests to 22 charitable organizations. Included among these organizations was the Home for Incurable Children. The Home for Incurable Children later became known as Bloorview Childrens Hospital, one of the predecessor hospitals to the Centre.

9 The Billes affidavit deposes, among other things, that the bequest from the John Billes estate was intended by John Billes to benefit the Home for Incurable Children, now known as the Centre, and not other institutions or charities. In the Billes affidavit, Alfred Billes states that to apply the funds from the Billes estate otherwise than to benefit the Centre would be contrary to his father's intent.

10 The affidavit also clarifies the size of the bequest that the Centre has received from the Billes estate. In the affidavit sworn and served as part of the application record on May 5, 2000 by Julie Hannaford, the current president of the Bloorview Foundation, Ms. Hannaford states that the Bloorview Childrens Hospital, a predecessor to the Centre, received a bequest from the Billes estate of approximately \$3.5 million. Exhibit B to the Billes affidavit is a letter from National Trust dated November 15, 2000 providing a schedule of payments to the Bloorview Childrens Hospital or predecessor organizations from the Billes Estate. The total amount of the payments is \$5,057,714.07.

Analysis

11 Rule 39.02(2) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, provides as follows:

A party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing or conduct an examination under rule 39.03 without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of an affidavit or a transcript of an examination conducted under rule 39.03.

12 The Centre and the Bloorview Foundation each refer me to the decision of *Nolan v. Canada (Attorney General)* (1997), 38 O.R. (3d) 722 (Gen. Div.). In that case at page 728, Mr. Justice Quinn set out the following four-part test to consider when determining if leave to deliver an affidavit should be granted to a party who has already cross-examined on an affidavit by an adverse party:

1. Is the matter that was "raised on the cross-examination" relevant to the litigation?
2. Is the affidavit, sought to be filed, itself responsive to the matter that was raised on the cross-examination?
3. If the leave sought is granted, will it operate unfairly against the adverse party?
4. If the leave sought is granted, what additional terms (apart from costs and an adjournment), if any, are just?

13 The Centre submits that the Billes affidavit is relevant to the question of whether the Bloorview Foundation

should be able to amend its charitable objects to permit its funds to be used for purposes other than those that directly benefit the Centre, or whether the funds are impressed with a trust in favour of the Centre.

14 I will first deal with the relevance of the quantum of the bequest which is set out in the Billes affidavit.

15 While the information in the Billes affidavit differs from the information tendered by Ms. Hannaford, I am not persuaded that the quantum of the bequest has any particular relevance to the issues raised. The discrepancy of approximately \$1.5 million between the figures in the Hannaford and Billes affidavits does not impact the issues in this matter, that is, the ability of the Bloorview Foundation to make grants to organizations other than the Centre, the ownership of the assets of the Bloorview Foundation, the ability of the Bloorview Foundation to amend its letters patent, the allegations of breach of fiduciary duty, the imposition of a trust on the funds held by the Bloorview Foundation, and the allegations of improper corporate actions taken by the Bloorview Foundation. While \$1.5 million is a significant difference, the precise amount of the very generous Billes bequest is not germane to the many questions to be determined, and the first part of the Nolan test is not satisfied.

16 The Centre also submits that the Billes affidavit is relevant to the issue of the supplementary letters patent as it sets out the intention of the late John Billes to support only the Centre, and no other institutions or charitable purposes.

17 The Centre and the Public Guardian and Trustee both rely on the decision in *Re Baker* (1984), 47 O.R. (2d) 415. In *Re Baker* the will of Dr. Baker provided for a gift to Northwestern General Hospital "for the general purposes of the hospital". After Dr. Baker's death, the Northwestern General Hospital Foundation and the Harold and Grace Baker Centre were established. The objects of the Northwestern Foundation did not include the maintaining and running of a general hospital. The Harold and Grace Baker Centre was not a general hospital. The Northwestern General Hospital, the Northwestern Foundation and the Baker Centre and one of the trustees sought a variation to allow the trust to support the Northwestern Foundation and the Baker Centre, which were not supported by the charitable objects of Northwestern General Hospital. The variation was not allowed. The Court looked to the will of Dr. Baker to determine his intention, and that intention was to benefit the general purposes of Northwestern General Hospital. This provision, although seemingly general, was a restriction on the Baker gift.

18 In obiter in *Re Baker* the Court suggested that what, in effect, was sought was a variation of the letters patent of the Northwestern General Hospital to allow it to support the Northwestern Foundation and the Baker Centre, and that the Court would, in that case, intervene on behalf of the Public Trustee to restrain such conduct.

19 In my view, *Re Baker* supports the position of the Bloorview Foundation as it confirms the common law that the will of the testator is to be respected, and that the intention of the testator is to be garnered from the will: *Re Browne*, [1934] 2 D.L.R. 588 (S.C.C.). In *Re Baker* there was no evidence beyond the terms of the will submitted to the Court for consideration.

20 The Centre also refers to the English Court of Appeal in *Re Weir Hospital*, [1908] All E.R. 690 as support for its position. However, in that case as well the Court looked only to the will to determine the intention of the testator.

21 The Centre suggests in argument that on its cross-examination of Ms. Catherine MacMillan, who was a former member of the Bloorview Childrens Hospital Board of Trustees and the first Chair of the Bloorview Foundation, the matter of the intention of donors to the Centre, or its predecessor hospitals, was raised. However, there is nothing in the material before me from the Centre to support this suggestion. It is clear that donor intention has always been an issue with respect to the question of the supplementary letters patent and was raised in the Centre's material. I have not been provided with any cogent reason why the matter of the intention of the Billes bequest was

not dealt with in accordance with the Rules. Accordingly, I am not satisfied that this is a matter that was raised on cross-examination as required by rule 39.02(2).

22 In any event, the gift in the Billes will was simply to the Home for Incurable Children. There is nothing more in the will. The Centre submits that all bequests, including that of Mr. Billes, were received by the Bloorview Foundation impressed with a trust for the Centre, and that the changes contemplated by the supplementary letters patent should not be allowed. The determination of these issues is not before me today. However, in my view, the Billes affidavit will not be relevant when these issues are before the Court as it is not relevant to determine the intention of the late John Billes. Accordingly, even if the matter of donor intention had been raised on cross-examination I am not satisfied that the first part of the Nolan test as it relates to relevance has been met.

23 For these reasons, the Centre's motion for leave to file the affidavit of Alfred Dickson Billes is dismissed.

24 I have not heard submissions as to costs. If counsel are unable to agree on costs, written submissions may be made as follows:

By the Bloorview Foundation, by Friday May 11, 2001 By the Centre, by Wednesday May 23, 2001 Any
reply, by Monday May 28, 2001

CROLL J.

**THE REGIONAL MUNICIPALITY OF
WATERLOO**
Applicant

and

**PERSONS UNKNOWN/TO BE
ASCERTAINED**
Respondents

Court File No.: CV-25-00000750-0000

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at KITCHENER

ABBREVIATED BOOK OF AUTHORITIES
(MOTION IN WRITING)

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