IN THE MATTER OF: The Reciprocal Enforcement of Judgments Act, R.S.N.S. 1989, c. 388 and the Canada and United Kingdom Reciprocal Recognition and Enforcement of Judgments Act, R.S.N.S. 1989. c. 52 - and - IN THE MATTER OF: An application to register a Judgment of the Queen's Bench Division, of the English High Court of Justice BETWEEN: THE SOCIETY OF LLOYD'S Applicant - and - RICHARD MARCEL VAN SNICK Respondent; AND BETWEEN: THE SOCIETY OF LLOYD'S Applicant - and - MARTIN ALBERT EISENHAUER Respondent; AND BETWEEN: THE SOCIETY OF LLOYD'S Applicant - and - JOHN RAYMOND FISKE Respondent; AND BETWEEN: THE SOCIETY OF LLOYD'S Applicant - and - IAN HOLMES LANGLANDS Respondent; AND BETWEEN: THE SOCIETY OF LLOYD'S Applicant - and JAMES DOUGLAS RUSSELL Respondent

Society of Lloyd's v. Van Snick

File No. S.H. No. 160681-85

Nova Scotia Supreme Court

2000 A.C.W.S.J. LEXIS 48499; 2000 A.C.W.S.J. 507075; **95 A.C.W.S. (3d) 846**

January 26, 2000, Decided

KEYWORDS:

[*1]

CONFLICT OF LAWS -- Foreign judgments -- Reciprocal enforcement --Procedure for ex parte registration, under Civil Procedure Rule 64 (N.S.) was only applicable for reciprocating states under Reciprocal Enforcement of Judgments Act, R.S.N.S. 1989, c. 388 -- Notice was required to debtor for judgments not within Act

PROFESSIONS -- Barristers and solicitors -- Conduct --Counsel asserting case authority had duty to disclose that case was pending appeal -- Duty was particularly applicable on ex parte application

SUMMARY: Applicant obtained judgments in English High Court and asserted entitlement to register judgments in Nova Scotia without notice to respondents -- Reciprocal Enforcement of Judgments Act, R.S.N.S. 1989, c. 388, was not expressly applicable, in that United Kingdom had not been declared reciprocating state -- Canada-United Kingdom Convention was part of law of province and was applicable, and provided for registration on application, with practice and procedure for registration, including notice to judgment debtor and applications for setting aside, governed by law of registering court -- Procedure under Act, pursuant to Civil Procedure Rule 64 (N.S.), was for [*2] registration on ex parte application, followed by notice to debtor, who had one month in which to seek to set aside registration -- Applicant sought to rely on that procedure -- Counsel for applicant relied on judgment in previous case, without disclosing that it was subject of pending appeal --

HELD: Wording of Convention as to setting aside did not imply that procedure under Act should be followed -- In absence of specific provisions allowing ex parte application, or any urgency, general rule requiring notice was applicable -- Counsel should have disclosed situation of case authority, particularly in ex parte application -- Application was dismissed.

COUNSEL: Christopher C. Robinson, Q.C. & Stephen J. Kingston, for the Applicant
S. Bruce Outhouse, Q.C. & Lester Jesudason, for the Respondents

JUDGES: MacAdam J. in Chambers

MacAdam, J. :

[**1] The applicant, having obtained default judgments against each of the respondents, now seeks to register these judgments in the Province of Nova Scotia. The Originating Notices, filed December 16, 1999, and each made ex parte , refer to an application "... for an Order pursuant to the Canada and United Kingdom Reciprocal Recognition and Enforcement of [*3] Judgments Act , R.S.N.S. 1989, c. 52 and the Reciprocal Enforcement of Judgments Act , R.S.N.S. 1989, c. 388, registering a Judgment of the English High Court of Justice as a Judgment of this Honourable Court. "

[**2] The only issue raised on these applications is whether the applicant, as the holder of judgments obtained in the High Court of Justice, Queen's Bench Division, and upheld on appeal by the Court of Appeal (Civil Division) of the Supreme Court of Judicature, is entitled to obtain registration in Nova Scotia, without notice to the respondents.

[**3] Uncontested on this application is that the Reciprocal Enforcement of Judgments Act ("R.E.J.A.") is not, at least on its own, applicable, since the United Kingdom has not been declared by the Governor-inCouncil as a "reciprocating state". Also uncontested is that the statutory authority for the registration of these judgments is to be found within the Canada and United Kingdom Reciprocal Recognition and Enforcement of Judgments Act , by which the Convention for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters , (the "Convention"), was made part of the law of Nova Scotia. [*4]

[**4] Article III(1) of the Convention states:

Where a judgment has been given by a court of one Contracting State, the judgment creditor may apply in accordance with Article VI to a court of the other Contracting State at any time within a period of six years after the date of the judgment (or, where there have been proceedings by way of appeal against the judgment. after the date of the last judgment given in those proceedings) to have the judgment registered, and on any such application the registering court shall, subject to such simple and rapid procedures as each Contracting State may prescribe and to the other provisions of this Convention, order the judgment to be registered.

[**5] Article III(3) reads:

The practice and procedure governing registration (including notice to the judgment debtor and applications to set registration aside) shall, except as otherwise provided in this Convention , be governed by the law of the registering court.

[**6] It is similarly uncontested that applications for registration of judgments held by the applicant have been made in the Province of Ontario pursuant to rules and procedures of that province. Under the Ontario [*5] Rules of Court the procedure for registration under the Convention requires notice to be given to each of the judgment debtors. In Nova Scotia, Civil Procedure Rule 64 provides the procedure for the registration of judgments under R.E.J.A. . The Rule provides a two-step procedure for registering the judgment of the reciprocating state. The first step involves an ex parte application to register the judgment, with the subsequent requirement that notice then be given to the judgment debtor who has one month to apply to have the registration set aside. However, there is no rule providing the process or procedure for registration of judgments under the Convention .

APPLICANT'S POSITION

[**7] The applicant submits that the procedure envisaged by the R.E.J.A. should be applied in the present circumstances, having regard to the absence of any specific rule providing a procedure for registration under the Convention , together with the fact that in the Convention reference is made to applications to set aside the registration of the judgment. Reference may be made to Article where in section (1) it provides: Registration of a judgment shall be refused or set aside if.." [*6] , and in section (2): "the law of the registering court may provide that registration of a judgment may or shall be set aside if.. " . Reference to setting aside the registration of a judgment is also contained in Article IV (4), Article VIII, as well as section (3) of Article VI. Counsel, in his written submission, suggests:

... the reference in Article VI, para. 3 to "notice to the judgment debtor" and "applications to set aside" strongly suggest that applications under the Convention are to be made in accordance with procedures set out in the Reciprocal Enforcement of Judgments Act . Furthermore, the subject-matter of the Convention and that of that Act are the same - the enforcement of judgments obtained from courts outside

the Province. It is accordingly submitted that the procedures laid down in that Act should apply in the case of an application to have a U.K. judgment registered in Nova Scotia pursuant to the Convention.

[**8] Counsel for the applicant therefore proceeded to make these applications, ex parte , with the intention that the orders on registration, together with the material required under the R.E.J,A. , would be served on each of the respondents who [*7] would then have one month to apply to have the registrations set aside.

RESPONDENTS POSITION

[**9] Counsel for the respondents suggests that in the absence of a declaration by the Governor-in-Council that the United Kingdom was a reciprocating state pursuant to R.E.J.A. , this act has no further application, and in particular, is not relevant on an application for registration of judgments pursuant to the Convention . Counsel refers to Article VI (3) and the reference to applying the practice and procedure of the registering court, except as otherwise provided in the Convention , on an application for registration. In this regard the practice and procedure, absent a specific rule as in Ontario dealing with registration under the Convention , would be to apply the provisions of Civil Procedure Rule 37.04 to determine whether the applications may be made ex parte . Civil Procedure Rule 37.04 (1) reads:

37.04

(1)An application may be made ex parte where,

(a)under an enactment or rule, notice if not required;

(b)the application is made before any party is served;

(c)the applicant is the only party;

(d)the application is made during the course of a trial or [*8] hearing;

(e)the court is satisfied that the delay caused by giving notice would or might entail serious mischief, or that notice is not necessary.

[**10] Counsel continues by asserting that Civil Procedure Rule 37.04 does not apply and therefore notice should have been given and the applications should therefore be dismissed.

ARGUMENT and DECISION

[**11] The applicant submits that by imputing the provisions of R.E.J.A. into these applications there is a two-set procedure involving first, ex parte applications to register the judgments, and then notice to the judgment debtors whereupon the latter are given one month in which to apply to set aside the registrations. Counsel argues, in the alternative, that pursuant to Civil Procedure Rule 37.04(1) , (a) there is no provision in the Convention requiring notice, that under subsection (b), this application is being made before any party is served in respect to the Originating Notice , filed December 16, 1999, and under sub-section (e) when the court is satisfied notice is not necessary, that the application may be made ex parte .

[**12] Counsel for the respondent says R.E.J.A. is not applicable since the United [*9] Kingdom is not a reciprocating state, Therefore, it and its procedures have no application. In respect to whether under any of the provisions of Civil Procedure Rule 37.04 these applications may be made ex parte , counsel refers to the general principles of fairness and due process as exemplified by the audi alteram partem principle particularly where a person's rights or interests are being affected. He notes that the application of audi alteram partem in respect to proceedings brought by one party against another were discussed by Justice Pugsley in Burton v. Howlett (1998), 172 N.S.R. (2d) 342. In setting aside a notice of examination on a non-party, which had originally been brought ex parte , Justice Pugsley commented on the application of Civil Procedure Rule 37.04 . During the course of presentation, counsel for the applicant had apparently suggested that sub-paragraph (a) is ambiguous as to whether notice is only required when so stipulated in the enactment or rule as opposed to the contrary interpretation that absent a specific provision providing for ex parte application all applications should be made on notice. Justice Pugsley at paras. (44-53) stated:

[*10] Mr. Saulnier submitted to Justice Moir that since C.P.R. 18.15 does not explicitly provide that notice is required to be given to a person against whom a penalty is sought, that C.P.R. 37.04(1)(a) should be interpreted to mean no notice at all is required.

I interpret C.P.R. 37.04(1)(a) as impliedly stipulating that notice should always be given to a person who may be affected by any proceeding directed against him, or her.

That requirement is an essential ingredient of due process. No person should be "condemned unheard or without having had an opportunity of being heard." (Jowitt's Dictionary of English Law , Sweet and Maxwell, 1977, p. 161, definition of " audi alteram partem ").

I come to this conclusion notwithstanding the provisions of C.P.R. 37.04(1)(c),

Ms. Burton was, of course, the only party" to S.K. No. 5228 in respect of the Chambers motion of May 27.
In my view, this section as well, should be interpreted in a way that is not inconsistent with the obligation of a court to give an opportunity to an individual to state his or her case when the decision of the court can affect that person's rights.
Such an interpretation is consistent with the decision of this court [*11] in Walker v. Delory et al (1988), 90 N.S.R. (2d) 1; 230 A.P.R. 1 (C.A.). In that case, the plaintiff brought an action in negligence against three doctors. Counsel could not agree as to which of them was first entitled to examine the opposite parties on discovery. The plaintiff then obtained an ex parte order compelling the doctors to appear and be discovered first. The defendants appealed.
In the course of allowing the appeal and setting aside the order of the Chambers judge, Justice Matthews, on behalf of the court, held at p. 4:
"With deference to the Chambers judge, there was no account taken of the issues concerning the procedural rights of the parties. He ignored the basic principle that the other side should be heard (' Audi alteram partem ')."
The principle has long been identified as part of natural justice and an essential constituent of a fair hearing.
The authors of de Smith, Woolf & Jowell, Judicial Review of Administrative Action, 5th Ed. (1995) Sweet and Maxwell, refer to its impressive ancestry, in these words at p. 378:
"That no man is to be judged unheard was a precept known to the Greeks, inscribed in ancient times upon images in places where justice [*12] was administered, proclaimed in Seneca's Medea, enshrined in the scriptures, mentioned by St. Augustine, embodied in Germanic as well as African proverbs, ascribed in the Year Books to the law of nature, asserted by Coke to be a principle of divine justice, and traced by an eighteen-century judge to the event in the Garden of Eden."
[**13] Justice Pugsley concludes his analysis by noting that the " vitality of the maxim " survives in Canada, citing several Supreme Court of Canada decisions in this regard. Counsel submits that on the principles outlined by Justice Pugsley, to permit this application to proceed on an ex parte basis would be "entirely improper".
[**14] Counsel for the respondents refers to adverse consequences to the respondents. However, in our view, so long as persons are affected, the nature and extent of any adverse consequences are not relevant. The issue here is whether the respondents are entitled to notice and the degree or extent to which they would be affected by the procedure suggested by the applicant, as opposed to the procedure suggested by the respondents, is of little consequence.
[**15] Counsel for the applicant's submission is that the [*13] use of the phrase "set aside", as it appears both in the R.E.J.A. and the Convention , commends itself to only one logical conclusion, namely, the intention to adopt the procedure in the R.E.J.A. to the Convention , thereby providing for ex parte initial registration with the opportunity for the respondent to apply to set aside within a set "period of time". The submission is not persuasive. Neither is his submission that the legislation would have talked of "appeals" rather than "setting aside" if the legislature had not intended the same procedure in the Convention . Clearly the Convention recognizes the right of the province or the court, by its rules, to provide procedures or a process for registration. The use of the phrase "set aside" would clearly permit the province or the court to create a procedure similar to that now provided for in registering judgments under R.E.J.A. . However, it does not mandate such a two step procedure with notice only following initial registration. The Ontario Rules , adopted for registering U.K. judgments in Ontario, provide for notice on the application. There is nothing to suggest the same requirement could not have been legislated [*14] or incorporated in the Nova Scotia Civil Procedure Rules .
[**16] To be decided here is whether, absent any statutory provision or any rule, the application must be on notice or whether the application may be made by adopting the procedure for registering judgments under the R.E.J.A. .
[**17] In his written submission, counsel for the applicant states:
The Convention is in force in Nova Scotia and this Honourable Court has been designated to hear applications to register U.K. judgments. In David and Snape (a firm) and Nicholas Pounder v. A. Robert Sampson (S.J. No. 157352), the Court recently confirmed that the Canada and United Kingdom Reciprocal Recognition and Enforcement of Judgments Act was applicable and represented the law of Nova Scotia.
[**18] This decision of Chief Justice Kennedy, after a hearing and oral decision on July 15, 1999, with written reasons on October 11, 1999, is of little assistance on this application since the issue of notice was

apparently not raised before him. The application was made ex parte and the reasons detail a consideration of the issues of time limitations, the jurisdiction of the United Kingdom court to have considered [*15] the matter in the first instance, the process adopted for calculating the conversion of the judgment into Canadian currency and the appropriate rate of interest in view of the rate prescribed by the United Kingdom statute.

[**19] Counsel for the respondent, in his written submission, notes:

For example, in the case of Canadian Paraplegic Association (Newfoundland and Labrador) Inc. v. Sparcott Engineering Ltd et al. (1997), 150 Nfld. & P.E.I.R. 200 (Nfld. C.A.), a third party in a proceeding joined a fourth party by way of ex parte application despite the fact it knew the plaintiff would oppose such an application and wanted to make representations if the third party made same.

Upon learning of the ex parte order, the plaintiff successfully sought to have it set aside and was awarded solicitor and own client costs. The third party appealed to the Court of Appeal and the appeal was dismissed. The Court of Appeal held that, despite the fact the third party's application could be made ex parte , the third party had an obligation to disclose to the Court at the time of the initial application that the plaintiff was not consenting to the application and wished to make representations [*16] if any such application was made. The Court of Appeal held that if such disclosure had been made, the applications judge would likely not have granted an ex parte order but would have required the third party to give notice to the plaintiff and defendant of its application.

Several comments by Justice Green are particularly instructive in the present context:

... unless a rule expressly states that an application may be made ex parte , it requires that all other affected parties be given notice. (Par. 9)

... a party contemplating an application would be foolhardy to eschew an inter partes application where he or she knows that the other party opposes it and wishes to be heard. If he or she acts properly and discloses this fact to the judge all that will have been accomplished will be a waste of time because the likely result would be an order for notice to the other party. If on the other hand he or she withholds this material information and obtains the order ex parte or the applications judge nevertheless allows such an order, he or she runs the risk that a subsequent rule 29.13 application mill in any event result in an inter partes hearing with further delay and expense [*17] and the possibility that the order will be set side either because of material nondisclosure or because it was not justified in the first place, once the interests of the other party are taken into account. (Par. 16)

On any ex parte application, the utmost of good faith must be observed ... [Emphasis start] Because counsellor the applicant is asking the judge to invoke a procedure that runs counter to the fundamental principle of justice that all sides of a dispute should be heard[Emphasis end] counsel is under a super-added duty to the court and the other parties to ensure that as balanced a consideration of the issue is undertaken as is consonant with the circumstances (Par. 18) (emphasis added)

Counsel for Slaney argues that although the applications judge decided that notice to the plaintiff ought to have been given ... he argues, that because he. technically, was entitled to make an ex parte application, his conduct is so doing cannot attract solicitor and own client costs. (Par. 29)

This argument missed the point entirely. Counsel for Slaney appears to be under the misapprehension that all that is required of counsel in his dealings with the court and with other solicitors [*18] is a technocratic compliance with the literal provisions of the rules and that, absent some express provision in the Rules , he is free to engage in whatever behavior he regards as appropriate to advance his case. (Par. 30).

The Rules are not hurdles of inconvenience to be gotten over, nor are they to be interpreted and applied without reference to their underlying spirit and purpose. The Rules attempt to further the fundamental goal of procedural justice. They are to be interpreted by the courts and applied by counsel and parties with that goal in mind, so as to ensure an expeditious and inexpensive determination on the merits in a manner that is fair to all sides. (Par. 31).

In the case of rule 12.03, it is true that the rule allows ex parte applications; however, it is also recognizes that there will be circumstances where fairness requires that notice be given to the plaintiff. (Par. 32)

Applying these principles to the case at hand, it is important to note that unlike in Canadian Paraplegic , supra , where an order could be obtained on an ex parte basis, the U.K. Convention does not specifically provide for registration applications to be made on an ex parte [*19] basis. We therefore submit, as per Justice Green's comments, that absent any express provision allowing the present applications to be made ex parte , notice must be given to the Respondents who will be seriously affected

by the registering of the U.K. judgments in Nova Scotia. The Applicant has at all times been aware of the Association's representation of the Respondents and that [sic] fact that Association intends to resist the registration of the Applicant's U.K. judgments in Nova Scotia, just as it has in Ontario.

[**20] Clearly, these applications should have been brought on notice. From the information provided, the applicant was aware of counsel, particularly in Ontario, representing many, if not all, of the respondents and there is nothing in the material submitted to suggest that counsel for the applicant would have had any difficulty in effecting service of notice of these applications. Absent specific provisions in a rule or statute stipulating that an application may be made ex parte , and absent any unusual or urgent circumstances, there is no merit to the argument that simply because there is no specific provision requiring notice, one party may apply to court [*20] to seek remedy, redress or affect the rights of another party without giving the other party an opportunity to present their position. There was nothing in these applications to suggest any "urgent or unusual circumstances", such as would warrant the granting of an order pending a further hearing to review the respective rights of the parties involved. To suggest that in respect to the Nova Scotia proceeding, service had not been effected pursuant to Civil Procedure Rule 37.01(b) , is a submission of a technical argument that carries little, if any, weight since it is the judgments obtained in the United Kingdom which involved the respondents as parties that forms the foundation for these applications.

[**21] The circumstances when applications may be made ex parte can be no better stated than in the oral submission of counsel for the respondents:

... the courts of this province or any other province don't imply the right to proceed on an ex parte basis unless the right to proceed ex parte is expressly provided for either in legislation or in the Civil Procedure Rules . The Courts imply precisely the opposite; they imply that the other party is entitled to notice."

THE [*21] LAWYER AS ADVOCATE

[**22] As noted earlier, counsel for the applicant in his written submission referred to the decision of Chief Justice Kennedy in David and Snape (a firm) and Nicholas Pounder v. A. Robert Sampson , supra , as confirmation that the Convention was applicable and the ex parte procedure used on that application represented the law in Nova Scotia. Technically that is correct. It is, at least to the knowledge of this court, the only case in Nova Scotia recognizing a procedure for registering judgments under the Convention . However, in respect to this representation, counsel for the respondent, in his written submission, states:

Finally, some comment is warranted with respect to the case of David and Snape (a firm) and Nicholas Pounder v. A. Robert Sampson (S.H. No. 157352) referenced in the Applicant's Prehearing Memorandum. The Applicant suggests that this Honourable Court should rely on this case as a precedent for the current applications.

In Snape and Pounder , supra , an order to register the U.K. judgment against Sampson in Nova Scotia was obtained on an ex pane basis on representations similar to those made by the Applicant in the present case. [*22] What the Applicant has not advised in its Pre-hearing Memorandum is that the decision in Snape and Pounder , supra , is currently under appeal (C.A. No. 157942). One of the grounds of appeal is that the Learned Chambers Judge erred in law by granting the order on an ex parte basis, which of course, is the very issue before this Honourable Court in the Applicant's current applications. Furthermore, in the Snape and Pounder matter, there is also a pending application to set aside the ex parte order of the Chambers' Judge pursuant to Rule 37.13 . Again, one of the grounds alleged for setting the order aside is that it was obtained ex parte .

[**23] In his oral submission, counsel for the applicant, after referring to the fact the procedure he followed had been adopted in proceedings sanctioned in this court, had the following exchange with the court:

THE COURT : Is that matter under appeal?
COUNSEL : My understanding is that it is under appeal, My Lord.
THE COURT : You didn't know?
COUNSEL : I didn't know?
THE COURT : No, I'm asking - did you know?
COUNSEL : Ah ... I didn't at the time I made the applications in November.

[**24] The reference to [*23] "applications in November" apparently was intended to refer to orders obtained on similar applications taken before Chief Justice Kennedy and Justice Cacchione in November 1999.

[**25] Counsel for the respondents, in his oral submission, after noting that in the adversary system reliance is placed on counsel opposite to argue the other side of the case and to point out weaknesses and in commenting that the omissions in this application " illustrate very, graphically thy ex parte procedures are the rare exception rather than the rule ", then continues:

... but in an ex parte application, you don't have that luxury. Counsel doesn't have that ... can't rely on the other side and the court can't.

Now in this connection I want to refer back to what Justice Green said in the Canadian Paraplegic Association case. He indicated there and I think this is absolutely incontestible that in an ex parte matter, counsel must observe the utmost good faith. That was the word he used. The utmost good faith. Because and I quote him, " The applicant is asking the judge to invoke a procedure that runs counter to the fundamental principle of justice that all sides of a dispute should be [*24] heard. " And that as a result, counsel is under a -what he calls - " super added duty to the court and other parties to ensure that as balance the consideration of the issue is undertaken as is consonant with the circumstances. " Now I say to the court, with respect to my friends, that that standard does not appear to have been met in Snape and it certainly has not been met in the circumstances of the present case. Why do I say that? First, there is no explicit mention of Rule 37.04 and that Rule is fundamental to this case. It's not even mentioned to the Court. Secondly, there is no express statement anywhere in the material filed by the applicants to the effect that England is not a reciprocating state under the Reciprocal Enforcement of Judgments Act . Thirdly, the applications purport to be brought pursuant, at least in part, to the Reciprocal Enforcement of Judgments Act , even though it clearly doesn't apply, other than my friends argue you can import the procedure from it by implication, but clearly my friends aren't applying under the Reciprocal Enforcement of Judgments Act . It doesn't apply. The fourth thing I say and this is a point Your Lordship has already raised [*25] with Mr. Robinson - there was no disclosure whatever to the court of the parallel proceedings which are taking place in Ontario, which are being brought under the very same Act , the Convention Act . They are being brought on notice and they are being contested by the Association ... by Association counsel. That disclosure was never made to the court. Can you imagine what Chief Justice Kennedy's reaction would have been if he had been notified of that? If he can been told about that? His reaction would have been, why aren't you doing the same thing here? Why are you doing it differently here? He would have been bound to ask those questions. And the fifth thing is, My Lord, that Rule 64 is never drawn to the court's attention. I'm not saying the court was unaware of it, but here you have Rule 64 dealing with the Reciprocal Enforcement of Judgments Act , very neatly lays out the procedure you follow and there is no such rule for the Convention Act . Again, the court would be bound, in my submission, to be troubled by that dichotomy, that different treatment.

So, My Lord, I say that when you take those things together, these omissions amount to a material non-disclosure by the [*26] applicants within the meaning of the law as set out in the Canadian Paraplegic Association case and we say that that material non-disclosure explains why the previous 22 orders came to be granted in the first place and parenthetically why they'll be overturned on appeal, but that's why they were granted. They also clearly demonstrate, in my submission, why ex parte proceedings are to be avoided, save in exceptional circumstances which are either recognized expressly in legislation or the rules of this court.

[**26] In response to the allegation there was "material nondisclosure" in the materials submitted on the ex parte application, counsel for the applicant said:

In order to accept that thesis, I suppose the onus on counsel on an ex parte application would be to raise every conceivable and I suppose, inconceivable, argument that could be raised as (inaudible) and then beat them down in order to satisfy the onus that my friend says we must discharge, so that any argument that he can possibly conceive of should have been raised if I am not to be guilty of material non-disclosure or is there some sort of brain ... it's only one that he thinks out and not the one that someone [*27] thinks out ... The point is, My Lord, that it's a serious allegation to make of counsel that material non-disclosure was made to the court.

...I, as counsel, would have to think of every conceivable argument that I really think Mr. Outhouse made or thought of..or something else I have thought of .. to set them up and then knock them down. That is not ... that is not, My Lord, the onus in an ex parte application. In an ex parte application the onus on the solicitor is to bring up relevant and cogent material representations and arguments to the court and we suggest that we have done that in all of these applications and never was there once an intention, nor a material omission made before this Court, My Lord.

[**27] We concur with both the sentiments and statements of Justice Green in Canadian Paraplegic , supra , and counsel for the respondents on this application, as to the responsibilities and obligations of counsel to the Court, particularly on an ex parte application. In this respect I note the Code of Legal Ethics and Professional Conduct , adopted by the Council of the Nova Scotia Barristers' Society on February 23, 1990, and declared to apply to conduct of the [*28] Society's members occurring on or after August 1, 1990.

[**28] Chapter 14 , titled " Duties to the Court " states the rule:

When acting as an advocate, the lawyer has a duty to treat the court with candour, courtesy and respect.

[**29] Commentary 14.11 is titled " Ex parte proceedings " and reads:

When opposing interests are not represented, for example in ex parte or uncontested matters, or in other situations where the full proof and argument inherent in the adversary system cannot obtain, the lawyer has a duty to take particular case to be accurate, candid and comprehensive in presenting the client's care so as to ensure that the court is not misled.

[**30] The difficulty here is not so much with counsel's statement as to his duty as an advocate on an ex parte application, but the failure to consider the fact the authority he was citing for the procedure he was following was, apparently to his knowledge, then under appeal on the very issue for which it was being presented. Although, as noted, it would have represented counsel's understanding of the law, as stated by the Chief Justice, surely a relevant consideration is that it is now under appeal on the issue [*29] of whether this application may be made ex parte or must be on notice. I cannot, of course, comment on what information may, or may not, have been provided to the Justices who heard the November applications.

[**31] Under " Guiding Principles ", Chapter XIV of the Code of Legal Ethics and Professional Conduct , provides:

A lawyer has a duty not to

(h) deliberately refrain from informing the court of any pertinent adverse authority that the lawyer considers to be directly in point and that has not been mentioned by an opponent;

[**32] In " An Advocacy, Primer " (Carswell, 1990), Lee Stuesser, after noting the competing and conflicting duties to which an advocate is subject, at pp. 225-226, continues:

On the one hand, the advocate is expected to fight vigorously for his or her client's cause and the advocate is paid to win. On the other hand, the advocate is not a legal mercenary. The advocate is also an officer of the court and a member of the legal profession. The court and his or her fellow lawyers expect to be treated with fairness, honesty and respect. The advocate therefore serves many masters, each with competing claims, each demanding allegiance. Conflicts arise [*30] and nowhere are conflicts of duty more likely to arise than in the heated atmosphere of a trial. For this reason the trial advocate must be most sensitive to his ethical obligations. Lord Birkett put it in these terms:

The advocate has a duty to his client, a duty to the Court, and a duty to the State; but he has above all a duty to himself that he shall be, as far as lies in his power, a man of integrity. No profession calls for higher standards of honour and uprightness, and no profession, perhaps, offers greater temptations to forsake them...

[**33] Mr. Stuesser then poses a number of problems invoking ethical considerations, to which he appends answers based on his application, of the relevant provisions of the Canadian Bar Association Code of Professional Conduct . At pp. 237238:

Problem 6 Disclosure of Law

The Supreme Court of Canada recently rendered a decision that is on point to a case in which you are now in trial. The Supreme Court decision undermines your legal position. Your opponent has completed argument without mention of the case. Do you bring the case to the attention of the court?

Answer

Yes.

Commentary

The Code of Professional Conduct specifically covers [*31] this point:

2. The lawyer must not, for example:

h) deliberately refrain from informing the tribunal of any pertinent adverse authority that the lawyer considers to be directly in point and that has not been mentioned by an opponent.

In this case your obligation to the court prevails over any sense of loyalty to your client. The law is part of the public domain and you are not disclosing any solicitor-client confidence. Your role as counsel places a duty upon you to assist the court with the applicable law. Sir David Napley provided this rationale:

The situation in relation to the law is wholly different from that applicable to the facts. The law is part of the public fund of knowledge. If an advocate discovers or knows of a decision which is adverse to his case, he must not conveniently forget its existence for fear of damaging his client's case. His bounden duty to the court is then to draw the authority to the attention of the court and seek, where possible, to distinguish the facts in the instant case from those of the reported authority or endeavour to show that the authority was wrongly decided, or that, despite the adverse decision, the matter can otherwise be resolved [*32] in his client's favour.

Counsel may argue that no case is ever "directly in point", and in this way the rule can be circumvented. Such a position would reduce the rule to a nullity. In the United States the following interpretation of -directly-places the word and intent of the rule in proper context.

Some might argue, therefore, that precedent which can be distinguished is not "directly" adverse and need not be revealed in the first place. This interpretation trivializes the Rule [Model Rule 3.3(a)(3)l and does not adequately protect the court.

Formal Opinion 280 (1949) sounded the right note on this issue when it suggested that the test should be whether the omitted authorities "would be considered important by the judge sitting on the case," or whether the judge might consider himself "misled" if he remained unaware of them. Although this is a somewhat subjective test, the intent seems clear.

[**34] Although in view of the decision and reasons on this application, the omissions and lack of disclosure have not affected the outcome, they are nevertheless relevant matters for the Court's attention and consideration. Apart from the presence of counsel for the respondents, they [*33] may well have been overlooked by the Court.

[**35] Although, as noted, counsel may have been technically correct in stating, as of the date of his representation, the decision of Chief Justice Kennedy represented the then understanding of the law in the Province of Nova Scotia, it could not be said this statement was " candid and comprehensive " when counsel failed to also add that the decision was under appeal, including on the issue as to whether in applying to register a U.K. judgment under the Convention , it was necessary to first give notice to the persons affected by the registration of such a judgment.

[**36] Counsel is under a duty, when making applications in Court, particularly where affected persons are not present, either in person or by counsel. The comments of Justice Green in Canadian Paraplegic Association , supra , that " the utmost of good faith " must be observed, are here both applicable and appropriate.

[**37] In prefacing his comments as to the "material nondisclosure" by counsel for the applicant, counsel for the respondent said:

"...I want to preface what I am going to say by indicating that I have the highest regards for my friends both professionally [*34] and personally, who are here and I am not saying this to be unkind to them.

[**38] Like counsel for the respondents, the Court has the highest regard for counsel for the applicant. Nevertheless, and although his statement on the role of counsel, particularly on an ex parte application, meets the general parameters of counsel's duties, it is the failure to recognize the relevance of the omissions noted by counsel for the respondents and the nondisclosure of the fact his cited authority was under appeal that is here of concern. If applicant counsel's assessment on what is relevant to be disclosed on an ex parte application, and I do not suggest it does, represents the attitude or perspective of the Bar generally, then it raises serious questions as to the relationship, forged over many centuries, between the members of the legal profession and the court itself, including the propriety of the court relying on statements made in court by counsel. I interpret counsel's position on what is relevant, and therefore to be disclosed on an ex parte application, as a misunderstanding of the role of counsel, rather than any deliberate attempt to mislead or deceive the Court.

[**39] [*35] Eric Crowther, OBE, in his work, Advocacy for the Advocate (Second Edition, 1990), at p. 136, begins his chapter on " The advocates duty to the court ":

Many years ago Lord Atkin said:

The code of honour of the legal profession is at once its most cherished possession and the most valued safeguard of the public. In the discharge of his office the advocate has a duty to his client, a duty to his opponent, a duty, to the Court, a duty to the State, and a duty to himself. To maintain a perfect poise amidst the various and sometimes conflicting claims is no easy task.

I like to think that those words are still true today.

[**40] So do I.

[**41] Application dismissed.

CLB-NO: 000094010

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