Court File No.: C53925/C53926

COURT OF APPEAL FOR ONTARIO

BETWEEN:

DOL TECHNOLOGIES INC.

Plaintiff
(Respondent)

- and -

UNIQUE BROADBAND SYSTEMS, INC.

Defendant
(Appellant)

AND BETWEEN:

UNIQUE BROADBAND SYSTEMS, INC.

Plaintiff by Counterclaim
(Appellant)

- and -

DOL TECHNOLOGIES INC., ALEX DOLGONOS, GERALD MCGOEY, LOUIS MITROVICH AND DOUGLAS REESON

Defendants By Counterclaim
(Respondent)

- and -

PETER MINAKI

Third Party

FACTUM AND AUTHORITIES SUBMITTED ON BEHALF OF THE APPELLANT

(Appellant's motion to adjourn the appeal and for directions)

Date: March 2, 2012

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PART I – NATURE OF THE MOTION

1. This is a motion brought by the appellant Unique Broadband Systems, Inc. ("UBS") for an adjournment *sine die* of its appeal, scheduled for April 26, 2012, and for such other directions as may be appropriate in light of the CCAA proceedings.

2. On October 12, 2011, the parties appeared before the Honourable Madam Justice Simmons for UBS's motion to adjourn or stay its appeal *sine die* pending the completion of UBS's application under the *Companies' Creditors Arrangement Act*. In Her Honour's endorsement granting an adjournment to a date fixed by agreement of the parties (April 26, 2012), Her Honour held:

> Whether the appeal is stayed under para. 12 of the original CCAA order (as extended), it would seem to be a waste of resources of the parties and the court to deal with the appeal at this point. [Emphasis added.]

3. The appeal was adjourned to a fixed date only as a result of Jolian and DOL's concerns that their claims against UBS in the CCAA process might not be processed in a timely manner if the appeal were adjourned *sine die*.

4. Since October 12, the CCAA process has proceeded without delay. The stay of proceedings in the original CCAA order has been extended several times without opposition from the Respondents. Claims have been accepted and reviewed. The claims review process is ongoing.

5. It is not in the parties' interest, nor the interest of this Honourable Court, to have the appeal heard on April 26, 2012. The Respondents will not be prejudiced by an adjournment given the ongoing CCAA claims process.

PART II – FACTS

6. UBS commenced an appeal from the orders of Justice Marrocco (the "Motion Judge") dated April 27, 2011 and May 30, 2011, wherein the Motion Judge ordered that UBS is obliged to pay Gerald McGoey ("McGoey"), his personal company Jolian Investments Limited ("Jolian"), Alex Dolgonos ("Dolgonos") and his personal company DOL Technologies Inc. ("DOL") (collectively, the "Respondents") for:

> 1. all legal expenses incurred by the Respondents in pursuing the claims by Jolian and DOL against UBS pursuant to their respective consulting agreements with UBS, and
>
> 2. all legal expenses incurred by the Respondents in respect of their defences to UBS's counterclaims in the above actions pursuant to their consulting agreements and various indemnification agreements.
>
> Affidavit of Joe Thorne at para. 2.

7. 3. Subsequently, UBS was granted an order by Justice Wilton-Siegel on July 5, 2011 (the "CCAA Order") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). The CCAA Order includes this provision:

> ...no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicant and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicant or affecting the Business or the

> Property are hereby stayed and suspended pending further Order of this Court.

Affidavit of Joe Thorne at para. 3.

8. On October 12, 2011, DOL brought a motion before the Honourable Madam Justice Simmons seeking security for its costs in responding to the UBS appeal, and UBS brought a cross-motion to adjourn or stay the appeal pending the outcome of the CCAA process. The Honourable Madam Justice Simmons adjourned DOL's motion for security for costs to no fixed date.

Affidavit of Joe Thorne at paras. 4 and 5.

1. In Her Honour's endorsement in UBS's cross-motion to stay or adjourn the appeal, she stated:

> Whether the appeal is stayed under para. 12 of the original CCAA order (as extended), **it would seem to be a waste of resources of the parties and the court to deal with the appeal at this point**. The concern of the respondents is that their claims within the CCAA may be jeopardized because of uncertainty arising from the pending appeal of the Marrocco J. order.
>
> However, it is not yet clear whether that will be the case. If that becomes clear, or if the CCAA proceeding is delayed, the respondents may apply, in the CCAA proceeding, for leave to have the appeal and the motion for security for costs proceeded with. Alternatively, they may apply to me to have the issue clarified as to whether the para. 12 stay applies to the appeal. [Bold added. Underline in original.]

Affidavit of Joe Thorne at para. 6.

9. As set out in Her Honour's endorsement, UBS's request for an adjournment of the appeal *sine die* was declined and the appeal was adjourned to a fixed date only because of Jolian and DOL's concerns that their claims against UBS in the CCAA process may not have been processed and reviewed in a timely manner.

Affidavit of Joe Thorne at para. 7.

10. Since the appearance before the Honourable Madam Justice Simmons on October 12, 2011, the UBS CCAA process has proceeded without delay. Claims have been submitted by Jolian, DOL, McGoey and Dolgonos, among others, and those claims have been processed. The Jolian and DOL claims have been disallowed by the Monitor, and a process for dealing with Jolian and DOL's dispute of those disallowances is being determined by the parties and the Monitor.

Affidavit of Joe Thorne at para. 10.

11. Counsel for UBS requested that Jolian and DOL consent to an adjournment of UBS's appeal given the ongoing CCAA process. That request was denied.

Affidavit of Joe Thorne at para. 11.

PART III – ISSUES, LAW AND ARGUMENT

12. The granting or the refusing of an adjournment is a discretionary act that may require the Court to consider a number of factors.

Ariston Realty Corp. v. Elcarim Inc., [2007] O.J. No. 1497 (S.C.J.) at paras. 33 and 34.

13. This Honourable Court has held, however, that:

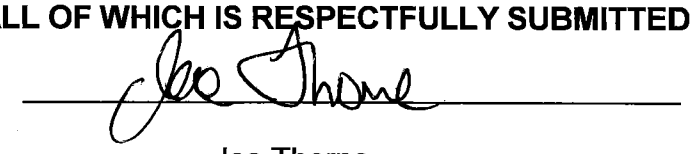
> Under our modern Rules non-compensable prejudice plays a pivotal role in deciding whether to grant an amendment or an adjournment.
>
> Denying the appellant a further adjournment in the absence of any prejudice to the respondents is contrary to the interests of justice.
>
> *Khimji v. Dhanani*, [2004] O.J. No. 320 (C.A.) at paras. 19 and 24.

14. In this case, the Respondents would not suffer any prejudice by an adjournment of the appeal. The Respondents' claims against UBS are being adjudicated in the CCAA claims process, a process that is ongoing.

PART IV – ORDER SOUGHT

15. UBS therefore respectfully requests that the appeal, scheduled for April 26, 2012, be adjourned *sine die* pending completion of the UBS CCAA proceedings, and requests such other directions as may be appropriate in light of the CCAA proceedings.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Joe Thorne

OF COUNSEL FOR THE APPELLANT

SCHEDULE A – LIST OF AUTHORITIES

1. *Ariston Realty Corp. v. Elcarim Inc.*, [2007] O.J. No. 1497 (S.C.J.).

2. *Khimji v. Dhanani*, [2004] O.J. No. 320 (C.A.).

TAB A

TAB 1

Case Name:

Ariston Realty Corp. v. Elcarim Inc.

Between
Ariston Realty Corp., Plaintiff, and
Elcarim Inc., Elcarim E Legana Inc., and Elaine Wai Mascall, Defendants
And between
Elcarim Inc., Elcarim E Legana Inc., and Elaine Wai Mascal, Plaintiffs by Counterclaim, and
Ariston Realty Corp. and Anthony Philip Natale, Defendants by Counterclaim

[2007] O.J. No. 1497

51 C.P.C. (6th) 326

2007 CanLII 13360

2007 CarswellOnt 2371

156 A.C.W.S. (3d) 1029

Court File No. 02-CV-238650CM4

Ontario Superior Court of Justice

P.M. Perell J.

Heard: April 11, 2007.
Judgment: April 20, 2007.

(48 paras.)

Civil procedure -- Discovery -- Examination for discovery -- Postponement, adjournment or stay -- Judge should have granted formerly self-represented parties request for order compelling opponents to attend for examination for discovery -- Although party failed to examine opponents as scheduled, opponents sustained no non-compensable prejudice -- Interests of natural justice required judge to exercise discretion to permit party to examine opponents at later date, where claim

at issue was substantial and party was not trying to avoid her obligations, but was trying to force opponents to satisfy theirs -- Ontario Rules of Civil Procedure, ss. 1.04(1), 2.03.

Appeal by Elcarim companies and Mascall, defendants and plaintiffs by counterclaim, from order by way of which they lost their right to examine for discovery Ariston, plaintiff, and Natale, defendant by counterclaim -- Action concerned environmental contamination of property sold by Elcarim companies and their principal, Mascall -- Purchaser sued Elcarim and Mascall for $8,000,000 -- Ariston, Elcarim's real estate agent, also sued Elcarim and Mascall for unpaid commission of $150,000 -- Elcarim and Mascall counterclaimed against Ariston and Natale for contribution and indemnity for Elcarim's exposure to liability to purchaser, and for damages for negligence as agent -- Timetable for discoveries reset in August 2006, requiring them to proceed in September and November 2006 -- Mascall to be discovered September 11, 2006 -- Counsel for Mascall and Elcarim brought urgent, unopposed motion to withdraw as solicitors of record on September 8 -- Mascall moved to represent herself and Elcarim -- Both motions allowed -- Mascall's examination took place as scheduled -- Mascall wrote to lawyer for Ariston and Natale, informing him she would not examine them as scheduled during following week -- Purchaser, Ariston and Natale took position Mascall and Elcarim thereby lost right of discovery -- New firm got on record to represent Mascall and Elcarim three weeks later, and moved for order requiring them to submit to examination for discovery -- Motion dismissed by judge who concluded there was no evidence Mascall experienced any difficulty while she was being examined, no explanation why she did not proceed with examination of plaintiffs and Natale, and no evidence to show Mascall was incapable of doing so.

HELD: Appeal allowed and order set aside -- Judge made reviewable error in exercising her discretion contrary to principles of natural justice -- Motion on behalf of Mascall and Elcarim could be characterized as after-the-fact request for adjournment of examinations -- No non-compensable prejudice to plaintiffs and Natale was shown, and delay to proceedings caused by Mascall was modest -- Mascall was not seeking to avoid her own obligations, but was seeking to prevent plaintiffs and Natale from avoiding theirs -- Claims at issue were substantial.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 1.04(1), Rule 2.03, Rule 15.01(2)

Counsel:

B. Skolnik for the plaintiff.

A. Postelwik for defendants by counterclaim.

R.B. Bissell and A. Tomasovic for the defendants.

D. Saxe for Context Real Estate Inc. and Context (High Park) Inc.

REASONS FOR DECISION

P.M. PERELL J.:--

Introduction and Overview

1 This appeal from the order of Master Sprout dated December 12, 2006 raises the question of how should the court address the problem of an opposed request by a litigant for an adjournment, the relaxation of a procedural rule, or the reinstatement or rescheduling of a missed interlocutory step.

2 This problem of how to adjudicate opposed requests for procedural indulgences is an everyday problem because it is a rare day when a trial or motions judge or master does not hear an opposed request for a dispensation from a rule or for a rescheduling of a timetable for the proceedings.

3 In the immediate case, the effect of Master Sprout's order is that the appellants, who are the defendants and plaintiffs by counterclaim, Elcarim Inc., Elcarim E Legana Inc. (the "Elcarim corporations") and Elaine Wai Mascall, all of whom have been examined for discovery, have lost their right to examine for discovery Ariston Realty Corp, ("Ariston"), the plaintiff and a defendant by counterclaim, and Anthony Philip Natale, a defendant by counterclaim.

4 The Elcarim corporations and Ms. Mascall argue that: (a) Master Sprout erred in not permitting them to reinstate their right to conduct examinations for discovery; (b) her error is of the type amenable to appellate review; and (c) the order that she ought to have made (and that this court should make in allowing the appeal) was to order that Ariston and Mr. Natale be examined for discovery and that the Elcarim corporations and Ms. Mascall pay some costs for the procedural disturbance they caused.

5 Further, the Elcarim corporations and Ms. Mascall argue that Master Sprout made a reviewable error because she asked herself the wrong question in approaching the appellants' request for a reinstatement of the discoveries of Ariston and Mr. Natale, which examinations Ms. Mascall had unilaterally decided to call off in circumstances that I will describe below.

6 In my opinion, Master Sprout did not ask a wrong question and she did not err in her consideration of the evidence and the arguments that were made to her during the argument of the motion. However, in my opinion, she did make a reviewable error, and for the reasons that follow,the appeal should be allowed and her order should be set aside.

Factual Background

7 The action in which Master Sprout made her order is part of an omnibus litigation that involves dozens of claims, crossclaims, counterclaims, and related actions, most of which have recently settled.

8 The lead plaintiffs are Context Real Estate Inc. and Context High Park (collectively "Context"), which purchased from the Elcarim corporations a property that suffered from environmental contamination. Context sued, amongst a dozen parties, the Elcarim corporations and their principal Ms. Mascall for $8,000,000.

9 The Elcarim corporations and Ms. Mascall were also sued by Ariston, which had been their real estate agent, for an unpaid real estate commission of $150,000. The Elcarim corporations and Ms. Mascal responded with a defence and a counterclaim that added Mr. Natale as defendant by counterclaim. The counterclaim was for contribution and indemnity for the Elcarim corporations' exposure to Context and for a separate $250,000 claim for damages for negligence as a real estate agent.

10 There has been a humungous amount of case management by Master Albert and more recently by Master Sprout to manage the omnibus litigation. In August 2006, Master Albert reset the timetable for discoveries to proceed in September and November, 2006. The examination for discovery of Ms. Mascall in her personal capacity and as the representative of the Elcarim corporations was scheduled to begin on Monday September 11, 2006.

11 On Friday September 8, 2006, Cassels Brock LLP, the solicitors of record for the Elcarim corporations and for Ms. Mascall, brought an urgent motion to remove itself from the record. This motion was not opposed by Ms. Mascall or her corporations, but she simultaneously brought a motion pursuant to rule 15.01(2) for leave to represent the corporations. Her motion, however, was opposed at least by Context.

12 It is to be noted that at the time of these motions, the Elcarim corporations and Ms. Mascall had already retained the law firm Fraser Milner Casgrain LLP for the limited purpose of negotiating a settlement; however, the request being made by Ms. Mascall was that she act for her corporations.

13 Master Sprout carefully considered the two motions and removed Cassels Brock as solicitor of record, and she granted Ms. Mascall leave to represent the corporations, despite the fact that she is not a lawyer.

14 Ms. Mascall was also going to represent herself, which, of course, she was entitled to do without leave being granted.

15 The examinations for discovery of the Elcarim corporations and of Ms. Mascall began as originally scheduled, and it appears that Ms. Mascall was given some behind-the-scenes assistance by Fraser Milner, but essentially she was on her own.

16 It was now Ms. Mascall's turn to examine Context, Ariston, and Mr. Natale, beginning with Ariston on September 21, 2006.

17 However, abruptly, on September 18, 2006, Ms. Mascall wrote a letter to Mr. Postelnik, who was acting for Ariston and Mr. Natale. The letter contained one sentence, which stated: "This is to advise that I will not be examining your client this week." This letter was copied to Fraser Milner.

18 Context, Ariston, and Mr. Natale responded by taking the position that Elcarim and Ms. Mascall had lost their right of discovery. Context subsequently relented, and it allowed its examination for discovery to proceed, although subject to some limitations.

19 On October 2, 2006, Fraser Milner Casgrain LLP did get on the record, and when Ariston and Mr. Natale would not relent and submit to an examination for discovery, the Elcarim corporations and Ms. Mascall brought a motion that was heard by Master Sprout on November 17, 2006.

20 On the motion, counsel for the Elcarim corporations and Ms. Mascall made the following submissions:

1. It is clear from the transcript of Mascall's examination for discovery that Mascall was incapable of representing herself and the Elcarim companies in the actions. It was clear that admissions were made that ought not to have been made;
2. It would have been wrong for Mascall to proceed with the discovery of Ariston in light of what happened on the Elcarim defendants' discovery;
3. Mascall was vulnerable and counsel for the examining parties took advantage of Mascall in view of her lack of legal representation;

4. What transpired on Mascall's discovery was a "travesty of justice";
5. The previous order granting leave to Mascall to represent the Elcarim companies was wrong. No matter what Mascall said, by affidavit or submission to the court, she was in fact incapable of making this decision and representing the Elcarim companies; and
6. The delay of three to four weeks in completing Ariston's discovery was not an undue delay in view of the fact that the action had been outstanding for four years.

21 It is notable that these submissions were based on a motion record that was devoid of any evidence from Ms. Mascall deposing about the circumstances of her unilateral decision to call off the scheduled examinations for discovery.

The Reasons for Decision of Master Sprout

22 Master Sproat reserved judgment on the motion and released reasons on December 12, 2006. In her Reasons for Decision, she defined the issue before her as follows: "whether the Elcarim defendants, who have elected not to retain legal counsel, ought to be bound by the decisions made by them." Master Sproat concluded that the answer to this question was yes, and she dismissed their motion.

23 In arriving at her conclusion, Master Sproat considered each of the submissions of the Elcarim defendants. And she noted there was no affidavit evidence that Ms. Mascall experienced any difficulty when she was examined for discovery or that she had made admissions she ought not to have made. Moreover, there was no explanation from her as to why she had not proceeded to examine Ariston and no evidence that she was incapable of doing so. Further, Master Sproat noted there was no evidentiary basis to second-guess the decision granting Ms. Mascall leave to represent the corporations.

24 For present purposes, it is not necessary to outline further Master Sproat's Reasons for Decision. In my opinion, there was no fundamental error in how she defined the question to be decided. Her question was just another way of asking whether the Elcarim corporations and Ms. Mascall should be granted an indulgence from a court order scheduling the examination for discoveries. Further, in my opinion, Master Sproat made no error in rejecting the somewhat hyperbolic submissions made on behalf of the Elcarim corporations and Ms. Mascall. I agree with Master Sproat's analysis and conclusions.

25 Although I conclude that Master Sproat did not misdirect herself by her phrasing of the question to be decided and that she correctly dismissed the arguments advanced by the Elcarim corporations and Ms. Mascall, I, nevertheless, conclude that her ultimate conclusion was wrong and that she ought to have granted the indulgence that was sought.

26 The reason for my conclusion rests in a consideration of the principles of natural justice and several general policies that underlie the *Rules of Civil Procedure.* In my opinion, Master Sprout erred in the exercise of her discretion and in the circumstances of this case she should have granted the request of the Elcarim corporations and Ms. Mascall to reschedule the examinations for discovery of Ariston and Mr. Natale.

Natural Justice and the Rules of Civil Procedure

27 Rule 1.04(1) of the Rules of Civil Procedure states: "These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."

28 Rule 2.03 states: "The court may, only where and as necessary in the interests of justice, dispense with compliance with any rule at any time."

29 Underlying these rules and interpretative principles are some fundamental principles associated with the administration of justice and civil procedure. These principles include but are not limited to the imperative of deciding disputes on their substantive merits, of ensuring that justice not only be done but be seen to be done, and of ensuring that the procedure is just and fair, which is to say that the civil proceedings accord with the principles of natural justice.

30 In the *Royal Commission Inquiry into Civil Rights* (*McRuer Report,* Vol. 1) chaired by the Honourable James McRuer (Queens Printer, 1968), there is at p. 137 a useful list of the main requirements of the rules of natural justice for an adjudicative tribunal. The report states [footnotes omitted]:

> (1) Notice of the intention to make a decision should be given to the party whose rights may be affected.
> (2) The party whose rights may be affected should be sufficiently informed of the allegations against his interest to enable him to make an adequate reply.
> (3) A genuine hearing should be held at which the party affected is made aware of the allegations made against him and is permitted to answer.
> (4) The parties affected should be allowed the right to cross-examine parties giving evidence against his interest.
> (5) A reasonable request for adjournment to permit the party affected to properly prepare and present his case should be granted.
> (6) The tribunal making the decision should be constituted as it was when the evidence and argument was heard.

31 As appears, the right to know the case to be met, the right to examine the opponent, and the right to an adjournment to properly prepare and present a case are all important elements of natural justice, and they are all factors to be considered in the immediate case. Ms. Mascall's motion may be viewed as a request to exercise these rights. Her request for a rescheduling of the Ariston and Natale examinations for discovery may be viewed as an after-the-fact request for an adjournment of those examinations.

32 Relatively recently, our Court of Appeal has had several cases where one of the grounds of appeal was that a trial judge in a civil proceeding had erred in refusing to grant an adjournment. See: *Khimji v. Dhanani* (2004), 69 O.R. (3d) 790 (C.A.); *Griffin v. O'Brien* (2005), 263 D.L.R. (4th) 412 (Ont. C.A.); *Moudry v. Moudry* [2006] O.J. No. 3957 (C.A.); *Cornfeld v. Cornfeld*, [2001] O.J. No. 5773 (C.A.); *Appiah v. Appiah*, [1999] O.J. No. 500 (C.A.); *McLeod v. Castlepoint Development Corp.* (1997) 31 O.R. (3d) 737 (C.A.); *Granovsky v. Richmond Square Development Corp.*, [1992] O.J. No. 1822 (C.A.). Without citing authority, I note that this issue also frequently arises in the context of the judicial review of the decisions of administrative tribunals.

33 These cases about the law associated with opposed requests for an adjournment reveal that the granting or the refusing of an adjournment is a discretionary act, and an appellate court will not in-

terfere with the exercise of the discretion unless it is shown that the judge or master failed to exercise his or her discretion judicially.

34 Depending on the circumstances of each case, to judicially exercise the discretion to grant or refuse an adjournment, a judge or master may need to weigh many relevant factors including:

* the overall objective of a determination of the matter on its substantive merits;
* the principles of natural justice;
* that justice not only be done but appear to be done;
* the particular circumstances of the request for an adjournment and the reasons and justification for the request;
* the practical effect or consequences of an adjournment on both substantive and procedural justice;
* the competing interests of the parties in advancing or delaying the progress of the litigation;
* the prejudice not compensable in costs, if any, suffered by a party by the granting or the refusing of the adjournment;
* whether the ability of the party requesting the adjournment to fully and adequately prosecute or defend the proceeding would be significantly compromised if the adjournment were refused;
* the need of the administration of justice to orderly process civil proceedings; and
* the need of the administration of justice to effectively enforce court orders.

35 In *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560, Sopinka, J., for the majority of the court, adopted the following statement about an adjudicator's discretion to grant or refuse an adjournment. The statement was taken from *Pierre v. Minister of Manpower and Immigration*, [1978] 2 F.C. 849, *per* Jackett C.J., at p. 851:

> The adjudicator is given discretion to determine whether an adjournment shall be granted, but, of course, this discretion is guided by the notion of a "full and proper" inquiry. In other words, the discretion must be exercised in accordance with principles of fairness and natural justice.

36 Where a judge fails to take into account relevant considerations he or she may exercise his or her discretion unreasonably, and if the result is contrary to the interests of justice, an appellate court is justified in intervening: *Khimji v. Dhanani, supra* per Laskin, J.A. at para. 14. Laskin, J.A. delivered a dissenting judgment, but the majority agreed with his articulation of the legal principles.

37 While as a matter of appellate review, deference must be given to the discretionary decision of a judge or master whether to grant or refuse an adjournment, a review of the recent judgments of the Court of Appeal reveal that it may be a highly contentious point whether or not a judge or master has properly exercised his or her discretion. Put somewhat differently, while it is difficult to overturn a judge's decision about an adjournment, it remains a viable ground of appeal. Thus, we see divided appellate courts in *Khimji v. Dhanani, supra* and *Griffin v. O'Brien, supra* where there are fulsome debates in the majority and the dissenting judgments about whether it was right or wrong for a trial judge to refuse an adjournment.

38 In my opinion, a concern for the principles of natural justice and the appearance of justice being done explains why, perhaps to the chagrin of those opposing adjournments and indulgences, courts should tend to be generous rather than overly strict in granting indulgences, particularly where the request would promote a decision on the merits. This liberality follows because it is in the public interest that whatever the outcome, a litigant should perceive that he or she had their day in court and a fair chance to make out their case.

39 Returning to the case at bar, I am not critical of Ariston and Mr. Natale in opposing the request to reschedule their examinations for discovery, although I confess to the view that Context took an honourable course in submitting to examinations. Ariston and Mr. Natale were entitled to insist that their opponents abide by the rules, but it remains for the court to decide whether it served the administration of justice for the price of a modest delay in the administration of justice and with no non-compensable prejudice to allow the action to move forward with asymmetrical examinations for discovery.

40 Thus, in my opinion, Master Sprout did not exercise her discretion reasonably and made a reviewable error. In this regard, while there was no explanation for the request for a rescheduling of the discoveries from Ms. Mascal, there also was no non-compensable prejudice to Ariston and Mr. Natale and the attendant delay in the overall proceeding was modest. Ms. Mascall was not seeking to avoid her own obligations; rather, she was seeking to prevent Ariston and Mr. Natale from avoiding their obligations. The claims against and the claims made by the Elcarim corporations and Ms. Mascall are substantial claims, and in the normal course these parties, which have submitted to examinations for discovery, would have a reciprocal right to examine their opponents. At the price of costs and a modest delay, Master Sprout could have maintained a level playing field for the contest.

41 Whatever the circumstances that led to it (and there was no basis for a collateral attack on the master's order granting Ms. Mascall the right to represent the corporations), Ms. Mascall's rescheduling request was not unreasonable as such.

42 The parties and the master may have focused their attention on the past, i.e., on what had happened during Ms. Mascall's examination, but the focus should have been on the future and on determining whether justice was being done and whether it would be seen to be done by granting the rescheduling request.

43 During the argument and in the factums, much was made of the relative or absolute importance of examinations for discovery to a fair adjudication. Upon reflection, it now seems to me that that debate misses the more fundamental points of whether in the circumstances of this case, the Elcarim corporations and Ms. Mascall will or will appear to have been denied natural justice if there are asymmetrical examinations for discovery and they ultimately fail in their defence or in their claims. I conclude that for a relatively short delay and the payment of costs for the waste caused by the disruption in the process, the Elcarim corporations and Ms. Mascall should be allowed to examine Ariston and Mr. Natale.

Conclusion

44 I therefore conclude that the appeal should be allowed, and if the parties cannot agree on dates for examinations for discovery for Ariston and Mr. Natale, these dates should be settled by Master Sprout.

45 I further conclude that Ariston and Mr. Natale should receive their costs for the preparation of the discoveries that were unilaterally cancelled by Ms. Mascall. Again if the parties cannot agree as to these costs, they can be settled by Master Sproat.

46 Finally, if necessary, I will receive submissions in writing about the costs of this appeal from the parties within 20 days from the release of these Reasons for Decision.

47 Subject to those submissions, my current opinion is that there should be no costs for the appeal. While the Elcarim corporations and Ms. Mascall have succeeded on the appeal, this side rail dispute became necessary because of their after-the-fact request for an indulgence from a court order and my tentative view is that this circumstance disentitles them to costs before Master Sproat and on this appeal.

48 Order accordingly.

P.M. PERELL J.

cp/e/qlbxm/qlmxt/qltxp/qljxl

TAB 2

Khimji v. Dhanani et al.
[Indexed as: Khimji v. Dhanani]

69 O.R. (3d) 790

[2004] O.J. No. 320

Docket No. C39372

Court of Appeal for Ontario

Catzman, Doherty and Laskin JJ.A.

February 10, 2004

Civil procedure -- Trial -- Adjournment -- Plaintiff taking no steps to obtain new counsel before scheduled trial date after his lawyer had himself removed from record -- Plaintiff appearing unrepresented on trial date and requesting adjournment to retain and instruct counsel -- Trial judge granting adjournment but making matter peremptory and ordering plaintiff to pay defendants' costs thrown away by new trial date -- Plaintiff not being diligent in seeking new lawyer and retaining lawyer who was unable to act for him on trial date -- Plaintiff making no effort to comply with costs order -- Plaintiff appearing unrepresented on trial date and seeking another adjournment -- Trial judge being justified in refusing adjournment and dismissing action in light of plaintiff's failure to take all reasonable steps to be prepared for trial and to comply with costs order. [page791]

The trial of a civil action was adjourned once before being scheduled for the week of November 11, 2002. In August 2002, counsel for the plaintiff obtained an order removing himself as solicitor of record because of a dispute over fees. The plaintiff took no steps to obtain new counsel before trial, and appeared unrepresented before the trial judge on November 12, requesting an adjournment of one and a half to two months to retain and instruct counsel. The trial judge adjourned the trial to December 16, told the plaintiff that he had to appear then with or without a lawyer or his case would be dismissed, and marked the case "peremptory". He ordered the plaintiff to pay the defendants' costs thrown away by the new trial date. The plaintiff retained counsel on November 27, 2002. His lawyer sought an adjournment on December 10, 2002, but it was denied and the action was ordered to proceed on December 16. The plaintiff, who was legally blind and not fluent in English, appeared before the trial judge on December 16 with an interpreter and sought an adjournment. He had a letter from his lawyer stating that the lawyer would act for him if the trial could be adjourned to the next sittings. The trial judge did not want to see the letter. The plaintiff explained that he had not paid the costs ordered on November 12 because he did not have the money and wanted to arrange for monthly instalments. The trial judge did not inquire about the plaintiff's means or

what payment arrangements might be made, and instead asked the plaintiff whether he was ready to proceed by himself. The plaintiff replied that he was not. The trial judge dismissed the action. The plaintiff appealed.

Held, the appeal should be dismissed.

Per Doherty J.A. (Catzman J.A. concurring): In determining whether to grant an adjournment, the trial judge had to consider not only the orderly processing of civil trials, but the need to effectively enforce court orders. The refusal of the adjournment in this case was justified because the plaintiff all but ignored the order of the court made in November. He took no steps to retain counsel for some 15 days, and when he finally got around to it, he went to only one lawyer, who told him that he was not available on the scheduled trial date. Instead of seeking the assistance of other counsel who could be available on the trial date, the plaintiff retained the lawyer who was not available, and that lawyer waited two weeks before bringing a motion for an adjournment. In addition to effectively ignoring the December trial date when retaining counsel, the plaintiff made no attempt to comply with the costs order.

The fact that the plaintiff was legally blind and not fluent in English was not relevant to the reasonableness of the trial judge's refusal to grant an adjournment. There was never any suggestion that the plaintiff would prosecute this case himself; nor was there any suggestion that the plaintiff's physical disability or his difficulties with the English language interfered in any way with his ability to retain and instruct counsel. Where a litigant successfully obtains the adjournment of a trial having failed to exercise due diligence in retaining counsel, that litigant must expect that, absent unforeseen circumstances, the trial will proceed on the new trial date. Similarly, where the adjournment is granted on terms, the litigant must make all reasonable efforts to comply with those terms. If in the assessment of the trial court a litigant does not take reasonable steps to be prepared for the new trial date and does not take reasonable steps to comply with the associated costs order, the trial court must have the authority to dismiss the claim.

Per Laskin J.A. (dissenting): Even though the plaintiff had been told on November 12 that he must be ready to proceed on December 16, his request for a further adjournment was reasonable and should have been granted. He [page792] sought only a short adjournment to the next sittings of the court. He had a lawyer ready to act. The adjournment would not have disrupted the court's trial schedule or prejudiced the other side. Although the plaintiff had not paid the costs ordered on November 12, he had an explanation for not having done so. In these circumstances, the order depriving him of his right to pursue his claim was wrong. It was contrary to the interests of justice and should not be allowed to stand.

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 2.01(1) (a), 26.01

APPEAL by the plaintiff from a judgment dismissing an action.

Jeffrey A. Dicker, for appellant.

Robert Lepore, for respondents.

[1] **LASKIN J.A.** (dissenting): -- The issue on this appeal is whether the trial judge unreasonably exercised his discretion by refusing to grant the appellant, Mr. Khimji, an adjournment of his trial to permit the counsel he had retained to conduct the trial for him. Instead of granting the adjournment, the trial judge dismissed Mr. Khimji's action. It is from this dismissal that Mr. Khimji appeals.

A. Background

(a) The dispute

[2] In late 1993, Mr. Khimji loaned Mr. Dhanani US$120,000. In May 1998, Mr. Dhanani died. In November 1998, Mr. Khimji's then lawyer wrote the respondent, Shirin Dhanani (Mr. Dhanani's wife), demanding repayment of the loan. Mrs. Dhanani replied by asserting that the loan had been repaid.

[3] In 1999, Mr. Khimji began this action, suing both Mrs. Dhanani and Mr. Dhanani's daughter, the court-appointed estate trustee, for repayment of the loan. The respondents acknowledge the loan. The only issue in the lawsuit is whether the loan has been repaid.

(b) Setting a trial date

[4] The action was scheduled to be tried in Newmarket on April 2, 2002. The respondents, however, obtained an adjournment because of another death in their family. Counsel for both sides told the court that they intended to amend their pleadings. The trial was adjourned to the trial scheduling court until June 4, 2002.

[5] On June 4 both counsel agreed to a trial date during the week of November 11, 2002. The appellant amended his statement [page793] of claim in mid-July, and the respondents amended their defence about a month later. Each side was to be permitted additional discovery on the amended pleadings. Those additional discoveries never took place.

[6] The appellant's difficulties began in early August when his lawyer obtained an order removing himself as solicitor of record because of a dispute over fees. A copy of the order of removal was served on Mr. Khimji by mail on August 13, 2002.

[7] Mr. Khimji took no steps to retain new counsel between mid-August 2003 and the scheduled trial date during the week of November 11. He appeared unrepresented before the trial judge on November 12, and requested an adjournment of one and a half to two months, which was a reasonable request in order to obtain a lawyer to conduct an anticipated three- to four-day trial.

[8] The respondents opposed the adjournment, but the trial judge granted it. However, he gave the appellant little more than a month. He adjourned the trial to December 16 and scheduled it for three days. He told the appellant that he "must appear then with or without a lawyer" and added: "If you don't show up or if you're not ready then, your case may be dismissed." He marked the case "peremptory" but did not explain to the appellant what that meant. Finally, he ordered the appellant to pay the respondents' costs thrown away, fixed at $6,700, by the new trial date.

[9] On November 27, 2002, 15 days after getting the adjournment, Mr. Khimji met with a new lawyer, Mr. Dicker, of the law firm of Robins, Appleby & Taub. Mr. Dicker told Mr. Khimji that he

would act for him if the trial could be adjourned to the next scheduled sittings in Newmarket in March 2003. On December 10, 2002, Mr. Dicker sought an adjournment before Regional Senior Justice Shaunessy but it was denied and the action ordered to proceed as scheduled on December 16.

(c) The trial judge's ruling on December 16, 2002

[10] Mr. Khimji is legally blind and, though he can converse in English, is not fluent in it. Because of these impediments, realistically he could not conduct the trial himself. He needed a lawyer. He appeared before the trial judge on December 16 with an interpreter and sought an adjournment so Mr. Dicker could act. The respondents opposed the adjournment.

[11] The discussion before the trial judge was brief. Mr. Khimji had a letter from Mr. Dicker in which Mr. Dicker said he would act for the appellant if the trial could be adjourned to the next sittings. The trial judge did not want to see the letter. Through his interpreter Mr. Khimji explained that he had not [page794] paid the costs of $6,700 ordered on November 12 because he did not have the money "to pay all at once" and wanted to arrange for monthly instalments. The trial judge did not inquire about Mr. Khimji's means or about what payment arrangements might be made. Instead he asked the appellant whether he was ready to proceed by himself. The appellant answered that he was not.

[12] The trial judge then turned to counsel for the respondents, who asserted that he was ready to proceed, that his clients needed "some closure" and that Mr. Khimji's assertion that he had no money was "a lark".

[13] The trial judge denied the adjournment and dismissed the action with the following short endorsement:

> The Plaintiff appears in person with a translator. He again requests an adjournment. Also the Plaintiff has not paid the costs previously ordered to be paid by today. The Plaintiff is not prepared to proceed today. A further adjournment is denied. The Plaintiff's action is therefore dismissed. Further costs to the defendants to be assessed.

B. Discussion

[14] A trial judge enjoys wide latitude in deciding whether to grant or refuse the adjournment of a scheduled civil trial. The decision is discretionary and the scope for appellate intervention is correspondingly limited. In exercising this discretion, however, the trial judge should balance the interests of the plaintiff, the interests of the defendant and the interests of the administration of justice in the orderly processing of civil trials on their merits. In any particular case, several considerations may bear on these interests. A trial judge who fails to take account of relevant considerations may exercise his or her discretion unreasonably and if, as a result, the decision is contrary to the interests of justice, an appellate court is justified in intervening. In my opinion, that is the case here.

[15] Even though the appellant had been told on November 12 that he must be ready to proceed on December 16, his request for a further adjournment was reasonable and should have been granted. He sought only a short adjournment to the next sittings of the court. He had a lawyer ready to act. The adjournment would not have disrupted the court's trial schedule. It would not have prejudiced the other side, which had already been granted a much longer adjournment. And, though the appellant had not paid the costs ordered on November 12, he had an explanation for not having

done so. In these circumstances the order depriving the appellant of his right to pursue his claim was simply wrong. It was contrary to the interests of justice. It should not be allowed to stand. [page795]

[16] The trial judge's refusal to adjourn the trial appears to have been based on three considerations: his costs order of November 12, 2002 had not been paid; he had already granted Mr. Khimji one adjournment; and he had marked the December 16 trial date "peremptory".

[17] These three considerations were all important. In some cases they might have been determinative. But not in this case. Here, other considerations should also have been taken into account.

1. The overall objective of civil proceedings: a just determination of the real matters in dispute

[18] I begin with the overriding goal of our modern Rules of Civil Procedure, R.R.O. 1990, Reg. 194: to ensure as far as possible that cases are resolved on their merits. This goal is expressly set out in rule 2.01(1)(a), which gives a judge power to grant any relief necessary "to secure the just determination of the real matters in dispute". Courts should not be too quick to deprive litigants of a decision on the merits. The trial judge does not appear to have sufficiently taken into account that his order deprived the parties, especially the appellant, of a determination of "the real matters in dispute".

2. Prejudice caused by refusing or granting an adjournment

[19] Under our modern Rules non-compensable prejudice plays a pivotal role in deciding whether to grant an amendment or an adjournment. For example, under rule 26.01, a court shall (not may) grant leave to amend a pleading "at any stage of an action" -- on the eve of or even during a trial -- "unless prejudice would result that could not be compensated for by costs or an adjournment". Here, the prejudice to Mr. Khimji from the denial of an adjournment is obvious: his action was dismissed without an adjudication on its merits. In his very fair argument in this court, counsel for the respondents acknowledged that an adjournment of the trial from December 2002 to March 2003 would not have prejudiced his clients except for the costs incurred for the December 16 date. The trial judge, however, did not canvass the question of prejudice.

3. Mr. Khimji's ability to pay the costs ordered on November 12, 2002

[20] Whether Mr. Khimji could or could not pay these costs was a relevant consideration. If he genuinely could not pay them by December 16 but could, as he suggested, pay them over time, [page796] then his failure to comply with the November costs order should not have deprived him of his day in court. The trial judge was faced with conflicting statements from Mr. Khimji and counsel for the respondents on whether the appellant had the means to pay. Yet the trial judge made no inquiry to resolve this conflict or determine whether the appellant had the ability to pay. The appellant, in fact, paid these costs shortly before the hearing of the appeal.

4. Mr. Khimji's explanation for not being ready for trial on December 16, 2002

[21] The appellant did not have a lawyer ready to proceed on December 16 and he was incapable of representing himself. Admittedly, he bears some responsibility for the position he found himself in. On the evidence before us, he did not try to retain a new lawyer between the time his former

lawyer withdrew from his case and the scheduled November trial date. Moreover, after obtaining an adjournment in November he waited 15 days before speaking to Mr. Dicker. Still, litigants do not always act with the haste that we, perhaps unrealistically, expect of them. I do not regard Mr. Khimji's tardiness as being so prolonged that it should have deprived him of a further adjournment.

[22] Also, as Mr. Khimji appeared alone on November 12, he may not have appreciated the implications of a peremptory trial date. Even had he attempted to retain a lawyer immediately after November 12, I doubt that he could have found a litigator to take on a three-day trial on such relatively short notice. Any reasonably busy trial lawyer would have already had his or her schedule booked for that period, as Mr. Dicker apparently did.

5. The length of the adjournment requested and disruption to the court's trial schedule

[23] The appellant sought only a short adjournment to the next sittings of the Newmarket court, when Mr. Dicker had undertaken to be available. Had the adjournment been granted, it would have delayed the trial for three and a half months. The adjournment obtained by the respondents earlier in the year had caused a delay of over seven months. Additionally, the adjournment requested by the appellant would not have disrupted the Newmarket civil trial schedule. The December transcript of the proceedings before the trial judge showed that he had another trial ready to proceed. [page797]

C. Conclusion

[24] It seems to me, respectfully, that the trial judge gave short shrift to Mr. Khimji's request for an adjournment. By dismissing the action, the trial judge deprived the appellant of the right to pursue a substantial claim of over $150,000. In failing to take into account the considerations I have listed, the trial judge exercised his discretion unreasonably. Denying the appellant a further adjournment in the absence of any prejudice to the respondents is contrary to the interests of justice. The appellant should be allowed to maintain his action.

[25] I would therefore allow the appeal, set aside the order of Loukidelis J. dated December 16, 2002 and in its place order that the action be tried at the next civil sittings in Newmarket convenient to the court and to counsel for the respondents.

[26] The respondents are entitled to their costs of preparing for and attending at the hearing of December 16, 2002. However, the appellant is entitled to his costs of the appeal on a partial indemnity basis. I would fix both parties' costs in the offsetting amounts of $3,500, inclusive of disbursements and GST.

[27] DOHERTY J.A. (CATZMAN J.A. concurring): -- I have had the privilege of reading the lucid reasons of Laskin J.A. I adopt his summary of the facts and his statement of the principles governing this appeal. I would only add that in determining whether to grant an adjournment in this case, the trial judge had to consider not only the orderly processing of civil trials, but the need to effectively enforce court orders. I think the refusal of the adjournment in this case was justified principally because the appellant all but ignored the order of the court made in November. He made virtually no attempt to retain a lawyer who could act for him on the scheduled trial date, or to pay even part of the costs order made against him.

[28] As my colleague points out, the appellant's first lawyer was removed from the record in August 2002. The appellant had notice of his lawyer's motion to be removed, but did not attend on the

motion. Instead, he did nothing before the scheduled trial date some three months later in November 2002. My colleague describes the appellant's request for one and a half to two months adjournment in November as a "reasonable request". While the length of the adjournment requested was reasonable, the adjournment was only needed because the appellant had done nothing to retain counsel since August 2002. Unlike the earlier adjournment requested by the respondents, there was no good reason for this adjournment. I would describe the appellant as [page798] seeking the indulgence of the court in November as a result of his failure to take any steps to retain counsel between August and November.

[29] A transcript of the November proceedings was not initially part of the record on appeal. A copy was obtained at the court's request. It is clear from that transcript that the appellant knew that he would be expected to be ready for trial on the new trial date and indeed had agreed to that:

THE COURT: We're going to set a new date for the trial.

ROSHANALI KHIMJI: Yes.

THE COURT: And you must appear then with or without a lawyer.

ROSHANALI KHIMJI: Okay.

THE COURT: And it's going to go ahead.

ROSHANALI KHIMJI: Okay.

THE COURT: If you don't show up or if you're not ready then, your case may be dismissed.

ROSHANALI KHIMJI: Okay.

THE COURT: In addition, I'm going to award costs to the other side for today. Do you understand?

ROSHANALI KHIMJI: Yes.

THE COURT: And they'll be payable forthwith as well. Okay. The date . . . .

E

TRIAL COORDINATOR: We do have next week available, Your Honour, but I understand that Mr. Khimji will need some time to find a lawyer.

T H E COURT: Okay. How much time do you need to find a lawyer?

ROSHANALI KHIMJI: One and a half, two months.

THE COURT: I'll give you . . . .

ROSHANALI KHIMJI: Because still now I not know any lawyer, and my friend can look another lawyer for me and to splend [sic] everything in the new lawyer and they have to study everything again, you know.

THE COURT: What about the middle of December?

ROSHANALI KHIMJI: Okay.

THE COURT: Middle of December?

ROSHANALI KHIMJI: Okay.

[30] It is also evident that the appellant understood that he was obliged to pay the costs awarded by the trial judge as a term [page799] of the adjournment. He did not suggest that paying those costs posed any difficulty.

T H E COURT: Okay. You have to pay that money by the date of the trial. You must pay $6,720.00. Okay?

ROSHANALI KHIMJI: Okay.

[31] The appellant took no steps to retain counsel for some 15 days after the November appearance even though he knew the trial was scheduled for December 16th. When the appellant finally got around to going to a lawyer, he went to only one lawyer who told him that he was not available on the scheduled trial date. Instead of seeking the assistance of other counsel who could be available on the trial date, the appellant retained the lawyer who was not available on the trial date. That

counsel waited two weeks and then brought a motion for an adjournment on the basis that he was not available on the trial date.

[32] I do not know how difficult it would have been for the appellant to find a lawyer who could have been available on the December trial date. Lawyers have been known to juggle their schedules to make themselves available on short notice. I do know, however, that by waiting 15 days to contact any lawyer, by going to see only one lawyer, and by retaining that lawyer even though he was not available on the trial date, the appellant insured that he could not be ready for trial on December 16th.

[33] In addition to effectively ignoring the December trial date when retaining counsel, the appellant made no attempt to comply with the costs order that had been made against him. There was a dispute as to appellant's ability to pay those costs and the trial judge should have made some inquiry into the appellant's ability to pay the order. However, even on the appellant's own version of events, he could have paid some part of those costs, but instead chose to pay nothing.

[34] The appellant is legally blind and is not fluent in the English language. Neither is relevant to the reasonableness of the trial judge's refusal to grant an adjournment. There was never any suggestion that the appellant would prosecute this case himself. The real question was whether the trial judge failed to act judicially in refusing to give the appellant a further adjournment so that he could be represented by counsel. There was no suggestion that the appellant's physical disability or his difficulties with the English language interfered in any way with his ability to retain and instruct counsel.

[35] Individual litigants have a right to pursue and defend their respective claims. They must do so, however, within a [page800] court structure that must accommodate thousands of individual litigants. That system can function effectively only when litigants take scheduling commitments seriously and make genuine efforts to comply with court orders relating to adjournments and related matters. Where a litigant successfully obtains the adjournment of a trial having failed to exercise due diligence in retaining counsel, that litigant must expect that absent unforeseen circumstances, the trial will proceed on the new trial date. Similarly, where the adjournment is granted on terms, the litigant must take all reasonable efforts to comply with those terms. If in the assessment of the trial court a litigant does not take reasonable steps to be prepared for the new trial date and does not make reasonable attempts to comply with the associated costs order, the trial court must have the authority to dismiss the claim. That is not to say that the dismissal of the claim will be inevitable in circumstances such as those presented on this appeal, but rather it is to say that the option of dismissal must be available to the trial court to ensure the ongoing effective operation of trial lists and to preserve the integrity of court orders.

[36] This court sits at a distance from the day-to-day operation of trial courts. That distance must impair this court's ability to review decisions such as the one under appeal. Strong deference is due to the decision of those in the trial courts who are responsible for the day-to-day maintenance of an efficient and just system of civil trials. Some judges may have given the appellant a third opportunity to proceed to trial, despite his apparent disregard for previous trial dates and his failure to make any attempt to comply with the court order relating to costs. I would not have interfered with the decision granting a third adjournment. Equally, however, I would not brand as unreasonable the decision refusing a third adjournment in light of the appellant's failure to make any effort to retain counsel who could act on the trial date and his failure to make any effort to pay the costs order. The

trial court is in a much better position to balance the competing interests than is this court. I would dismiss the appeal.

Appeal dismissed.

DOL TECHNOLOGIES INC. - Plaintiff (Respondent) - **UNIQUE BROADBAND SYSTEMS, INC.** - Plaintiff by Counterclaim (Appellant) – **PETER MINAKI** - Third Party-	Court File No.: C53925/C53926 **v.** **UNIQUE BROADBAND SYSTEMS, INC.** – Defendant (Appellant)- **v. DOL TECHNOLOGIES INC. ALEX DOLGONOS, GERALD MCGOEY, LOUIS MITROVICH AND DOUGLAS REESON** Defendants by Counterclaim/(Respondent)-

COURT OF APPEAL FOR ONTARIO

(PROCEEDING COMMENCED AT TORONTO)

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