Court File No. CV-23-00707394-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TACORA RESOURCES INC.

BOOK OF AUTHORITIES OF THE AD HOC GROUP OF NOTEHOLDERS

October 22, 2023

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TAB 1

2001 CarswellOnt 2904
Ontario Superior Court of Justice

Indcondo Building Corp. v. Steeles-Jane Properties Inc.

2001 CarswellOnt 2904, [2001] O.J. No. 3316, 107 A.C.W.S. (3d) 679, 14 C.P.C. (5th) 117

Indcondo Building Corporation v. Steeles-Jane Properties Inc. and Others v. Minden Gross Grafstein & Greenstein and Another, (Third Parties)

Nordheimer J.

Heard: August 14, 2001
Judgment: August 16, 2001 *
Docket: Doc. Brampton C16551/92

Proceedings: additional reasons at 2001 CarswellOnt 3065 (Ont. S.C.J.)

Counsel: *Enza Di Iorio*, for Defendants, Carlo Rotundo, D. Robin Sloan
Peter C. Wardle and *J. Pratt*, for Third Parties

Subject: Civil Practice and Procedure

Headnote

Practice --- Third party procedure — Practice — Instituting third party proceedings — Time for bringing in third party — General

Third party lawyers drafted share purchase agreement between plaintiffs and defendants, and also acted for all parties to agreement in so doing — Plaintiffs commenced action against defendants on May 21, 1992 arising out of agreement — In November 2000, defendants issued third party claim grounded in negligence and breach of contract — Third parties brought motion for summary judgment dismissing third party claim on ground that claim was statute barred by virtue of six-year limitation period contained in s. 45(1)(g) of Limitations Act — Motion granted — Material facts upon which defendants relied for third party claim were known to them since at least 1993 — By 1993, defendants knew that third parties had acted for all of shareholders with respect to share purchase agreement and that they had not been advised to obtain independent legal advice — Defendants alleged at time that they did not understand agreement as result and that they had personal liability under it — Defendants knew by then that plaintiff was advancing personal claim against them based on term in agreement — Therefore, defendants clearly had to know that live issue existed regarding quality of representation they received from third parties — Given that third party claim was not instituted until 2000, claims therein fell outside six-year limitation provision — Limitations Act, R.S.O. 1990, c. L.15, s. 45(1)(g).

Limitation of actions --- General principles — Practice and procedure — Third party proceedings

Third party lawyers drafted share purchase agreement between plaintiffs and defendants, and also acted for all parties to agreement in so doing — Plaintiffs commenced action against defendants on May 21, 1992 arising out of agreement — In November 2000, defendants issued third party claim grounded in negligence and breach of contract — Third parties brought motion for summary judgment dismissing third party claim on ground that claim was statute barred by virtue of six-year limitation period contained in s. 45(1)(g) of Limitations Act — Motion granted — Material facts upon which defendants relied for third party claim were known to them since at least 1993 — By 1993, defendants knew that third parties had acted for all of shareholders with respect to share purchase agreement and that they had not been advised to obtain independent legal advice — Defendants alleged at time that they did not understand agreement as result and that they had personal liability under it — Defendants knew by then that plaintiff was advancing personal claim against them based on term in agreement — Therefore, defendants clearly had to know that live issue existed regarding quality of representation they received from third parties — Given that third party claim was not instituted until 2000, claims therein fell outside six-year limitation provision — Limitations Act, R.S.O. 1990, c. L.15, s. 45(1)(g).

Limitation of actions --- Actions in tort — Statutory limitation periods — When statute commences to run — General

Third party lawyers drafted share purchase agreement between plaintiffs and defendants, and also acted for all parties to agreement in so doing — Plaintiffs commenced action against defendants on May 21, 1992 arising out of agreement — In November 2000, defendants issued third party claim grounded in negligence and breach of contract — Third parties brought motion for summary judgment dismissing third party claim on ground that claim was statute barred by virtue of six-year limitation period contained in s. 45(1)(g) of Limitations Act — Motion granted — Material facts upon which defendants relied for third party claim were known to them since at least 1993 — Defendants were aware that they were at risk of harm from alleged failures of third parties because they knew that plaintiff was seeking recourse against them based on very term of shareholder agreement about which they said they were not properly advised — Final determination that plaintiff was entitled to such recourse was not required to start limitations clock ticking for any claim over of type advanced in third party claim — Limitations Act, R.S.O. 1990, c. L.15, s. 45(1)(g).

Limitation of actions --- Actions in tort — Specific actions — Actions against particular parties — Barristers and solicitors

Third party lawyers drafted share purchase agreement between plaintiffs and defendants, and also acted for all parties to agreement in so doing — Plaintiffs commenced action against defendants on May 21, 1992 arising out of agreement — In November 2000, defendants issued third party claim grounded in negligence and breach of contract — Third parties brought motion for summary judgment dismissing third party claim on ground that claim was statute barred by virtue of six-year limitation period contained in s. 45(1)(g) of Limitations Act — Motion granted — No pleading of breach of fiduciary duty existed anywhere in third party claim to support contention that third party claim was, in essence, claim for breach of fiduciary duties and as such was not subject to

limitation period — Fact that relationship between solicitor and client is fiduciary one does not mean that allegations made against solicitor must necessarily be taken as being allegations of breach of fiduciary duty — Difference exists between claims in negligence and claims for breach of fiduciary duties arising out of solicitor and client relationship — How claim for breach of fiduciary duty could be advanced was difficult to see, as clients were aware that solicitors were acting for all sides and no suggestion existed that any objection was made to them so acting — Limitations Act, R.S.O. 1990, c. L.15, s. 45(1)(g).

MOTION by third parties for summary judgment dismissing third party claim on ground that claim was statute barred by virtue of six-year limitation period contained in s. 45(1)(g) of *Limitations Act*.

Endorsement. ***Nordheimer J.*****:**

1 The third parties move for summary judgment dismissing the third party claim on the ground that the claim is statute barred by virtue of the limitation period contained in *section 45(1)(g) of the Limitations Act*, R.S.O. 1990, c. L.15, that is, that more than six years passed between the launching of the third party claim and the time when the defendants, Carlo Rotundo and D. Robin Sloan, knew or ought to have known that they had a claim against the third parties.

2 This action was commenced on May 21, 1992. It arises out of a share purchase agreement that existed between the plaintiffs and the defendants. There is no dispute that the third parties drafted the share purchase agreement and they acted for all of the parties to the share purchase agreement in so doing.

3 It was not until November 2000 that the third party claim was issued. In the third party claim, the defendants, Rotundo and Sloan, allege that the third parties represented that they had expertise in the preparation of share purchase agreements, that they relied on the skill, judgment and advice of the third parties, that they did not receive independent legal advice prior to executing the agreements and that the third parties preferred the interests of certain of the other parties to the share purchase agreement over the interests of Rotundo and Sloan. It is then alleged that there was either negligence or breach of contract which resulted from the actions of the third parties which gives rise to a claim for contribution and indemnity for any amounts which these defendants are found liable to the plaintiff or, in the alternative, for damages.

4 I do not consider it necessary to review the history of the action in any great detail. It is sufficient to say that the action was commenced in 1992, pleadings were completed in 1993 and there was then a hiatus of about four years where nothing appears to have happened. In 1997, the plaintiff retained a new solicitor. The action was then set down for trial and there was an assignment court date scheduled in Milton for April 17, 1997. The record does not reveal what happened at the assignment court. On February 17, 1998, an order was obtained granting leave to the defendants, Rotundo, Sloan and Rinomato, to amend their statement of defence. An examination for discovery of the defendant, Rotundo, was conducted on October 29, 1998. As part of that examination, an

undertaking was given to obtain the files of the third parties with respect to the share purchase agreement. Those files were obtained in May 1999. It is stated in the affidavit of the defendant, Rotundo, filed in opposition to this motion that it was not until those files were obtained and reviewed that the defendants, Rotundo and Sloan, became aware that a third party claim should be made against Minden, Gross, Grafstein and Greenstein and Mr. Greenstein.

5 There are a number of problems with the response of the defendants, Rotundo and Sloan, to this motion. First, there is no affidavit from Mr. Sloan. Given the nature of the allegations being made against the third parties, particularly that there was a failure to provide independent legal advice prior to executing the agreement and that the third parties preferred the interests of certain of the other parties to the share purchase agreement over the interests of Rotundo and Sloan, it seems to me that it was incumbent on both of these defendants to give sworn evidence as to the issues that arose from these alleged failures, the harm or impact which those failures had on these defendants and, in particular, when it was that these defendants became aware of the problems relating to the actions of the third parties. I note in this regard the comment made by Borins J.A. in *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.) at p. 301:

> In this regard rule 20.02 provides that on the hearing of a rule 20 motion 'an adverse inference may be drawn, if appropriate, from the failure of a party to provide evidence of persons having personal knowledge of contested facts'.

6 Second, the affidavit of Mr. Rotundo is devoid of any factual foundation to back up the bald allegations that are made regarding the alleged failings of the third parties. For example, while Mr. Rotundo complains that he did not receive independent legal advice, he does not go on to say that he did not understand the share purchase agreement which he signed — signed twice, in fact, once personally and once on behalf of the defendant, Steeles-Jane Properties Inc. Similarly, while Mr. Rotundo alleges that the third parties preferred the interests of others over his, he again does not say how this occurred nor does he state how he was adversely effected by such conduct. In fact, Mr. Rotundo's response to this motion for summary judgment is contained entirely in the penultimate paragraph of his affidavit where he states:

> It was not until after my solicitors reviewed Mr. Greenstein's file some time in May or June of 1999 that Mr. Sloan and I discovered for the first time that we had a cause of action against Mr. Greenstein and Minden Gross.

The affidavit does not, of course, go on to say what it was that was discovered from a review of the file or how whatever was discovered lead to the conclusion that these defendants had a cause of action against the third parties.

7 Third, there are the events surrounding the cross-examination of Mr. Rotundo on his affidavit. A review of the transcript shows that Mr. Rotundo refused to answer almost all of the questions that had any significance to his position on this motion. The transcript lists 23 separate refusals

out of a total transcript of only 34 pages. I appreciate that the third parties could have moved to compel answers to these questions but did not. Their failure to do so, however, does not preclude them from pointing to the degree of interference that occurred with their attempt to cross-examine the only deponent offered in response to this motion and from asking the court to draw an adverse inference therefrom. In my view, the concerted effort to block the third parties from obtaining relevant information through the cross-examination of Mr. Rotundo ought to be the subject of an adverse inference by the court on the same principle that underlies *rule 20.02* which is referred to by Mr. Justice Borins in the above quotation.

8 There was, however, one series of questions that were answered, at least in part, by Mr. Rotundo that are germane to the issues before me. They are as follows:

> 37. Q. And sir, when you were examined by Mr. Chapman, you told him that your lawyer in April of 1990, was Herb Greenstein of Minden Gross; wasn't that answer correct?
>
> A. Correct.
>
> 38. Q. And you also told Mr. Chapman that Mr. Greenstein acted for all of the shareholders and for Steeles-Jane in connection with the transaction in this action; correct?
>
> A. That's correct.
>
> 39. Q. And you knew that at the time; correct?
>
> A. Correct.
>
> 40. Q. And you also know that Mr. Greenstein did not advise you to get independent legal advice; correct?
>
> A. Correct.
>
> 41. Q. That's one of the allegations you're making in this lawsuit; right?
>
> A. Correct.
>
> 42. Q. And you also alleged that you didn't understand the nature of the documents you signed; correct?
>
> A. Correct.
>
> 43. Q. And I take it that the document that we're talking about is the share purchase agreement that is found in Mr. Greenstein's affidavit as Exhibit "A"?
>
> That's the agreement you say you didn't understand; right?

A. That's correct.

44. Q. And the provision you say you didn't understand is the provision that provides for your personal liability; right?

A. That's correct.

45. Q. Okay. And you would have found out sometime in 1991 that at the very latest, that there was a claim being made by Indcondo against you relating to that provision; correct?

A. Correct.

46. Q. That's right. So long before, sir, you swore the affidavit in the Wishart proceedings, you knew that Mr. Greenstein had acted for you, that he hadn't advised you to get independent legal advice and that you were being pursued by Indcondo on that provision in the agreement; right?

A. [refusal]

47. Q. So let me suggest to you, sir, that it would have been clear to you, prior to 1992 and certainly prior to 1993, that you might have a problem with Mr. Greenstein's handling of the transaction; isn't that right?

A. I didn't understand that question. I refuse to answer. The question is not clear to me; I don't understand it.

48. Q. Okay. I suggest to you, sir, that at the very latest, you must have been aware that you had a problem with Mr. Greenstein's handling of the transaction when you filed this affidavit in the Wishart proceeding in May of 1993?

A. [refusal]

9 I pause at this point to clarify the above references to the Wishart proceeding. There was a proceeding in 1992 and 1993 involving Mr. Rotundo and Mr. Sloan (and others who are defendants in this action) and the Royal Bank of Canada. It appears that Mr. Rotundo filed an affidavit in that proceeding dated May 27, 1993. Within that affidavit, Mr. Rotundo made very similar allegations about the third parties in the context of that case that are made here, namely, that they preferred the interests of the Royal Bank over those of Mr. Rotundo, Mr. Sloan and others and that the third parties had failed to tell them to obtain independent legal advice regarding the documents that they signed in favour of the Bank. At Mr. Rotundo's cross-examination, the affidavit was produced and attempts were made to cross-examine Mr. Rotundo on it but those attempts were met with a blanket refusal to answer any questions regarding the affidavit, even to the extent of refusing to allow Mr. Rotundo to confirm whether he remembered swearing the affidavit. At the hearing, I did

not permit counsel for the third parties to get into the contents of the affidavit. While counsel was at liberty to put the document to Mr. Rotundo on his cross-examination, it does not become evidence before me unless Mr. Rotundo confirmed that he had sworn the affidavit. Regardless of whether the refusals made at the cross-examination were proper ones, without at least that admission, I do not see how the affidavit becomes admissible before me as evidence against Mr. Rotundo. It could only be admissible before me as a prior statement of the witness but that requires an adoption of the statement by the witness unless it is separately proven to be a statement made by the witness. There being no adoption of the statement by Mr. Rotundo, and there being no other proof that it was made by Mr. Rotundo, I do not believe that I can accept it as evidence against Mr. Rotundo.

10 There is one other issue that arises from the cross-examination that I should mention. Mr. Rotundo was asked about his assertion that it was not until the files were obtained from Minden Gross that he and Mr. Sloan became aware of the cause of action against the third parties. Mr. Rotundo was asked what it was in the files that lead to that conclusion. Mr. Rotundo responded that he did not know because he had not reviewed the files. Rather, his former solicitor had reviewed them. An undertaking was then obtained to ask the former solicitor the same question. At the time that the hearing began before me, the undertaking had not been answered. However, counsel for these defendants attempted during the course of his submissions to provide the information in answer to the undertaking, to which counsel for the third parties objected. Counsel for these defendants contended that he had just obtained the information the evening before. I refused to allow the undertaking to be answered in that way for a number of reasons. It was, I believe, simply too late to add to the evidentiary record in that manner; it is inappropriate for counsel to be giving evidence on the motion in any event, and it is fundamentally unfair to the other side to allow evidence to be put forward in such a fashion. If these defendants needed to put that evidence before the court, then they should have requested an adjournment of the motion for that purpose. However, no request for an adjournment of the motion was made at any point.

11 Returning to the issues, the above exchange clearly establishes that the material facts upon which these defendants rely for the third party claim have been known to them since at least 1993. By that time, they knew that the third parties had acted for all of the shareholders with respect to the share purchase agreement. They knew that they had not been advised to obtain independent legal advice. They were, at the time, alleging that they did not understand the share purchase agreement as a result and, in particular, that they had personal liability under it. They also knew by then that the plaintiff was advancing a personal claim against them based on that very term in the share purchase agreement. Therefore, these defendants clearly had to know that there was a live issue regarding the quality of the representation they had received from the third parties. It follows that, by 1993, these defendants knew the material facts on which their cause of action against the third parties is now based. It also follows that any claim based thereon had to be launched, at the latest, by 1999. Given that the third party claim was not instituted until 2000, the claims therein fall outside the six year limitation provision. As Le Dain J. said in *Central & Eastern Trust Co. v. Rafuse* (1986), 31 D.L.R. (4th) 481 (S.C.C.), at pp. 535-536:

> I am thus of the view that the judgment of the majority in *Kamloops* laid down a general rule that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence, and that that rule should be followed and applied to the appellant's cause of action in tort against the respondents under the Nova Scotia *Statute of Limitations*.

12 These defendants respond to this conclusion in two ways. First, they contend that the limitation period does not begin to run in such circumstances until there is a finding of liability in the main action. In other words, they contend that until such time as there is a determination that they are liable to the plaintiff, and that consequently they have been harmed by the failure of their solicitors, the claim against the solicitors has not crystallized and the limitation period therefore does not begin to run.

13 In support of this assertion, these defendants rely on *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 (S.C.C.) where La Forest J. said, at p. 34:

> American courts have also refined the rule to meet different circumstances and harms. In *Raymond v. Eli Lilly & Co.*, 371 A.2d 170 (N.H., 1977), the court set out the gradations of accrual as follows, at p. 172:
>
> > There are at least four points at which a tort cause of action may accrue: (1) When the defendant breaches his duty; (2) when the plaintiff suffers harm; (3) when the plaintiff becomes aware of his injury; and (4) when the plaintiff discovers the causal relationship between his harm and the defendant's misconduct.

In particular, these defendants pick out point #2 from this quotation as establishing that harm must be suffered before the limitation period begins to run.

14 With respect, I consider this submission to involve a misreading of the *M.(K.) v. M.(H.)* decision. Mr. Justice La Forest was not stipulating that all of the above four events had to be present in order for the cause of action to accrue but rather was identifying that a cause of action may accrue at different times in differing circumstances. In *M.(K.) v. M.(H.)* the court was considering the time at which a cause of action arising out of an allegation of incest might accrue and, in particular, the point in time a cause of action accrues when an individual is aware that they have been subjected to an act but where they have no reason necessarily to appreciate that they may have suffered harm from that act or may not link any harm suffered to that act. That is not this case. In this case, these defendants were clearly aware that they were at risk of harm from the alleged failures of the third parties because they knew that the plaintiff was seeking recourse against them based on the very term of the shareholder agreement about which they say they were not properly advised. It does not require a final determination that the plaintiff is entitled to such recourse to

start the limitations clock ticking for any claim over of the type advanced in this third party claim. I agree, in this regard, with the conclusion of Madam Justice Molloy in *Kenderry - Esprit (Receiver of) v. Burgess, MacDonald, Martin & Younger* (2001), 53 O.R. (3d) 208 (Ont. S.C.J.) where she said, at p. 215:

> For purposes of the case before me, I think it is a logical inference from *Central Trust* that the possibility of solicitor's negligence having been raised in the first action, the limitation period for a negligence action against those solicitors may well start to run before there is a conclusive finding by the court in that action as to the interpretation of the document in question. Once the issue of invalidity is raised, the plaintiff is on notice that there may be a problem and must exercise reasonable diligence to determine whether there are facts giving rise to a cause of action.

15 The other response proffered by these defendants is that the claim against the third parties is, in essence, a claim for breach of fiduciary duties and that such a claim is not subject to the limitation period. While the latter contention is correct, the problem with the former contention is that there is no pleading of a breach of fiduciary duty found anywhere in the third party claim. These defendants contend that it is not necessary for the claim to be made specifically as long as the material facts are pleaded. They say that the third party claim reveals, particularly in paragraph 17(d) of the third party claim, those necessary essential facts. Paragraph 17(d) states that:

> Minden Gross and Greenstein negotiated, drafted and presided over the execution of the agreements without disclosing the obvious conflict of interest arising due to their acting on behalf of all of the signatories to the agreements.

16 It does not follow that, because the relationship between a solicitor and client is a fiduciary one, allegations made against a solicitor must necessarily be taken, by that very fact, as being allegations of a breach of the fiduciary duty. There is a difference between claims in negligence and claims for breach of fiduciary duties arising out of a solicitor and client relationship. As Southin J. said in *Girardet v. Crease & Co.*, [1987] B.C.J. No. 240 (B.C. S.C.) at p. 1:

> Counsel for the plaintiff spoke of this case in his opening as one of breach of fiduciary duty and negligence. It became clear during his opening that no breach of fiduciary duty is in issue. What is in issue is whether the defendant was negligent in advising on the settlement of a claim for injuries suffered in an accident. The word 'fiduciary' is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth. But 'fiduciary' comes from the latin 'fiducia' meaning 'trust'. Thus, the adjective, 'fiduciary' means of or pertaining to a trustee or trusteeship. That a lawyer can commit a breach of the special duty of a trustee, e.g., by stealing his client's money, by entering into a contract with the client without full disclosure, by sending a client a bill claiming disbursements never made and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a

> perversion of words. The obligation of a solicitor of care and skill is the same obligation of any person who undertakes for reward to carry out a task. One would not assert of an engineer or physician who had given bad advice and from whom common law damages were sought that he was guilty of a breach of fiduciary duty. Why should it be said of a solicitor?

17 It should be noted, in this regard, that paragraph 17(d) is specifically pleaded by these defendants as a particular of the negligence and/or breach of contract alleged against the third parties. While I appreciate that such an allegation could theoretically also be a ground to advance a claim for breach of fiduciary duties, it is difficult to see how that claim could be advanced here where the clients were well aware that the solicitors were acting for all sides and there is no suggestion that any objection was made to them so acting. As Sharpe J. said in *Fasken Campbell Godfrey v. Seven-Up Canada Inc.* (1997), 142 D.L.R. (4th) 456 (Ont. Gen. Div.) at p. 483:

> In my view, a claim for breach of fiduciary duty involves situations in which the solicitor takes advantage of the solicitor-client relationship by failing to make proper disclosure, *acting for both sides without informing the client*, breaching confidence, or other like behaviour. The claim here is not based upon allegations of this quality but rather upon failure to render appropriate advice. [emphasis added]

18 Finally, in this regard, counsel for these defendants said that I could make an order granting leave to the defendants to amend their third party claim to advance a claim for breach of fiduciary duty. Specifically, counsel did not ask for leave to amend but submitted that I could grant leave of my own motion if I thought it was necessary. In support of this assertion, reliance was placed on the Court of Appeal's decision in *Forde v. Alcan Aluminum Ltd.*, [2001] O.J. No. 1272 (Ont. C.A.) where, in an oral endorsement, the court said, at para. 3:

> While the discoverability finding of the motions judge was proper on the pleading before us, we would give leave to the plaintiff to amend his statement of claim to answer the limitation defence by addressing discoverability. The plaintiff may also amend his pleading, if advised, to plead breach of fiduciary duty.

19 I cannot determine from this endorsement what the particular facts were that lead the Court of Appeal to grant the relief that it did. I surmise that there were other considerations extant in that case that may well have driven the result. I doubt that the Court of Appeal was intending to lay down a rule of general application that a party, faced with a limitations defence, is always to be allowed to amend their pleading to avoid the consequences of that defence by advancing a claim of breach of fiduciary duty especially where, as here, the factual foundation for such a plea appears to be absent.

20 In the end result, therefore, it is plain that these defendants knew all of the material facts necessary to advance this claim against their solicitors in 1993 at the latest. It follows, therefore, that the third party claim is statute barred given that it was instituted more than six years after those

facts were known. The third parties are, consequently, entitled to summary judgment dismissing the third party claim.

21 The third parties are entitled to their costs of this motion and of the proceeding payable by the defendants, Rotundo and Sloan, forthwith. If the parties cannot agree on those costs, I am prepared to fix them upon receipt of appropriate submissions in that regard. The third parties' submissions are to be filed with 10 days of the release of these reasons and the defendants' response is to be delivered within 10 days thereafter. No reply submissions are to be filed without leave.

Motion granted.

Footnotes

* Additional reasons given 2001 CarswellOnt 3065 (Ont. S.C.J.).

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(Applicant)

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PROCEEDINGS COMMENCED AT TORONTO

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