TAB 6

CED Judgments and Orders XVII.2.(b) (Western)

Canadian Encyclopedic Digest

Judgments and Orders (Western)
XVII — Setting Aside Judgments and Orders
2 — Grounds
(b) — Evidence Subsequently Discovered

For print citation information and the currency of the title, please click here.

XVII.2.(b)

See Canadian Abridgment: CIV.XXII.17.b.iv Civil practice and procedure — Judgments and orders — Setting aside — Grounds for setting aside — New evidence

§520 Whether it is sought to set aside a judgment on the ground of fraud or the discovery of new evidence, the judge must be satisfied that there is a reasonable probability that the plaintiff will succeed in a new action. When an action is brought to set aside a judgment on the ground of the discovery of new evidence and an application is brought to dismiss the action on the ground that it is frivolous and vexatious, it is the duty of the judge to inquire whether the plaintiff has, since the impugned judgment was obtained, discovered evidence, other than that given at the former trial, which was not known to the plaintiff at the time of that trial and which could not with reasonable diligence have been discovered before it, and, if there is such newly discovered evidence, to inquire whether if it had been given before, it would have led the court to a different result.[1]

§521 The failure of the party seeking a new trial on the basis of fresh evidence to prove that the material sought to be introduced was not available at the time of trial nor could have been made available by reasonable diligence is fatal to the application.[2]

§522 The burden is on the applicant to show reasonable diligence, materiality and conclusiveness.[3]

§523 In Manitoba, a party seeking to have an order set aside or varied on the ground of facts arising or discovered after it was made may make a motion in the proceeding for the relief claimed.[4]

§524 The Federal Courts Rules expressly empower the court, on motion, to set aside or vary an order by reason of a matter that arose or was discovered subsequent to the making of the order.[5] The rules are not, however, a vehicle for an appeal or an opportunity to repair a deficient submission.[6]

Footnotes

1 *Kaliel v. Aherne* (1946), [1946] 1 W.W.R. 461 (Alta. C.A.); *Alberta (Public Trustee) v. Koblanski* (1961), 34 W.W.R. 24 (Alta. T.D.); *Kornberg v. Kornberg* (1990), 43 C.P.C. (2d) 10 (Man. Q.B.); reversed in part (1990), 1990 CarswellMan 241 (Man. C.A.); leave to appeal refused (1991), 1991 CarswellMan 61 (S.C.C.) (court refusing reconsideration where new evidence merely confirming earlier decision); *Fouracres v. Taylor* (1996), 49 C.P.C. (3d) 313 (B.C. S.C. [In Chambers]) (court's inherent jurisdiction to reopen case in light of new evidence to be used sparingly, particularly where matter tried by judge and jury; defendants failing to show probable miscarriage of justice without re-hearing or that evidence would probably have changed trial outcome; evidence available before trial had defendants exercised ordinary diligence); *Apotex Fermentation Inc. v. Novopharm Ltd.* (1995), [1996] 2 W.W.R. 346 (Man. Q.B.).

2 *Alberta (Public Trustee) v. Koblanski* (1961), 34 W.W.R. 24 (Alta. T.D.) (plaintiff failing to show evidence of conclusive nature and not discoverable by due diligence); *Barker v. Nofield* (1957), 24 W.W.R. 157 (B.C. Co. Ct.) (application dismissed where no material filed to explain why evidence not available at trial); *National Arts Services Corp. v. Bank of British Columbia* (1981), 16 Alta. L.R. (2d) 111 (Alta. Q.B.) (failure to discover evidence due more to inattention than inability; evidence not incontrovertible); *Bains v. Bhandar* (2000), 80 B.C.L.R. (3d) 1 (B.C. C.A.); leave to appeal refused (2001), 269 N.R. 206 (note) (S.C.C.) (plaintiff, defendant and third party involved in joint venture which failed; during course of number of lawsuits between parties and others, settlement agreement entered into between defendant and accountant who worked for joint venture providing accountant not to actively assist plaintiff in defendant's action against plaintiff for fraudulent misrepresentation; defendant successful in action; plaintiff bringing action to set aside judgment on grounds defendant concealing evidence and misleading court after plaintiff discovering terms of agreement; plaintiff failing to establish deliberate concealment of material evidence; question not what

plaintiff knew, but what plaintiff ought to have known; plaintiff aware agreement existed and had concern about potential impact on accountant as witness, but not actively taking steps to pursue disclosure; plaintiff failing to meet onus of showing due diligence in pursuing and ascertaining terms of agreement in timely manner).

3 *de Lamprecht v. de Lamprecht* (1935), 54 B.C.R. 332 (B.C. S.C.) (plaintiff's action dismissed at trial for failure to prove consideration for alleged contract; application to adduce fresh evidence after judgment delivered but before judgment entered dismissed where due diligence not shown); *Luscar Ltd. v. Pembina Resources Ltd.* (1992), 2 Alta. L.R. (3d) 157 (Alta. Q.B.); *D.K. Investments Ltd. v. S.W.S. Investments Ltd.* (1990), 44 B.C.L.R. (2d) 1 (B.C. C.A.) (factors to be considered on issue of due diligence); *Hill v. Hill* (2016), 2016 ABCA 49 (Alta. C.A.); leave to appeal refused (2016), 2016 CarswellAlta 1752 (S.C.C.) (very high threshold for materiality to set judgment aside on basis of new evidence alone; new evidence must be incontrovertible, and must, on its face, give rise to conclusion that result would have been different had it been adduced at trial); **see also** *Loughlin v. Hargrove* (1983), 53 B.C.L.R. 342 (B.C. C.A.) (order to proceed as though no defence filed; defendant applying to set aside order when documents difficult to obtain becoming available; order set aside).

4 *Manitoba Court of Queen's Bench Rules*, Man. Reg. 553/88, R. 59.06(2); *Wong v. Grant Mitchell Law Corp.* (2016), 2016 MBCA 65 (Man. C.A.); leave to appeal refused (2017), 2017 CarswellMan 53 (S.C.C.) (rule not intended as back door appeal of merits of unfavourable decision).

5 Federal Courts Rules [title re-en. SOR/2004-283, s. 1], SOR/98-106, R. 399(2); *Peerless Lake Indian Band v. Canada (Minister of Indian Affairs & Northern Development)* (2002), 2002 FCT 642 (Fed. T.D.); *Metro-Can Construction Ltd. v. R.* (2001), 203 D.L.R. (4th) 741 (Fed. C.A.) (subsequent decisions of higher court in separate cases not constituting "new matter"); *Del Zotto v. Minister of National Revenue* (2000), 181 F.T.R. 168 (Fed. T.D.) (inappropriate for proceedings for review of decision based on new facts to go forward at same time as hearing of appeal; appellate court quite capable of admitting newly discovered facts into evidence).

6 *Phillip v. Canada (Minister of Citizenship & Immigration)* (2008), 2008 CarswellNat 296 (F.C.).

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