Court of King's Bench of Alberta

Citation: Jonathan B Denis Professional Corporation v Findlay, 2025 ABKB 249

Date: 20250422
Docket: 2001 11546
Registry: Calgary

Between:

Jonathan B. Denis Professional Corporation and GLG LLP

Appellants

- and -

Andrew Findlay, John Doe I and John Doe II

Respondent

-and-

Assadullah Ali Bik

Respondent

Reasons for Decision
of the
Honourable Justice Lisa A. Silver

Overview

[1] This appeal considers whether intervenor status in a summary judgment application should be granted to the former lawyer of a claimant in a personal injury action.

[2] On September 11, 2018, Mr. Bik was in a motor vehicle accident with Mr. Findlay. Mr. Bik brought a personal injury claim. Mr. Bik's lawyer sent a settlement proposal to the insurance

provider defending the claim. The insurer accepted the proposal but required Mr. Bik to sign a release before the funds were distributed.

[3] Mr. Bik refused to sign the release, and the funds were returned to the insurer. Mr. Bik discharged his lawyer. Mr. Bik eventually launched a personal injury claim against Mr. Findlay. In defence of the claim, Mr. Findlay seeks to enforce the previous settlement.

[4] Mr. Bik also issued a statement of claim alleging professional negligence against his former lawyer. The former lawyer, the Appellant, takes the position that there was no agreement to settle. Rather, when the insurer required a release, this was a counteroffer to the settlement proposal. The counteroffer was not accepted, and no agreement was made. In contrast, Mr. Findlay, the Respondent, maintains that the requirement for a release was a trust condition accepted by the lawyer's paralegal. Therefore, the agreement was binding and enforceable.

[5] A summary judgment application was filed by Mr. Findlay. Mr. Bik's former lawyer applied for intervenor status. Applications Judge Mason dismissed the application.

[6] Mr. Bik made no submissions on the application and did not participate in the appeal. The standard of review is correctness: ***Jacobs v McElhanney Land Surveys Ltd***, 2019 ABCA 220 at para 153, leave to appeal to SCC refused.

[7] The sole issue on this appeal is whether Mason, AJ was correct in dismissing the application for intervenor status. For reasons to follow, I uphold the decision of Mason, AJ and dismiss the appeal.

The Intervenor Context and General Legal Principles

[8] The granting of intervenor status is uniquely Canadian, evolving from the English and American *amicus curiae* tradition: ***Canada (Attorney General) v Aluminum Company of Canada***, 1987 CanLII 162 (BCCA) p 14 [*Aluminum*]. In the ***Aluminum*** decision, Justice Seaton analyzed the development of intervenor status both through its historical context and various Supreme Court of Canada decisions: ***Aluminum*** at pp 13-21. The decision provides a useful exploration of the purpose and objectives behind granting intervenor status.

[9] Notably, Justice Seaton described the transformation of intervenors from "friends" of the court to "advocates" pursuing a particular perspective: ***Aluminum*** at p 17. In Canada, this advocacy role is a key aspect of the intervenor's relationship with the court.

[10] Since the ***Aluminium*** decision, the granting of intervenor status has continued to develop and expand throughout Canada. Each province has developed their own approach to the granting of such status. For example, Ontario codified a "party" intervenor rule. Under this rule 13.01, the court may add an intervenor as a party to a claim if they may be adversely affected by a decision arising from the claim or if the parties have a legal or factual issue in common. If leave is granted, the intervenor becomes a party to the action with broad ranging rights to conduct Questionings, cross-examine witnesses, present evidence, and make submissions.

[11] In contrast, rule 2.10 of the *Alberta Rules of Court* gives a judge the broad discretion to grant an application for intervenor status on whatever terms, conditions, rights, and privileges the court deems appropriate. Still, the legal test and governing principles are found in the common law.

[12] The test involves the global consideration of two criteria: ***VLM v Dominey Estate***, 2023 ABCA 226 at para 3 [*VLM*]. The first criterion is "whether the proposed intervenor has a particular interest in, or will be directly and significantly affected by the outcome" of the matter: ***VLM*** at para 2. The second is "whether the intervenor will provide some special expertise, perspective, or information that will help resolve" the matter: ***VLM*** at para 2.

[13] This test is informed by several factors: ***Styles v Canadian Association of Counsel to Employers***, 2016 ABCA 218 at para 15. Many of these factors overlap to assist the court in a robust review of the two criteria. These factors are as follows:

1) Will the intervenor be directly affected by the matter before the court;
2) Is the presence of the intervenor necessary for the court to properly decide the matter;
3) Might the intervenor's interest in the proceedings not be fully protected by the parties;
4) Will the intervenor's submission be useful and different or bring particular expertise to the subject matter;
5) Will the intervention unduly delay the proceedings;
6) Will there possibly be prejudice to the parties if intervention is granted;
7) Will intervention widen the *lis* between the parties; and
8) Will the intervention transform the court into a political arena.

[14] The Respondent also referenced the intervenor guidelines used by the Supreme Court of Canada. In my view, these guidelines are not of great assistance because the management of appeals and the focus of an appellate court is different than an interlocutory matter within an action. On appeal, the perspective is more expansive accounting for the role of the appellate court in providing precedential direction to the lower courts. For instance, a defining feature of appeals before the apex court is whether the issue impacts the national interest. Conversely, at the interlocutory trial level the perspective is very much fixed on the parties.

[15] With the legal principles and historical evolution of intervenors in mind, I will now turn to an application of the facts to the factors involved. The factors are not mutually exclusive and are inevitably intertwined one with the other.

Application

Will the intervenor be directly affected by the summary judgment application?

[16] According to the Appellant, the summary judgment application will determine whether there was an enforceable and binding agreement to settle. This determination will in turn directly impact the professional negligence claim Mr. Bik has launched against the Appellant. The Respondent submitted the lawyer is not directly affected. The professional negligence claim is collateral to the personal injury action and attracts its own particular issues. Mason, AJ agreed with the Respondent.

[17] I agree that the issue of professional negligence is collateral. A finding of professional negligence is a separate determination using a discrete test that engages fact finding driven by

that specific issue. Even if the settlement is enforceable, a finding of professional negligence does not necessarily follow.

[18] Although the Appellant's conduct and actions matter to the factual and legal matrix of the claim, the outcome of the summary judgment application will not necessarily affect the professional negligence action. The binding nature or enforceability of the settlement does not engage the Applicant's professional duties and obligations *per se* because the negotiation and acceptance of the settlement agreement raises its own legal and factual concerns removed from the professional negligence claim. The characterization of the negotiations will not turn on whether the Appellant was professionally negligent but whether, in law, the negotiation resulted in an enforceable settlement.

[19] In any event, whether Mr. Bik will proceed with a professional negligence claim if summary judgment is granted is speculative and amounts to a strategic decision that Mr. Bik may or may not make. Moreover, the summary judgment application may be dismissed or Mr. Bik and Mr. Findlay could come to a settlement. In all these scenarios, Mr. Bik could continue his claim against the Appellant despite the summary judgment outcome.

[20] Additionally, the test on a summary judgment application engages a low threshold. If there is a genuine issue for trial, factually or legally, then the application fails. I heard no argument on the strength of the summary judgment application but there is no guarantee that the application will be successful with or without the Appellant as intervenor.

[21] I am satisfied that Mason, AJ was correct in finding that the Appellant would not be directly affected by the summary judgment application.

Is the presence of the intervenor necessary for the court to properly decide the matter?

[22] The Appellant argued that the Appellant's presence is necessary because the Appellant has argument and evidence that will benefit the court. To date, the Appellant has not been contacted to provide any evidence. I will not speculate on what evidence the parties will rely on in the summary judgment application but certainly the Appellant's evidence is factually relevant and material to the steps taken in the settlement negotiations. Mr. Bik was not involved in the negotiations but the insurer on behalf of Mr. Findlay was involved.

[23] In further support of the Appellant's presence being necessary, the Appellant referred to the hearsay rule. Affidavit evidence on a summary judgment application is based on the personal knowledge of the person swearing the affidavit because the application may dispose of the claim: see rule 13.18 (3). However, supporting affidavits may contain hearsay evidence if the evidence is reliable and is otherwise admissible at trial: ***Barry v Industrial Alliance Insurance and Financial Services Inc (IAF)***, 2022 ABQB 265 at para 53. The hearsay rule does not necessarily impact this factor.

[24] In a summary judgment application, the parties must put their best case forward. If there are serious factual issues in dispute or significant evidentiary gaps foreclosing a just determination of the case, summary judgment will not be granted. How the justice hearing the application will decide is a matter of speculation. In my view, the presence of the Appellant as an intervenor is not necessarily required.

[25] In any event, intervenor status is not granted to a witness merely because the intervenor wants to give evidence but is not called to do so in a case. The status cannot be used by a person as the means to giving evidence.

[26] I am satisfied that the Appellant's presence is not necessary for the proper determination of the summary judgment application. The parties involved in the claim are more than capable to present the case without the Appellant as an intervenor. Although the Appellant's evidence is germane to the claim, it is up to Mr. Bik who brings the claim and Mr. Findlay who defends it to proceed with the action in the manner they see fit.

Might the intervenor's interest in the proceedings not be fully protected by the parties?

[27] I have already found that the Appellant is not directly impacted by the outcome of the summary judgment application and the Appellant's presence as an intervenor is not required. Therefore, there is no interest at stake in the proceedings that requires protection by either parties.

[28] The Appellant relied heavily on the ***Molnar v Canada (Citizenship and Immigration)***, 2012 FC 1076 [*Molnar*] decision because, in their view, it provides a factually similar situation. In that case, the Federal Court allowed intervener status to a lawyer to fully participate in a judicial review application that raised concerns with the lawyer's competence. I find that the ***Molnar*** decision is distinguishable. In the case before me, and as I have already found, the professional negligence claim is a parallel proceeding that does not necessarily intersect with the personal injury claim.

Will the intervenor's submission be useful and different or bring particular expertise to the subject matter?

[29] The Appellant also submitted that the Appellant would take a unique position that the other parties will not take, namely that the Appellant's actions were within the scope of his retainer and in any event the settlement was not binding because the counteroffer was not accepted. The Appellant suggested that the arguments will provide a different perspective particularly because of the Appellant's unique perspective as a lawyer who was involved in the settlement negotiations.

[30] This argument in my view boils down to the Appellant's desire to give evidence and to have his own personal perspective before the court. Intervenor status is not granted so that the intervenor can control the process or make the claim their own: ***Aluminum*** at p 18. The personal injury action is not the appropriate forum for the Appellant to propound on the niceties of contract law to protect his reputation. The lawyers representing the parties can more than adequately debate the law of contracts and the effects of settlement negotiations. The Appellant has no different expertise than them.

[31] Moreover, parties cannot be "compelled to deal with issues raised by other parties": ***Eckervogt v British Columbia (Minister of Employment and Investment)***, 2022 BCCA 675 at para 145. If expert evidence is needed specific to the ordinary practice of lawyers in similar circumstances, the parties are in the best position to arrange for it.

Will the intervention unduly delay the proceedings?

[32] The delay in this matter is already inordinate. Even so, this is a summary judgment application and strict deadlines could be used to ensure the application would be heard as soon as possible. Still, I am mindful that adding an intervenor will require scheduling with another "party" in mind, which may delay the hearing of the application.

Will there possibly be prejudice to the parties if intervention is granted?

[33] This application is premised on the understanding that Mr. Bik has waived the solicitor-client communications with the Appellant. Mr. Bik has not participated in this appeal, and this waiver has not been confirmed. The personal injury claim itself does not raise privileged issues. There is a concern that granting intervenor status will necessarily involve privileged communication. I agree with Mason, AJ that the privilege belongs to Mr. Bik. He may rely on it or waive it. Granting intervenor status may prejudice Mr. Bik who enjoys this protection and leave Mr. Bik with no real choice but to waive privilege.

Will intervention widen the *lis* between the parties?

[34] Although the Appellant maintains granting intervenor status would not widen the legal context of the summary judgment application, there is a valid concern that the intervention will result in an outsized importance and over emphasis on the Applicant's actions. In other words, granting intervenor status might improperly shift the focus from the binding and enforceable nature of the settlement at large to the scope of the Appellant's authority in the negotiation process. There is a possibility that granting intervenor status will transform the personal injury claim between the party injured and the party who caused the harm into the defence of the claimant's lawyer conduct and actions.

Will the intervention transform the court into a political arena?

[35] Granting the Appellant intervenor status would not transform the court into a political arena. This factor is not applicable.

Final Analysis

[36] In reviewing all the factors and keeping in mind the purpose and objectives of intervenor status, I find that Mason, AJ was correct when she dismissed the Appellant's application for intervenor status.

[37] I specifically find that the Appellant will not be directly and significantly affected by the outcome of the summary judgment application because the professional negligence claim is collateral to the summary judgment application. The Appellant may be interested in the outcome but the summary judgment application will not circumvent and displace the need for a final determination on the professional negligence claim.

[38] I further find that the Appellant will not provide special expertise or a unique perspective in the case any different than any other lawyer. The Appellant may personally have specific information to share on the actual negotiations in the claim but in that respect the Appellant is better positioned and more useful to the process as a witness rather than an intervenor. However, the parties are at liberty to conduct their case as they see fit and to strategize in whatever way they consider appropriate in the prosecution and defence of this personal injury claim.

[39] In the end, there are better alternatives to the Appellant's inclusion in the process be it as a witness or in bringing an application to consolidate the professional negligence claim with the personal injury claim.

[40] The granting of intervenor status is highly discretionary. In deciding whether to grant such an application, the court, through the consideration of a multitude of factors, assesses whether the intervenor, who is not a party, will add value to the matter before the court. That added value is not for the benefit of the intervenor alone but for the integrity of the administration of justice to ensure a just and fair determination of the issues at hand. There is a risk the summary judgment application will stray from the true question of whether in law the negotiations resulted in a binding and enforceable agreement if intervenor status is granted. Overall, the administration of justice is not served by the court exercising their discretion to grant the application. In this case, the summary judgment application can proceed in a just and fair manner without the Appellant as an intervenor.

Comments on the Affidavit Filed in Support of the Appeal

[41] The Appellant filed an affidavit from their paralegal with additional information that was not before Mason, AJ. The information was primarily to show that the parties delayed providing key information in their affidavit of records. By bringing this information to the attention of the court, the Appellant was trying to show that the Appellant has information that would be useful to the determination of the action. The Respondent argued that the Appellant was only aware of this information through another action.

[42] Rule 6.14(3) permits the justice hearing an appeal of an Applications Judge decision to exercise their discretion to allow further and other evidence to be filed on the appeal. I find that the probative value of this information is minimal. The fact a party delayed providing information which the proposed intervenor had does not make the intervenor argument more cogent. It simply shows the Appellant has access to certain information. I am exercising my discretion and not admitting this further evidence on appeal.

Conclusion

[43] The Appeal is dismissed. The parties are encouraged to agree to costs on this appeal, which typically would be ordered against the Appellant in accordance with schedule C. If the parties cannot agree to costs within thirty days, they can schedule a hearing before me on the issue.

Heard on the 12th day of March, 2025.
Dated at Calgary, Alberta this 22nd day of April, 2025.

Lisa A. Silver
J.C.K.B.A.

Appearances:

Aamara Hameed
for the Appellant

Raymond Bastedo
for the Respondent Findlay