

CITATION: 1555638 Ontario Inc. v. Cooper, 2025 ONSC 328
COURT FILE NO.: 633/24
DATE: 20250115

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 1555638 Ontario Inc. o/a Framatome Canada Ltd., Moving Party/Responding Party on the Cross-Motion/Respondent

AND:

William Cooper, Responding Party/Moving Party on the Cross-Motion/Appellant

BEFORE: O'Brien J.

COUNSEL: *I. Matthews and K. Archibald*, for the Moving Party/Responding Party on the Cross-Motion/Respondent

P. Carey and A. Goldberg, for the Responding Party/Moving Party on the Cross-Motion/Appellant

HEARD: By videoconference in Toronto on January 10, 2025

ENDORSEMENT

[1] The Appellant, Mr. Cooper, has brought an appeal of an order of Associate Justice Frank dated October 2, 2024 (*1555638 Ontario Inc. O/A Framatome Canada Ltd. v. Cooper*, 2024 ONSC 5445), which dealt with a request for production of documents and re-attendance for cross-examination.

[2] The motions before me address (1) whether the appeal was brought in the right court; and (2) if not, whether it should be transferred to the court with jurisdiction to hear it.

[3] Mr. Cooper used to work for Framatome Canada Ltd. and related companies. In a separate action, he has alleged he was wrongfully dismissed. He also has sought damages for breach of a royalty agreement related to royalties he says were owed for use of his inventions.

[4] At the time of his termination, Mr. Cooper did not immediately return his company laptop. Following negotiations arising from a claim in Small Claims Court, Mr. Cooper returned the laptop in March 2022. However, he retained 922 documents that were on the laptop. Framatome Canada brought an application seeking judgment and a mandatory order requiring Mr. Cooper to disclose and deliver up, then permanently delete, all privileged communications between Framatome Canada and its lawyers and all third-party communications that he was not entitled to possess.

[5] Following cross-examinations on the application, Framatome Canada brought a motion seeking orders that Mr. Cooper be required to disclose and produce for inspection the documents retained on the laptop as well a list of the files retained in his possession. It also sought an order requiring Mr. Cooper to reattend for cross-examination.

[6] On the motion, Mr. Cooper submitted Framatome Canada in effect sought an order pursuant to s. 104 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (CJA) and that the three-part injunction test therefore applied. He also submitted the motion was an abuse of process.

[7] The associate judge allowed the motion. In his view, the s. 104 test did not apply. The documents and list were relevant to the application and therefore should be produced. He was of the view Framatome was not required to accept Mr. Cooper's evidence denying that the documents he retained were privileged or third-party communications.

[8] The associate judge rejected the argument that the motion was an abuse of process for a number of reasons. For example, in response to Mr. Cooper's argument that Framatome Canada was bringing the motion to obtain pre-pleading documentary disclosure to enable it to tailor its defence in the wrongful dismissal action, the associate judge noted that discovery of documents is not always limited to post-pleading discovery. He also dismissed the argument that the motion was an abuse of process because it sought the same relief as the proposed amended notice of application. The associate judge ordered Mr. Cooper to produce the requested lists and documents for inspection and then reattend for cross-examination.

[9] Mr. Cooper appealed the order of the associate judge to this court. An appeal lies to this court from a final order of an associate judge pursuant to s. 19(1)(c) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (CJA). Framatome Canada brought a motion to quash the appeal because in its view the order of the associate judge was interlocutory. An appeal from an interlocutory order of an associate judge lies to the Superior Court of Justice pursuant to s. 17(a) of the CJA.

[10] After a case conference before Matheson J. on December 4, 2024 and at her suggestion, Mr. Cooper brought a cross-motion for the appeal to be transferred to the Superior Court pursuant to s. 110 of the CJA.

[11] I agree with Framatome Canada that the Associate Judge's order was interlocutory and, therefore, this court does not have jurisdiction to hear the appeal. In determining whether an order is interlocutory or final, the question is whether the judgment or order finally disposes of the rights of the parties. To determine if an order is final or interlocutory, the court will consider the terms of the order, the motion judge's reasons, the nature of the proceedings giving rise to the order and other contextual factors: *Paulpillai Estate v. Yusuf*, 2020 ONCA 655, at para. 15.

[12] This was an order for the production of documents and further cross-examination, which is a classic interlocutory order. I realize the order has similarities to the final order sought because, on the application, Framatome Canada also seeks an order for the disclosure and delivery of the documents.

[13] But to accept Mr. Cooper's position that this is therefore a final order would be akin to accepting one of the abuse of process arguments put before the associate judge – that is, that the motion was an abuse of process, which ultimately sought and obtained a final order in the guise of an interim motion. The associate judge clearly did not think he was making a final determination of the issues on the application because, as Framatome pointed out, he distinguished his decision from the application judge's final determinations on various issues. It would be open to a judge hearing the appeal to intervene in the associate judge's conclusion that the motion was not an abuse of process. It is not appropriate to pre-determine the appeal by doing so on this motion.

[14] In any event, there are differences between the relief sought on the application and on the motion. On the application, Framatome Canada seeks that the documents be permanently deleted, whereas the motion only seeks that the documents be produced for inspection. The order is properly characterized as interlocutory.

[15] However, I am of the view the appeal should be transferred to the Superior Court rather than dismissed for lack of jurisdiction. The test for a transfer under s. 110 considers the merits of the appeal, whether the respondent will suffer undue prejudice while the appeal is waiting to be heard, and whether the appellant moved expeditiously once it was known that jurisdiction was disputed: *Mattina v. Mattina*, 2018 ONSC 1569, at para 54.

[16] Although I agree with Framatome Canada that it will be challenging for Mr. Cooper to persuade a judge on appeal to interfere with the associate judge's findings of fact or mixed fact and law, this is not a case where the appeal is frivolous or clearly without merit. Given the specific context of the application and related litigation, it should be open to Mr. Cooper to challenge the associate judge's decision, including to argue why the associate judge erred in finding there was no abuse of process.

[17] There is no substantial prejudice to allowing the transfer. The associate judge's order was made just over three months ago. The application was started over two and a half years ago. As Mr. Cooper pointed out, Framatome Canada did not serve the notice of application on Mr. Cooper until over 20 months after it became aware Mr. Cooper had the documents on his laptop.

[18] Mr. Cooper filed his cross-motion for transfer on the date established by Matheson J. It was heard on the date for the hearing of the motion to quash, so did not cause any further delay.

[19] I disagree with Framatome Canada's submission that the transfer should not be permitted because the notice of appeal was not filed within the 7 days required for an appeal to the Superior Court of Justice. Mr. Cooper filed his notice of appeal 17 days after the associate judge's order and well within the requirements of an appeal to this court. Although I do not think an extension of time is technically needed if I exercise my discretion under s. 110, the factors considered in granting an extension of time are similar to those considered under s. 110. Both tests look to the appellant's conduct, prejudice to the respondent, and the merits of the appeal. Although the appeal was filed in this court after it would have been due in the Superior Court, I consider it in the interests of justice to transfer the appeal to the Superior Court of Justice.

[20] Therefore, the appeal shall be transferred to the Superior Court of Justice. It shall be considered timely in that court as long as it is filed within 7 days from receipt of this decision.

[21] Having considered the parties' costs outlines and costs submissions, I reserve the costs of both motions to the judge hearing the appeal.

Date: January 15, 2025

O'Brien J.