IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Smith v. VM Agritech Limited,* 2025 BCSC 206

Date: 20250210
Docket: S230800
Registry: Vancouver

Between:

Alan Gilbert Smith

Plaintiff

And

VM Agritech Limited (formerly Myco Sciences Limited) and Christopher J. Wightman

Defendants

Before: The Honourable Madam Justice Fitzpatrick

On appeal from: an Order of Associate Judge Muir dated May 13, 2024 (*Smith v. VM Agritech Limited*, 2024 BCSC 1017, S230800).

Reasons for Judgment

Counsel for the Respondent/Plaintiff:	S. Lin
Counsel for the Appellants/Defendants:	M. Ross N. Galanopoulos
Place and Date of Hearing:	Vancouver, B.C. October 23, 2024
Place and Date of Judgment:	Vancouver, B.C. February 10, 2025

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INTRODUCTION

[1] On February 6, 2024, Associate Judge (A.J.) Muir granted default judgment in favour of the plaintiff, Alan Smith, against the defendants.

[2] On March 6, 2024, the defendants applied before Muir A.J. to set aside the default judgment. She exercised her discretion and declined to do so.

[3] The defendants now appeal Muir A.J.'s refusal to set aside the judgment.

BACKGROUND FACTS

[4] The defendant VM Agritech Limited is a company registered in the UK. The defendant Christopher Wightman, a resident of the UK, is a director of that company. I will refer to the defendants collectively as "VM".

[5] Mr. Smith is a BC resident and a shareholder of Voice Mobility International Inc. ("Voice"), a BC company.

[6] A Canadian law firm provided legal advice in respect of certain transactions between VM and Voice. The invoices were addressed to Voice for payment. Mr. Smith paid an amount to the law firm in settlement of the invoices and he took an assignment of the debt owing to the law firm. Mr. Smith took the position that VM, not Voice, had agreed to pay the invoices. He demanded that VM pay him the amount of the invoices ($24,155), but VM refused to do so.

[7] On February 1, 2023, Mr. Smith filed a notice of civil claim (NOCC) against VM, seeking payment of the invoices. Despite the small amount that is in issue in this proceeding, the matter then spawned an extensive litigation history both in this Court and in the Court of Appeal. The relevant events are:

a) On February 21, 2023, VM filed a jurisdictional response to the NOCC;

b) On May 2, 2023, Justice E. McDonald granted VM's application to set aside the purported service of the NOCC: *Smith v. VM Agritech Limited*, 2023 BCSC 729;

c) On May 9, 2023, Mr. Smith purported to serve the NOCC again, but service was also not in compliance with the *Supreme Court Civil Rules* [*Rules*];

d) On June 26, 2023, VM filed a second jurisdictional response to the NOCC;

e) On November 7, 2023, Justice Giaschi heard VM's application to set aside the second service of the NOCC and to dismiss or stay the proceedings on the grounds that the Court was without jurisdiction. On that same date, Giaschi J. provided reasons (Unreported, 7 November 2023, Vancouver S230800). The entered order (the "Giaschi Order") granted that day provided:

> (1) Mr. Smith's service of the NOCC was defective.
>
> (2) The defendants' application to dismiss or stay the proceedings on jurisdictional grounds is declined.
>
> (3) The defendants' application to extend the time to serve their notice of application from July 26 to August 2, 2023 is declined.
>
> (4) The defendants have attorned to the jurisdiction of the court and, consequently, Mr. Smith does not need to re-serve the notice of civil claim in this matter.

f) VM appealed the Giaschi Order;

g) In November 2023, Mr. Smith applied for default judgment, after giving numerous notices to VM that he intended to do so given Giaschi J.'s finding that VM had attorned to this Court's jurisdiction. Mr. Smith advised VM's counsel that he intended to reset the application for hearing. VM's counsel advised that they would oppose any default judgment application;

h) In November 2023, Mr. Smith expressly advised VM's counsel that, failing the filing of a response to civil claim (RTCC), the only way to avoid a default judgment was to seek a stay of the Giaschi Order. VM did neither;

i) Mr. Smith advised VM's counsel that he would proceed with his default judgment application on November 24, 2023, in light of VM's failure to file any RTCC;

j) On November 24, 2023, Mr. Smith appeared before Associate Judge Hughes. VM's counsel did not appear. Nevertheless, Hughes A.J. dismissed the application, finding that the time by which VM was required to respond to the NOCC had not expired (the "Hughes Order"). She determined that the response period under the *Rules* (49 days) began to run from the date of the Giaschi Order. She stated:

> … in my view, the clock didn't start ticking for the defendants to file their response to civil claim until the order was made on November 7th determining that they had attorned to the jurisdiction. Prior to that, there was an issue about whether or not services was valid, whether or not this was the appropriate jurisdiction. So I think you are premature in bringing your default judgment application.

k) On January 22, 2024, Mr. Smith advised VM's counsel that he intended to proceed with a default application. He indicated that the 49-day period to respond after the finding of attornment had expired and that no RTCC had been filed;

l) On January 23, 2024, Mr. Smith filed a second default application. In response, VM's counsel advised Mr. Smith of their position that, since the *Rules* do not provide a deadline for filing a RTCC where a jurisdictional application has been dismissed, Mr. Smith was required to apply to the Court for a determination as to when that time limit expired. (At this time, VM's counsel was not aware of the Hughes Order and her determination of the time to respond to the NOCC after the date of the Giaschi Order);

m) On January 25, 2024, Hughes A.J. heard the default judgment application, again on notice to VM. The email exchanges regarding the service issue—including VM's counsel's email to Mr. Smith dated January 23, 2024 regarding their position on service—were before the Court. However, in

light of the upcoming leave application before the Court of Appeal, Hughes A.J. adjourned the application to February 1, 2024. She also required that Mr. Smith serve filed copies of his application materials and advise VM's counsel of the new hearing date;

n) Thereafter, Mr. Smith advised VM's counsel of the February 1, 2024 hearing date, although he only served unfiled application materials;

o) On January 29, 2024, Justice Hunter addressed VM's leave application in respect of the appeal of the Giaschi Order. The court allowed the appeal to proceed, finding that certain aspects of the Giaschi Order did not require leave or, if so, leave was granted; *VM Agritech Limited v. Smith*, 2024 BCCA 39. The appeal was set for September 23, 2024;

p) On January 30, 2024, Mr. Smith served his application materials for the February 1, 2024 hearing. VM did not respond. Mr. Smith appeared that day before Muir A.J. and the matter was adjourned to February 6, 2024 to provide VM more time to respond;

q) On February 6, 2024, Mr. Smith again appeared before Muir A.J. Again, VM chose not to attend. The various email exchanges between the parties on the service issue were again before the Court. On that date, Muir A.J. granted default judgment against VM, since no RTCC had been filed, pursuant to R. 3-8(1) (the "Default Judgment"); and

r) On March 6, 2024, VM filed an application to set aside the Default Judgment under R. 3-8(11) of the *Rules*.

[8] On May 13, 2024, Muir A.J. heard VM's application to set aside the Default Judgment. She dismissed the application, with costs: *Smith v. VM Agritech Limited*, 2024 BCSC 1017. Her reasons for doing so form the basis for VM's present appeal (the "*Set-Aside RFJ*").

[9] On October 22, 2024, the Court of Appeal released its reasons on the appeal from the Giaschi Order: *VM Agritech Limited v. Smith*, 2024 BCCA 360. At para. 59, the court found that Giaschi J. had erred in finding that attornment had occurred, but it was irrelevant since the Court had jurisdiction under the *Court Jurisdiction and Proceedings Act*, S.B.C 2003, c. 28.

[10] On the issue of service of the NOCC, the appeal court agreed with Giaschi J. that re-service of the NOCC was not required, stating:

> [61] As for the issue of re-service, I would not disturb the judge's order that re-service is unnecessary, since the previous service was found only to be "defective" and not "null": [citations removed]. … In this instance, the defendants have had full and actual notice of the claim for many months [citation removed] and in fact told this court that they were not seeking re-service.

ISSUES ON APPEAL

[11] Although the parties frame the issues somewhat differently, I consider that the issues on appeal raised by VM are:

a) whether Muir A.J., as an Associate Judge, lacked jurisdiction to address the application to set aside the Default Judgment;

b) whether Muir A.J. erred in exercising her discretion to refuse to set aside the Default Judgment by:

   i. misapprehending Hughes A.J.'s decision on November 24, 2023 as to the running of time after service of the NOCC, which materially affected her decision; and

   ii. finding that Mr. Smith did not have a duty of full and frank disclosure on the application for Default Judgment.

STANDARD OF REVIEW

[12] The leading case on the standard of review for appeals of Associate Judges' (formerly Masters') orders pursuant to what is now Rule 23-6(8.1) is *Abermin Corp.*

v. Granges Exploration Ltd., 1990 CanLII 1352 (BC SC), [1990] B.C.J. No. 1060 [*Abermin*]. On page 9, Justice MacDonald stated:

> An appeal from a Master's order in a purely interlocutory matter should not be entertained unless the order was clearly wrong. However, where the ruling of the Master raises questions which are vital to the final issue in the case, or results in one of those final orders which a Master is permitted to make, a rehearing is the appropriate form of appeal.

[13] The question in the latter category of cases—that is, "where the ruling of the Master raises questions which are vital to the final issue in the case, or results in one of those final orders which a Master is permitted to make"—is whether the associate judge was correct, not whether she was clearly wrong: *Canadian Western Bank v. 353806 B.C. Ltd.*, 2017 BCSC 1072 at para. 11.

[14] The first question is what is the nature of an order arising from an application to set aside a default judgment?

[15] It has been stated many times in the past that the standard of review for an Associate Judge's decision on an application to set aside a default judgment under the test laid out in *Miracle Feeds v. D. & H. Enterprises Ltd.* (1979), 10 B.C.L.R. 58 (Co. Ct.) is the "clearly wrong" standard: *Keeler v. Shields*, 2007 BCSC 1627 at para. 7. This standard of review has been well accepted given that the decision as to whether or not to set aside a default judgment is a highly discretionary exercise that is entitled to deference on appeal: *H.M.T.Q. In Right Of The Province of British Columbia v. Ismail*, 2007 BCCA 55 at para. 11 [*Ismail*], cited in *Keeler* at para. 16; *Andrews v. Clay*, 2018 BCCA 50 at para. 30; *Lanyard Investments Inc. v. 2328884 Ontario Ltd.*, 2019 BCSC 601 at para. 25; and, *Royal Bank of Canada v. Rose*, 2022 BCSC 1472 at paras. 31–32.

[16] The parties agree that the question of jurisdiction is a legal question. Accordingly, whether an Associate Judge has jurisdiction to make a particular order is to be assessed on a standard of correctness: *Lewis v. Frye*, 2007 BCSC 89 at para. 9.

DOES AN ASSOCIATE JUDGE HAVE JURISDICITON TO SET ASIDE A DEFAULT JUDGMENT?

[17] On this application, VM argues that Muir A.J. did not, as an Associate Judge, have jurisdiction to consider or rule on their application to set aside the Default Judgment. VM argues that such decisions are final orders outside of the jurisdiction of Associate Judges.

[18] This argument appears to be only an afterthought on VM's part. VM stated in their notice of application to set aside the Default Judgment that the matter *was* within the jurisdiction of an Associate Judge and no such argument was advanced before Muir A.J. Also, VM did not raise lack of jurisdiction as an issue in their notice of appeal to challenge Muir A.J.'s dismissal of their application. VM only raised the issue in their statement of argument filed in support of this appeal.

[19] In any event, I agree that a party cannot imbue any judicial officer presiding in this Court with jurisdiction where it does not otherwise exist: *Pye v. Pye*, 2006 BCCA 352 at para. 8. Despite VM's procedural shortcomings in advancing this argument, both counsel, particularly Mr. Smith's counsel, have addressed the issue extensively in their written and oral arguments.

Relevant statutory and other provisions

[20] Associate Judges are appointed pursuant to the *Supreme Court Act*, R.S.B.C. 1996, c. 443 [the *SC Act*]. Section 11.3(2) of the *SC Act* addresses the powers of an Associate Judge in that:

> Subject to the limitations of section 96 of the *Constitution Act, 1867*, an associate judge has the same jurisdiction under any enactment or the Rules of Court as a judge in chambers unless, in respect of any matter, the Chief Justice has given a direction that an associate judge is not to exercise that jurisdiction.

[21] In our Court, the Chief Justice's direction and guidelines as to the powers or jurisdiction of an Associate Judge is found in Practice Direction (PD)-50. PD-50 was issued in May 2016 and has been recently updated in January 2024.

[22] In PD-50, “Part A-Direction”, paragraph 3 provides a list of matters upon which an Associate Judge is *not* to exercise jurisdiction. The only matters listed that are relevant here are:

> a. to grant relief where the power to do so is conferred expressly on a judge by a statute or rule;
>
> …
>
> l. to set aside, vary or amend an order of a judge …

[23] In PD-50, “Part B-Guidelines”, other relevant provisions include:

a) Paragraph 4: provides that the guidelines are for the assistance of the profession and the public and are not intended to be exhaustive;

b) Paragraph 5: refers to Associate Judges hearing applications under the *Rules* (consistent with s. 11.3(2) of the *SC Act*):

> Subject to constitutional limitations and to the direction set out in paragraph 3, an associate judge has jurisdiction to hear applications under the Rules of Court, including applications for approval of sale in foreclosure proceedings.

and

c) Paragraph 8: provides that Associate Judges have jurisdiction to make certain listed final orders, subject to constitutional limitations and leaving aside the matters which expressly may not be considered by Associate Judges under paragraph 3 of PD-50. The final orders that may be granted by Associate Judges include paragraph 8(e) “judgment in default”, just as Muir A.J. did here on February 6, 2024.

[24] The *Rules* specifically allow for applications to set aside default judgments under R. 3-8(11).

[25] It is significant that R. 3-8(11) provides that the “*court* may set aside or vary any judgment granted under [R. 3-8]”, meaning that the jurisdiction to do so is not to be exclusively exercised by a Supreme Court justice. Rule 1-1 provides that “court”

means the Supreme Court of BC and, if an associate judge has jurisdiction, includes an associate judge of the Supreme Court.

Does *Euro Ceramics* determine this issue?

[26] The parties argue that, in order to decide whether Muir A.J. had jurisdiction to hear and decide VM's application to set aside the Default Judgment, it is necessary to determine whether that decision was a final or interlocutory order. If it was interlocutory, the parties agree it was within the A.J.'s jurisdiction.

[27] VM argues that the Court of Appeal has decided that such decisions are final orders and outside of the jurisdiction of Associate Judges, citing *Euro Ceramics Tile Ltd. v. T & C Ceramic Tile Contractors*, 1991 CanLII 1463 (BC CA), 60 B.C.L.R. (2d) 86 [*Euro Ceramics*]. VM argues that *Euro Ceramics* is a controlling decision that decides the point in this Court. Indeed, this decision is listed in *British Columbia Annual Practice* for this proposition.

[28] Mr. Smith argues that *Euro Ceramics* has been surpassed by subsequent jurisprudence and is no longer good law on this point.

[29] VM notes that, in *Euro Ceramics*, the court considered that the Master's order being appealed—which refused to set aside a default judgment—was a final order. The court concluded that an application under the R. 17(12) (now R. 3-8(11)) was not within the jurisdiction of the Master because it was an exercise of power under s. 96 of the *Constitution Act, 1867*, 30 & 31 Vict, c. 3.

[30] However, I agree with Mr. Smith's counsel that the relevance of *Euro Ceramics* is very much in doubt. Before moving to a more substantive discussion of that case, it is worth noting that the court in *Euro Ceramic* expressly acknowledged that the court's reasoning did not have the assistance of counsel's argument on the point.

[31] In any event, since *Euro Ceramics*, there has been considerable development in s. 96 jurisprudence, which notably includes *Reference re Code of Civil Procedure*

(Que.), Art. 35, 2021 SCC 27 [*Quebec Reference*]. In that case, the Court emphasized that s. 96 does not mean that judicial functions are frozen in an 1867 mold. The essential question is whether, even though a province may assign portion or offshoots of private law to judges it appoints, that grant of jurisdiction may not infringe on a superior court's "core jurisdiction" and, if it does, it is unconstitutional: *Quebec Reference* at para. 86.

[32] *Quebec Reference* was considered in *British Columbia (Attorney General) v. Le*, 2023 BCCA 200. At para. 187, the court discussed "core jurisdiction" and stated that this does not prevent legislative changes to:

> … modify other aspects of the administration of justice provided that, in doing so, the changes do not effectively prevent a superior court functioning as a court of inherent general jurisdiction.

[33] At para. 88, *Quebec Reference* lists various factors that may be relevant to a consideration of the issue of jurisdiction of judicial officers appointed by a province (such as Associate Judges). Although the Court lists six factors as were relevant in that case, in my view, only two of those listed have relevance here.

[34] One factor is whether the grant of jurisdiction is exclusive or concurrent: *Quebec Reference* at para. 101. Here, both Associate Judges and justices of this Court have the ability to address applications to set aside default judgments.

[35] As stated in *Quebec Reference* (paras. 119–125), appeal rights from a provincial court to a s. 96 court were also found to be a relevant factor as to whether the lower court's jurisdiction infringed on a superior court's "core jurisdiction". The Court stated:

> [121] Nevertheless, how decisions rendered by the provincial court in exercising the jurisdiction at issue are to be appealed may help us answer the question whether the grant of that jurisdiction prevents the superior court of general jurisdiction from playing its role. If decisions of the court with provincially appointed judges can be appealed to a superior court of general jurisdiction at little cost, without leave and with no requirement of deference on questions of law, then there is a very clear hierarchical distinction between the two courts, and the superior court of general jurisdiction retains its ability to state the law. It will then be more difficult to conclude that the grant of

> jurisdiction undermines the superior court's role and impermissibly invades its general private law jurisdiction. If, on the other hand, there is a right to appeal directly to the provincial court of appeal, then there is no hierarchical distinction between the two courts and the superior court of general jurisdiction has no sway over decisions of the court with provincially appointed judges. In short, that would suggest that the court with provincially appointed judges functions as a parallel court.
>
> [Emphasis added.]

[36] In *Euro Ceramics*, the difficulty was that any appeal from the Master's order, said to be a final order, was to the Court of Appeal. This is to be contrasted to the current situation where an appeal from an Associate Judge is to a justice of this Court, namely a s. 96 judicial officer of general jurisdiction. In addition, such appeals may be brought before a justice of this Court without leave under R. 23-6 and no deference to an Associate Judge's decision is required on questions of law under the *Abermin* test.

[37] Further, under s. 13(2)(b) of the *Court of Appeal Act*, S.B.C 2021, c. 6 [*Current CA Act*], an appeal may not be brought before the Court of Appeal from an order of an Associate Judge. As such, the appeal regime from Associate Judge's decisions, as was before the court in *Euro Ceramics*, has changed considerably.

[38] More recently, the issue under s. 96 in relation to the jurisdiction of associate judges in Alberta was considered in some detail in *Lesenko v. Wild Rose Ready Mix Ltd.,* 2024 ABKB 333 at paras. 34–56. Justice Feasby concluded that no s. 96 issue arose in relation to certain orders granted by associate judges and that normal appellate standards of review by justices of the Alberta Kings Bench applied to such decisions.

[39] I acknowledge that later BC cases have referred to and followed *Euro Ceramics* on this issue. In *A.J. Carsten Company v. Alfred J. Carsten*, 2007 BCSC 1631 at para. 35, Master Taylor stated that he would be exceeding his jurisdiction to set aside a default judgment. Similarly, Master Bouck came to the same conclusion in *Sasquatch v. Applied Bottling Ltd.*, 2012 BCSC 1358 at para. 3.

[40] Having said that, there are some examples indicating a different approach. The jurisdiction of (then) Masters to hear applications to set aside default judgments was confirmed without extensive reasons in the rather dated decision in *Richview Holdings (1987) Inc. v. Au*, 1993 CanLII 2157 (BC SC), [1993] B.C.J. No. 2241, where the resulting order was described as "final" (contrary to later Court of Appeal decisions cited below). In many other and more recent cases, no question arose as to the jurisdiction of Masters or Associate Judges to hear such applications: *Keeler*, *Wang v. Liu*, 2019 BCSC 1983 and *Melco Resorts (Macau) Limited v. Huang*, 2023 BCSC 631.

[41] In my view, the above state of affairs, including the conflicting decisions in this Court as to status of *Euro Ceramics*, is sorely in need of some clarification.

Do leave decisions from the Court of Appeal assist in determining this issue?

[42] The parties have referred to various Court of Appeal decisions which have addressed the issue of whether an order was final or interlocutory in the context of whether parties needed leave to appeal decisions of this Court to set aside (or not) default judgments.

[43] VM argues that *Morguard Real Estate Investment Trust v. Davidson*, 2002 BCCA 66 [*Morguard*] stand for the proposition that a decision to set aside a default judgment is a final order. The issue was whether there was an appeal as of right or whether leave was required in respect of an order dismissing an application to set aside a default judgment, for the purposes of the then *Court of Appeal Act*, R.S.B.C. 1996, c. 77 [*Former CA Act*]. At paras. 18–19, the court concluded that this was a final order, rather than interlocutory, for appeal purposes (although it is somewhat curious that the default judgment itself was said to be "final" for enforcement purposes).

[44] Mr. Smith refers to *Weyerhauser Company Ltd. v. Hayes Forest Services Ltd.*, 2006 BCCA 506 at para. 11. In that case, the court found that an application to re-open and re-consider a decision was an interlocutory order (said to be akin to

Muir A.J.'s refusal to set aside the Default Judgment). As in *Morguard*, the court's conclusion was based the definition of "interlocutory order" found in s. 7 of the *Former CA Act*.

[45] In the 2007 Court of Appeal decision of *Ismail* at paras. 4–6, Justice Smith in chambers found that an order setting aside a default judgment was an interlocutory order, again referring to s. 7 of the *Former CA Act*.

[46] *Morguard* was cited with approval in *Dosanjh v. Singh*, 2010 BCCA 425 at para. 9, where the court found that a dismissal of an application to set aside a default judgment was a final order, not requiring leave to appeal.

[47] Since *Morguard*, further Court of Appeal decisions concerning a determination of whether an order is final or interlocutory also bear on this issue.

[48] In *Radke v. M.S.*, 2006 BCCA 12, the court endorsed an "application approach" as opposed to an "order approach" in determining whether an order was final or interlocutory (more on the "application approach" below). The court summarized the approaches as follows:

> [19] This approach to the issue of "final or interlocutory" has sometimes been called the "application approach". Rather than look to the order "as made", one looks to the application that gave rise to the order. On this approach, a final order is one made on such an application or proceeding that, no matter who succeeds, the order will, if sustained, finally determine the matter in litigation.

[49] *Radke* was followed and applied in *E. Sands & Associates Ltd. v. Dextras*, 2006 BCCA 82, a case specifically discussing whether leave was required to appeal a justice's decision dismissing an application to set aside a default judgment. Justice Prowse in Chambers found that it was a final order.

[50] Yet, the final vs. interlocutory debate was still not yet settled in terms of practice before the Court of Appeal, to the extent that you might have described the above case authorities as having "settled" the controversy.

[51] In *Forest Glen Wood Products Ltd. v. British Columbia (Minister of Forests)*, 2008 BCCA 480, the court convened a five-person division to reconsider whether the "application approach" or "order approach" should be used to decide if an order was interlocutory or final, in the context of a pleading issue. The two competing decisions at time were *Radke*, for the former approach, and *Hayes Forest Services Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 120 [*Hayes*], for the latter. The court chose *Hayes*, indicating that the "order approach" was the correct one for leave issues.

[52] If you considered the above state of law (not including many other leave to appeal decisions on the issue which I have not referred to) as confusing and contradictory, you would not be alone. The Court of Appeal agreed, concluding that the state of the case law did not provide sufficient clarification of what orders required leave to appeal, as evidenced by the fact that disputes over whether leave was required continued to arise.

[53] In the *B.C. Court of Appeal 2011 Annual Report*, the Rules Committee reported that changes had to be made to improve access to justice by substantially reducing the number of orders that required leave. The Committee stated:

> The Committee found that a large amount of litigant time and money was being expended on leave to appeal applications. For the judges as well, leave applications were often long and complicated hearings where the initial question was whether or not leave was required. The case law reviewing the distinction between interlocutory and final orders spans decades and has resulted in inconsistent jurisprudence.
>
> [Emphasis added.]

[54] Consequently, in May 2012, the *Former CA Act* was amended to abolish the final/interlocutory distinction in favour of a fixed or codified list of "limited appeal orders" requiring leave: Bill 33, *Justice Statutes Amendment Act, 2012*, 4th Sess., 39th Leg, British Columbia, 2012 (as passed 24 April, 2012), s. 2.

[55] As such, for some time now, for the purposes of the Court of Appeal, considerations as to whether an order is final or interlocutory for leave purposes is irrelevant. The 2012 changes to the leave to appeal regime were continued into the *Current CA Act* which was enacted in 2021. This arises from the s. 1 definition of a

"limited appeal order" and s. 13(2)(a) which sets out that only certain prescribed orders under the rules under the *Current CA Act* require leave.

[56] While the Court of Appeal's earlier interpretations of "final" and "interlocutory" in the leave context may be considered helpful, it must be emphasized that this interpretation originated in a specific statutory context. The meaning given to certain words in the context of one statute (such as the *Former CA Act*) does not bind the courts on the meaning of those words in the context of another statute—even if the same words are used: *R. c. Lapointe*, 2021 QCCA 360 at para 34; *Lainiere de Roubaix v. Craftsmen Distributors Inc.*, 1991 CanLII 1938 (BC CA) at p. 5.

[57] What I conclude from my discussion in the above sections (including that relating to *Euro Ceramics*) is that this Court must consider the matter of an Associate Judges' jurisdiction afresh in the context of this appeal.

Discussion

[58] I conclude that Muir A.J. did have jurisdiction to address VM's application to set aside the Default Judgment and grant the order she did, for the following reasons.

[59] I start from the proposition that, as authorized by the *SC Act*, and in accordance with the *Rules*, as cited above, PD-50 was intended to and does clarify and provide guidance to the profession and the public as to the jurisdiction of Associate Judges.

[60] It is uncontroversial that Associate Judges have jurisdiction to make interlocutory orders: *S.M.Z. v. A.Z.*, 2005 BCSC 341 at para. 19, aff'd *Zuk v. Zuk*, 2006 BCCA 132.

[61] The first question that can be asked is whether the order arising from *Set-Aside RFJ* was final or interlocutory.

[62] In light of the above, it is necessary to determine whether the approaches previously considered by the Court of Appeal to determine when leave was required

should be adopted to determine whether an order is final or interlocutory in the context of the *Rules* and PD-50. Despite the Court of Appeal discarding the application approach, and later abandoning any approach in favour of a codified list, it remains a valid consideration here.

[63] In my view, the application approach adopted in *Radke*, as opposed to the order approach, is better suited for assessing which orders are final and which are interlocutory in this context. I note that the application approach has been previously adopted in this Court: *J.P. v. British Columbia (Children and Family Development*, 2016 BCSC 57 at paras. 21-22.

[64] In *Hayes* at paras. 15-16, the court outlined the history of the final/interlocutory distinction in the leave context and contrasted the two approaches. The "order approach" was articulated by Lord Alverstone C.J. in *Bozson v. Altrincham Urban District Council*, [1903] 1 K.B. 547 (C.A.) at 548-549:

> Does the judgment or order as made finally dispose of the rights of the parties? If it does then I think it ought to be treated as a final order; but if it does not it is then, in my opinion, an interlocutory order.

[65] The "application approach" was articulated by Lord Esher M.R. in *Salaman v. Warner*, [1891] 1 Q.B. 734 (C.A.) [*Salaman*] at 735:

> If [the court's decision], whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but if given in the other, will allow the action to go on, then I think it is not final, but interlocutory.

[66] One key difference between the order and application approaches is that the application approach assesses the decision "whichever way it is given". The application approach looks not only to the order, but also to the application that gave rise to it: *Radke* at para. 19.

[67] VM's counsel argues that the finding in *Ismail*—that an order setting aside the default judgment was interlocutory—can be distinguished from Muir A.J.'s order where she *refused* to set aside the default judgment, which VM says is a final order.

[68] With respect, I fail to see how jurisdiction can be determined only after the results of the hearing are known.

[69] The order approach assesses the decision only after it is made, and looks solely to the order itself. This aspect of the order approach makes it poorly suited to determining the jurisdiction of Associate Judges. If an Associate Judge's jurisdiction could only be determined by the outcome of a decision, then Associate Judges would be placed in the untenable position of having jurisdiction to rule one way but not the other. This approach would not provide Associate Judges with a reliable means to assess whether they have jurisdiction before agreeing to hear an application. Needless to say, it would also be completely at odds with the object of the *Rules* to have the Court deliver just and speedy determinations (R. 1-3).

[70] VM's argument, essentially the "order approach", in the context of applications to set aside default judgments, would create the anomalous situation where the party seeking to set aside a default judgment can either win on the application itself or lose the application, but later win on the argument that the Associate Judge lacked jurisdiction. Such an illogical approach is inconsistent with the *Radke* analysis which dictates that it is the application itself informs whether the resulting order is final or interlocutory.

[71] The only solution to the above conundrum would be that *only* Supreme Court justices could hear applications to set aside default judgments, which is contrary to the *SC Act* and *Rules*, which say that Associate Judges may hear such applications.

[72] Applying the application approach as laid out in *Radke* and *Salaman* to this case, the question is whether a decision on an application to set aside a default judgment—whichever way it is given—will finally dispose of the matter in dispute. In my view, it is clear that it does not.

[73] An order setting aside a default judgment does not finally dispose of a matter—an order for judgment in default has already done so. Default judgments are expressly listed as "final" orders under paragraph 8(e) of PD-50. See also *Ismail* at

para. 5, citing *Donald Berman Enterprises Ltd. v. 365946 B.C. Ltd.*, 2000 BCCA 391 at para. 18. Default judgments can be enforced immediately. They are not "incidental to the principal object of the action, namely, the judgment": *Roadburg v. British Columbia*, [1980] B.C.J. No. 1331 at para. 3. They are the judgment.

[74] It is difficult to see how two "final" orders can exist at the same time. If the application to set aside the judgment results in a dismissal, then there is no change in the result—ie. the final order/default judgment stands. If the application results in a default judgment being set aside, the result is that no final order exists and the final determination must be determined later. In my view, no matter what the result, this is consistent with the resulting order, whatever the result, being an interlocutory order.

[75] I conclude that a decision to set aside (or not) a default judgment is an interlocutory judgment within the jurisdiction of Associate Judges (with an exception, as noted below). Accordingly, Muir A. J. had jurisdiction to address VM's application to set aside the Default Judgment and grant the order she did.

[76] Ultimately, when addressing an application to set aside a default judgment granted by an associate judge, an associate judge is exercising jurisdiction conferred by the *SC Act* and the *Rules*, not any inherent jurisdiction: *Sood v. Hans*, 2023 BCCA 138 at paras. 30–33.

[77] Even if one were to describe the resulting order as "final", there is nothing in PD-50 that prohibits Associate Judges exercising such jurisdiction, particularly given ss. 4 and 8 in the "Guidelines" section that states that the list of certain "final orders" may be granted by Associate Judges is not exhaustive. Final or not, the order that arose from the *Set-Aside RFJ* was not outside of Muir A.J.'s jurisdiction unless it offends s. 96 of the *Constitution Act, 1867* (as expressly stated in s. 11.3(2) of the *SC Act* and paragraph 8 of PD-50).

[78] I am satisfied that no constitutional issues arise in respect of s. 96. Allowing Associate Judges to address these types of applications (leaving aside where a

default judgment is granted by a justice of this Court) does not offend this Court's core jurisdiction under s. 96.

[79] My conclusion arises from the analysis above in relation to *Quebec Reference*, again noting that an appeal from an Associate Judges' decision lies to a justice of this Court (i.e. a s. 96 judicial officer) under R. 23-6(8.1)–(8.10). Any appeal allows that justice to apply the standards of review arising from *Abermin*, which affords appropriate deference to any discretion exercised under the *Miracle Feeds* test and, in relation to issues of law, apply a correctness standard of review.

[80] In that vein, I do not consider that *Euro Ceramics* validly states the law at this time.

[81] Finally, the effect of s. 11.3(2) of the *SC Act*, in the context of R. 3-8(11) and PD-50, indicates a legislative intention to broaden the matters that may be addressed by Associate Judges. In my view, this legislative approach recognizes that Associate Judges contribute greatly to completing the substantive workload of the Court and in the administration of justice in BC.

[82] In *Quebec Reference* at paras. 126–130, the Court stated that a relevant factor in relation to the jurisdiction of lower court judges is the pursuit of an important societal objective. Access to justice is such an objective:

> [126] Granting jurisdiction to a court with provincially appointed judges may be the means a legislature adopts to try to address a societal concern. The pursuit of an important societal objective may lend credence to the idea of a legitimate exercise of the provincial power in relation to the administration of justice, that is, of an exercise of that power for a purpose other than the creation of a prohibited parallel court. Access to justice, for example, is an important societal objective that could justify granting certain areas of jurisdiction to courts with provincially appointed judges (*Re: B.C. Family Relations Act*, at p. 107). The provinces must have considerable flexibility in what they do to address the needs of a changing society. The only limit on their initiative is that they may not create parallel courts that undermine the role of the superior courts of general jurisdiction. ...
>
> [Emphasis added.]

[83] This Court's approach to Associate Judge's jurisdiction is also consistent with the shift to recognize and advance access to justice and, as such, it is in the public interest: *Lesenko* at para. 48 and *Pye* at paras. 26–27.

[84] I see no difficulty with Associate Judges addressing applications to set aside default judgments that have been granted by either Registrars or other Associate Judges, from a practical viewpoint. In addition, an Associate Judge considering a default judgment granted by him or her also respects a long standing practice in this Court that encourages the same judicial officer to hear both matters, as a matter of efficiency and toward the objective of delivering just and speedy decisions under R. 1-3(1).

[85] I find that an Associate Judge has jurisdiction to hear and decide applications to set aside default judgments, save for applications to set aside a default judgment that was granted by a justice of this Court (as prohibited by paragraph 3(l) of PD-50). Muir A.J. was acting within her jurisdiction in addressing and ruling upon VM's application to set aside the Default Judgment.

DID THE ASSOCIATE JUDGE ERR IN THE EXERCISE OF HER DISCRETION?

[86] Alternatively, VM argues that Muir A.J. erred in the *Set-Aside RFJ* in two ways: firstly, in respect of her finding as to the time VM had to file any RTCC; and secondly, in respect of her finding as to Mr. Smith's purported duty of disclosure on the application for default judgment.

Time to File the RTCC

[87] VM argues that Muir A.J. misapprehended the evidence in finding that Hughes A.J. had previously determined that VM had 49 days to file any RTCC after Giaschi J.'s dismissal of VM's application to set aside service of the NOCC.

[88] In attempting to set aside the default judgment, VM argued that the conditions for obtaining default judgment had not been met. Rule 3-8(1) provides:

> (1) A plaintiff may proceed against a defendant under this rule [3-8] if
>
> (a) that defendant has not filed and served a response to civil claim, and

> (b) that period for filing and serving the response to civil claim has expired.

[89] The issue raised by VM was that the period for the filing of any RTCC by them had not expired.

[90] VM's position was rejected by Muir A.J. She said in the *Set-Aside RFJ*:

> [20] [On November 24, 2023] Associate Judge Hughes heard that application [Mr. Smith's application for default judgment] and dismissed it, determining that the time for filing a response had not yet expired, as it would run from the date of the Giaschi order, *i.e.*, November 7, 2023, and the defendants, being from outside of Canada, had 49 days within which to file a response. The defendants advised that they were unaware of Hughes A.J.'s November 24, 2023 determination regarding the time for filing a response until after the default judgment had been granted by me on February 6, 2024 and after they obtained copies of the relevant transcripts.
>
> …
>
> [22] The defendants took the position that the conditions for obtaining a default judgment had not been met, as the rules do not provide a deadline for filing a response to civil claim where a jurisdictional application has been dismissed.
>
> …
>
> [33] Although the defendants were not aware of it, that deadline [that is, the deadline for filing a response to the plaintiff's civil claim] had already been determined by Hughes A.J. to be 49 days after the Giaschi order on November 7, 2023. That determination was not disputed nor was a different expiration period proposed in the hearing before me.

[91] I agree with Mr. Smith's counsel that Muir A.J. implicitly accepted that the time for service had expired by February 6, 2024. This was clearly a requirement in terms of whether the default judgment could be granted under R. 3-8(1)(b). It was also a consideration in terms of whether VM had expressed any intention to file a RTCC within that period of time, as is relevant to whether VM had intentionally failed to respond: *Set-Aside RFJ* at paras. 35 and 56.

[92] VM maintains its position that the time for the filing of any RTCC had not expired by February 6, 2024.

[93] VM refers to its application response filed in August 2023 in respect of Mr. Smith's July 2023 application for default judgment. In that document, VM argued that

R. 3-8(1) was "inapt" in the face of its jurisdictional response. However, the Giaschi Order did address service. At para. 25 of his reasons (and para. 4 of the Giaschi Order), Giaschi J. explicitly stated that VM had attorned and that there was no need to "re-serve" the NOCC [emphasis added].

[94] Even after the granting of the Giaschi Order, I agree that VM continued to take this position in relation to Mr. Smith's repeated efforts to schedule his later applications for default judgment. In an email dated January 23, 2024 to Mr. Smith, VM"s counsel repeated his position that the conditions for a default judgment had not been met in that Mr. Smith had not "identified" the expiration date for the filing of a RTCC. VM's counsel stated that the *Rules* have nothing to say in regard to "current circumstances" and certain "nothing in regard to subsequent attornment". Finally, VM's counsel said:

> Accordingly, our position is that you must bring an application for a determination in regard to Rule 3-8(1) before you can apply for default judgment. In which case, it is our intention to respond.

[95] Nevertheless, Mr. Smith's direct communications to VM's counsel were to the effect that he disagreed and that he intended to proceed.

[96] In the face of that dispute, it was open to VM to seek clarification on the service issue, if one existed, before Giaschi J. VM did not.

[97] In addition, in the face of that ongoing dispute, it was open to VM to attend before Hughes A.J. to argue the point. Mr. Smith's evidence before Hughes A.J. included the emails which disclosed this dispute. VM argues that Hughes A.J. added nothing as to the conditions under which and, most importantly for present purposes, when it would become appropriate for Mr. Smith to file a new default application. I disagree. Her reasons—that a default judgment was premature since the 49 days had not expired—indicate that she clearly accepted that service had occurred, arising from the Giaschi Order and Giaschi J.'s reasons for that Order.

[98] I agree that Hughes A.J.'s reasoning on this point accords with the plain meaning of Giaschi J.'s reasons and the *Rules*. If VM was not required to have been

"re-served" then, as a matter of common sense, that means that they were *served* initially.

[99] VM's counsel was expressly told that the default judgment application had been adjourned to February 1, 2024. Again, in the face of the ongoing dispute regarding service, it was open to VM to attend before Muir A.J. on that date to argue the point. VM did not. VM's only response to Mr. Smith was that he should inform the Court of his earlier emails (which was done) and that VM was granted leave to appeal the Giaschi Order (which was also done).

[100] I agree with Mr. Smith's counsel that VM is effectively asking this Court to ignore the effects of the Giaschi Order as to the need to re-serve the NOCC.

[101] VM essentially argues that they had an undetermined and infinite time to file a RTCC unless and until such time as Mr. Smith brought forward an application. In essence, VM argues that they can decide to unilaterally impose a stay of proceedings, without having been granted such relief by the court, unless and until Mr. Smith obtains a court order that no stay exists. VM has never referred to any case authority supporting their position, either at any earlier application or on this appeal.

[102] The above point leaves aside the further point that VM has chosen to ignore the issue entirely in the face of repeated court applications where VM's position could have been considered substantively as relevant to whether a default judgment was available under the *Rules*. VM does not offer any explanation for their failure to bring this position before the Court.

[103] I conclude that VM's argument or position as to the need for a further court application to determine service—i.e. whether there was a new deadline and if so, what it was—is without merit. Both Hughes A.J. and Muir A.J. properly rejected that position under the *Rules*, and in the face of the Giaschi Order, even leaving aside the fact that VM did not appear to advance any such argument.

[104] In addition, in the *Set-Aside RFJ*, Muir A.J. did not misapprehend the evidence as argued by VM. Consistent with the reasons of Hughes A.J., it was open to Muir A.J. to conclude that VM had 49 days from November 7, 2023 to file a RTCC from at least the date of the Giaschi Order and that VM had failed to do so.

[105] In my view, Muir A.J. correctly found that the time for filing a RTCC had expired. Further, in the alternative, I do not find that she was clearly wrong in the exercise of her discretion in relation to this aspect of the appeal.

Mr. Smith's Disclosure

[106] VM also argues that Muir A.J. erred in law in holding that Mr. Smith did not have an obligation to make full and frank disclosure on the default judgment application.

[107] In the *Set-Aside RFJ*, Muir A.J. accepted that no such obligation existed in respect of an application for default judgment:

> [52] As to the alleged misrepresentations or failures to disclose, the *Wang* decision [i.e. *Wang v. Corsa Auto Gallery Ltd.*, 2023 BCSC 382] is clear that there was no obligation on the plaintiff to make full and frank disclosure on a default application.

[108] I agree with VM that *Wang v. Corsa Auto Gallery Ltd.*, 2023 BCSC 382 does not directly address the nature of an application for default judgment. In that case, default judgment had been obtained and the defendant was seeking to set aside both the default judgment and the later damages assessment order. The issue was the nature of the application to assess damages, whether it was an *ex parte* application and whether the plaintiff had an obligation of full disclosure in those circumstances.

[109] At para. 30 of *Wang*, Justice Blake found that, since the defendant had not filed a RTCC, it never became a party of record so as to be entitled to notice of an assessment hearing. As such, the assessment was not *ex parte* with any obligation of full and frank disclosure.

[110] The facts in *Wang* are not directly analogous because, of course, it is obvious that no RTCC has been filed before a default judgment is brought. Nevertheless, the decision is analogous in the sense that the application for default judgment is necessarily without notice or *ex parte* because the only prior "notice" required is service of the originating pleading. In that circumstance, any named defendant is not a "party of record": *Wang* at para. 30; *M.T.B. v. L.B.V.*, 2024 BCCA 159 at para. 27.

[111] In my view, it would be an odd circumstance to impose such an obligation of disclosure in respect of an application for default judgment which is often times only an administrative function performed by the Registrar: *LLS America LLC (Trustee of) v. Dill*, 2017 BCSC 469 at para. 258, rev'd on other grounds *Kriegman v Dill*, 2018 BCCA 86. It must be emphasized that, whether considered by the Registrar or an Associate Judge, the *Rules* only require that the plaintiff establish two things: that service has been effected and that the time to respond has expired. There is inevitably no responding "party of record" who may engage in that process with other facts, since they would be irrelevant to a consideration of the seminal issues under R. 3-8(1).

[112] It is important to consider the nature of an application to set aside a default judgment.

[113] Rule 8-5(6) provides that a court may make an order without notice in cases of urgency. An application for a default judgment under the *Rules* is not analogous to an *ex parte* or without notice application in the true (i.e. legal) sense where an application is brought without a party being aware of that fact, such as for an injunction where all material facts must be disclosed: *Northguard Mortgage Corp. v. Hamada*, 1985 CanLII 536 (BC CA), 65 B.C.L.R. 60 at para. 20; *Matthes v. Manufacturers Life Insurance Company*, 2008 BCSC 6 at para. 53; and *Ruby v. Canada (Solicitor General)*, 2002 SCC 75 at para. 25.

[114] Similarly, R. 22-1(2) provides that, where a party fails to attend a hearing, the court may proceed in any event. However, that Rule inevitably presupposes that service had been effected and allows the court to require evidence of that fact.

Again, in this case, the only service that must be established is service of the originating pleading. That pleading itself gives a defendant notice of the time requirements within which a responding pleading must be filed, and also expressly advises that judgment may be pronounced against that defendants if no responding pleading is filed.

[115] In any event, even assuming that R. 22-1(2) had relevance to Mr. Smith's default judgment application, VM was given notice of the application to be heard by Muir A.J. on February 6, 2024: *Set-Aside RFJ* at paras. 17–18. As such, the application was not "without notice" in the true legal sense since it related to a situation where a party (not a party of record) was served, but chose not to attend: *Hamada* at para. 19.

[116] Further, assuming relevance of R. 22-1, R. 22-1(3) was engaged to allow a reconsideration of the result of the hearing. However, VM does not seek any such relief, no doubt because they would be required to address the issue of whether they wilfully did not attend the hearing under that Subrule, and which is also a *Miracle Feed* factor. On this point, Muir A.J. found that VM had clearly and willfully failed to file a RTCC and there was still no evidence of any intention to do so, or to apply for a stay of proceedings: *Set-Aside RFJ* at paras. 50-51.

[117] Finally, as noted by Mr. Smith's counsel, VM had not cited any decision to support the proposition that a plaintiff seeking default judgment can be said to be bringing an *ex parte* or without notice application that would engage the duty of full and frank disclosure.

[118] I conclude that Muir A.J. correctly concluded that Mr. Smith had no obligation to make full and frank disclosure on the default judgment application: *Set-Aside RFJ* at para. 52.

[119] In any event, in VM's notice of appeal and argument, VM makes no mention of what they say Mr. Smith failed to disclose or improperly stated to Muir A.J. before default judgment was granted and why it mattered.

[120] Before Muir A.J., VM alleged two errors on Mr. Smith's part at the default judgment application: firstly, that Mr. Smith falsely asserted that VM intended to apply for a stay, but had never done so; and, secondly, that Mr. Smith failed to bring VM's position to the attention of the Court, namely that a deadline for the filing of a RTCC had yet to be determined: *Set-Aside RFJ* at paras. 39–40.

[121] However, VM's first allegation—whether VM had any intention to apply for a stay—was not a "material" fact on the default judgment application under R. 3-8(1) and was therefore irrelevant, as Muir A.J. correctly stated in the *Set-Aside RFJ* at para. 52. The only "material" fact was that no stay of proceeding existed to prevent Mr. Smith from proceeding in the action, including to obtain default judgment.

[122] VM's second allegation also has no merit. Mr. Smith did provide evidence at the default judgment application before Muir A.J. as to VM's position, by putting copies of various email exchanges with VM's counsel into evidence. Those emails included references to VM's position about the need to convene a further court application to "determine" when service had occurred and whether the time to respond had expired. Further, as with the first allegation, Muir A.J. correctly found that this position was irrelevant to the issues considered on the default judgment application: *Set-Aside RFJ* at paras. 52–53.

CONCLUSION

[123] VM's appeal from Muir A.J.'s decision declining to set aside the default judgment is dismissed. As in the order below, Mr. Smith is entitled to his costs of this appeal, payable forthwith after assessment.

"Fitzpatrick J."