COURT OF APPEAL FOR ONTARIO

CITATION: P1 v. XYZ School, 2021 ONCA 901
DATE: 20211217
DOCKET: M52787 (C69600) & M52786 (C69592)

Doherty, Benotto and Huscroft JJ.A.

BETWEEN

P1, by his Litigation Guardian Parent P1, Parent P1 and Parent P2

Appellants/Plaintiffs

and

XYZ School, A.A., D1, a Minor by his Litigation Guardian, Parent D1, D2, a Minor by his Litigation Guardian, Parent D2, B.B., C.C. and E.E.

Respondents on Appeal/Defendants

and

Toronto Star Newspapers Ltd.

Respondent on Appeal/Appellant

Graeme A. Hamilton, for D2, a Minor by his Litigation Guardian, Parent D2

Brendan F. Morrison, for D1, a Minor by his Litigation Guardian, Parent D1

Emma Carver, for Toronto Star Newspapers Ltd.

Broghan Masters, for the plaintiffs

Kathryn McCulloch, for XYZ School, A.A., B.B., C.C. and E.E.

Heard: December 2, 2021

On appeal from the order of Justice Grant R. Dow of the Superior Court of Justice, dated June 4, 2021.

Benotto J.A.:

[1] This is a motion to quash the appeals of a non-publication and sealing order. The question is whether the order under appeal is final or interlocutory.

[2] As I will explain, the legal nature of the order under appeal finally determines the constitutional rights of the media and thus is a final order for the purposes of appeal. Although the order is interlocutory with respect to the other appellants, I would nonetheless direct that the appeals be heard together.

The underlying action

[3] The action is brought by a minor and their litigation guardian parents (collectively, the “plaintiffs”). The claim arises out of an alleged sexual assault on the child by classmates during an overnight school trip. The claim is against the classmates, the school and three school employees who – it is alleged – failed to protect and adequately respond to the assault (collectively, “the school defendants”).

[4] For the purposes of this motion, there is no need to further articulate the facts.

The publication ban and sealing orders

[5] The minor defendants moved for a non-publication and sealing order. The school supported the minors’ position. The plaintiffs opposed the ban with respect to the name of the school and/or those employed by the school. The motions judge granted an interim partial sealing order and publication ban on January 28, 2020, pending a full hearing of the motion. He made further orders continuing the

publication ban and anonymizing certain terms to be used in the action on February 14, 2020 and March 13, 2020. The sealing order and publication ban were continued on May 25, 2020.

[6] The media had no notice of the motion or the order until February 12, 2021. The Toronto Star Newspapers Ltd. requested that the motion judge allow the publication as to the identity of the school, identified only as XYZ, and the school employees. There was no issue then or now about protecting the identity of the minor defendants.

[7] Following a full hearing on the issue, on June 4, 2021, the motion judge imposed a publication ban over the identity of the school and sealed the court file. He concluded that the terms of the previous orders “shall remain in place, subject to further order of the Court.”

The appeals

[8] The Toronto Star and the plaintiffs appeal the June 4, 2021 order which deals with identity of the school defendants. For the purposes of this motion, I do not need to address the details of the order and the arguments on appeal.

Motion to quash

[9] The minor defendants (not the school defendants) move to quash the appeal because they say it is not a final order and no appeal lies to this court as of right. They submit that the order does not finally dispose of the matter between the parties. They also point to the motion judge’s words referring to a “further order”. They argue

that the order is therefore interlocutory, and an appeal lies to the Divisional Court with leave.

[10] The appellants submit that the order is final because they have been deprived of their freedom of expression contrary to the open court principle and as protected by s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The Toronto Star also submits that the order denies its constitutional right to contemporaneously report on, scrutinize and comment on Canada's courts.

This court's jurisprudence with respect to final/interlocutory orders

[11] For nearly 90 years, this court has approached the issue of final/interlocutory orders by beginning with this distinction laid out in *Hendrickson v. Kallio*, [1932] O.R. 675 (C.A.):

> The interlocutory order from which there is no appeal is an order which does not determine the real matter in dispute between the parties – the very subject matter of the litigation, but only some matter collateral.

[12] Since then, this court has, on many occasions, addressed *Hendrickson.* In the recent decision of *Paulpillai Estate v. Yusuf*, 2020 ONCA 655, at para. 16, Jamal J.A. (as he then was) summarized the law as follows:

> The main principles that determine whether an order is interlocutory or final are well known:
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> > 1. An appeal lies from the court's order, not from the reasons given for making the order.
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> > 2. An interlocutory order "does not determine the real matter in dispute between the parties – the very subject matter of the litigation – or

> any substantive right. Even though the order determines the question raised by the motion, it is interlocutory if these substantive matters remain undecided".
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> 3. In determining whether an order is final or interlocutory, "one must examine the terms of the order, the motion judge's reasons for the order, the nature of the proceedings giving rise to the order, and other contextual factors that may inform the nature of the order".
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> 4. The question of access to appellate review "must be decided on the basis of the legal nature of the order and not on a case by case basis depending on the application of the order to the facts of a particular case." In other words, the characterization of the order depends upon its legal nature, not its practical effect. [Citations omitted.]

[13] The moving parties rely on these principles to support their position. They say that, because the matter in dispute in the action has not been determined, it is interlocutory. Further, they submit that the legal nature of the order, not its practical effect, means that the order is interlocutory.

[14] The Toronto Star in turn submits that, in *Paulpillai,* the appealing party was a party to the underlying litigation, and this makes all the difference. While the matter in dispute between the plaintiffs and the defendants has not been determined, the matter in dispute for the Toronto Star – a non-party to the underlying action – has been because their *Charter* rights to freedom of the press were determined[1].

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[1] The plaintiffs submit that they too have s. 2(b) rights determined. This is addressed later in the reasons.

[15] When an order is directed to a non-party to litigation, the issue of whether it is interlocutory or final is more difficult. In *Houle v. St. Jude Medical Inc.,* 2018 ONCA 88, 420 D.L.R. (4th) 444, this court commented on this difficulty. Nordheimer J.A. considered two lines of cases. First, *Smerchanski v. Lewis* (1980), 30 O.R. (2d) 370 (C.A.), at para. 18:

> This Court has held that an order made in a contest between a party to an action and someone who is not a party is a final order, appealable without leave, if the order finally disposes of the rights of the parties in the issue raised between them.

[16] That principle was followed in other cases including *Morse Shoe (Canada) Ltd. v. Zellers Inc.* (1997), 100 O.A.C. 116 (C.A.); *Pennington v. Hawley*, [2005] O.J. No. 3591 (C.A.); and *CanWest MediaWorks Inc. v. Canada (Attorney General)*, 2007 ONCA 567, 227 O.A.C. 116.

[17] On the other hand, other cases have sought to confine the decision in *Smerchanski* to its particular facts, which means that it is not necessarily true that all orders directed to a non-party must be considered final: see *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman* (2001), 55 O.R. (3d) 794 (C.A.), at para. 16:

> *Smerchanski* was not intended to mean that all orders directed to a non-party must be final, and the principle expressed therein should not be further expanded in that way.

[18] In the end, Nordheimer J.A. did not determine the issue because he concluded that no substantive issue, nor right of the parties, was determined by the conditional approval order.

[19] We are left with the firm principles from *Paulpillai* that do not address either non-parties or the challenges that arise when those principles affect a non-party. If the *Paulpillai* factors are applied to non-parties, it follows that based on the principles from *Fisherman*, the order directed to a non-party must determine substantive rights for it to be final. The result, in my view, would be that:

1. A final order must deal with substantive rights.
2. All orders directed to non-parties are not necessarily final.
3. To be final, an order directed to non-parties must determine the non-parties' substantive rights.

Applying the principles to this motion

[20] I will consider first the position of the Toronto Star, then the plaintiffs.

(1) Does the order deal with and determine substantive rights of the Toronto Star?

[21] The moving parties submit that it is the substantive rights of parties to the litigation that are to be considered. An order that does not determine a substantive claim or defence and leaves the merits of the case to be determined is interlocutory. The order under appeal, they submit, deals with a collateral matter and in any event, might be changed by the motions judge in the future.

[22] I do not agree with this proposition.

[23] Though sealing orders are normally interlocutory as concerns the parties to the litigation, in this case the non-party's substantive rights are finally determined by the order. The rights are constitutional in nature and guaranteed by s. 2(b) of the *Charter*. They are finally determined because the sealing order precludes the ability of the Toronto Star to contemporaneously access, report and scrutinize all stages of a proceeding on behalf of the public.

[24] The freedom of the press has been historically recognized by the Supreme Court as a fundamental right in Canada. As Lamer C.J. wrote in the leading case, *Dagenais v. Canadian Broadcasting Corp.* (1994), O.R. (3d) 816, at p. 876, "a fundamental principle of our justice system … freedom of expression, including freedom of the press, is now recognized as a paramount value in Canadian society, as demonstrated by its enshrinement as a constitutionally protected right in s. 2(b) of the *Charter*."

[25] The Supreme Court has found that the open court principle is "bound up" with the constitutionally protected right of freedom of the press and is a public good: see *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33, at paras. 3, 46.

[26] The importance of the open court principle has been recently re-affirmed in *Sherman Estate v. Donovan*, 2021 SCC 25, 458 D.L.R. (4th) 361, at paras. 1-2:

> This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression

> and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press — the eyes and ears of the public — is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.
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> Accordingly, there is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But this discomfort is not, as a general matter, enough to overturn the strong presumption that the public can attend hearings and that court files can be consulted and reported upon by the free press.

[27] The Toronto Star has no interest in the outcome of the litigation between the plaintiffs and the defendants. The Toronto Star's interest is to be able to perform its function as the "eyes and ears" of the public.

[28] The facts here are analogous to those in *Hollinger Inc. v. The Ravelston Corporation*, 2008 ONCA 207, 291 D.L.R. (4th) 15, where this court considered an order affecting a non-party.

[29] In *Hollinger,* the motion judge made a sealing and protection order in respect of material filed for a *Mareva* injunction. The Globe and Mail sought intervener status to set aside the order. The motion judge dismissed the intervener motion. This court allowed the appeal, but for two different reasons. Two judges concluded that the motion judge's refusal to grant intervener status for the limited purpose of challenging the order was in error and was itself a final order. They determined that the matter should be returned to the Superior Court for a new hearing and consequently there

was no need to determine whether the order – standing alone – would be final or interlocutory for purposes of appeal routes. Juriansz J.A., however, squarely dealt with issue concluding that the order affecting the Globe and Mail was final. He would not have returned the matter to the Superior Court but would have granted intervener status.

[30] The reasons of Juriansz J.A. align with the situation here. At para. 52, he stated:

> The principle [of interlocutory or final] becomes difficult to apply when third parties, unconcerned with the merits of an action, become involved in the proceedings for a limited purpose. The Globe, in arguing the protective order was final, emphasized it was a third party uninvolved in the action. I agree this is the key to the determination of the issue.[2]

[31] Juriansz J.A. went on to say at para. 54 that whether the motion judge's order maintaining the protective order is interlocutory or final depends on its effect on the rights of the Globe, considering "what was at stake for the Globe" in the motion. There, like here, what was at stake for the Globe was the ability to exercise its routine right of access to a court file, based on freedom of the press. Here, what is at stake for the Toronto Star is freedom of the press.

[32] The moving parties say that the rights of the Toronto Star are not finally determined because the motion judge added the words "subject to further order of

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[2] While courts have repeatedly used the term "third party", a more accurate description is – as used in these reasons – "non-parties".

the Court". Most orders are subject to further order. Even if the motion judge expected the matter to be returned to him, the ability of the Toronto Star to have access to the court file and report was affected. I adopt the reasoning of Juriansz J.A. at paras. 56 and 58:

> I attach no importance to the fact that the literal wording of the order makes it apply indefinitely. The reasons of the motion judge make evident that he regarded the order as temporary. He fully expected the order would be set aside at someone's initiative after the U.S. proceedings ended. Even if the protective order, despite its wording, is regarded as sealing the court file temporarily, I still would consider it a final order.
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> …
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> In the context of the Globe's motion, the potential right to have access later is not the same as the actual right to have access now. The decision to maintain the protective order finally determined that the Globe may not exercise its constitutional right to freedom of the press in the circumstances that were before the motion judge. A motion brought later will not revisit that question but will decide whether the Globe may exercise its right of access in other circumstances.

[33] Although the moving parties urge us to reject the reasoning of Juriansz J.A., I see no basis to do so. The reasoning addresses the very issue before us. A constitutional right to freedom of the press is a substantive right that is to be exercised contemporaneously. Insofar as the order affects the Toronto Star, it is final.

(2) The Plaintiffs appeal

[34] The plaintiffs allege that the order as it applies to them is final because their right to freedom of expression is affected too. I do not agree. The matter between the plaintiffs and the defendants has not yet been determined.

[35] As to the plaintiffs, the order is not final. That said, the plaintiffs wish to continue their appeal. They submit that, if the order is considered interlocutory in relation to them, this court should assume jurisdiction under s. 6(2) of the *Courts of Justice Act*. That section provides:

> **(1) Combining of appeals from other courts**
>
> (2) The Court of Appeal has jurisdiction to hear and determine an appeal that lies to the Divisional Court or the Superior Court of Justice if an appeal in the same proceeding lies to and is taken to the Court of Appeal. R.S.O. 1990, c. C.43, s. 6 (2); 1996, c. 25, s. 9 (17).

[36] The appeal by the Toronto Star and the plaintiffs is in the same proceeding and deals with the same order. But this court has repeatedly said that, for s. 6(2) to apply, the appellant must have sought and obtained leave from the Divisional Court: see *Blair v. Ford*, 2021 ONCA 841, at para. 28. They have not done so.

[37] However, this court may assume jurisdiction over the interlocutory order, even if leave from the Divisional Court has not been sought, if the interlocutory and final orders are so interrelated that leave would inevitably have been granted on the interlocutory issue: see *Lax v. Lax* (2004), 70 O.R. (3d) 520 (C.A.), at para. 9.

[38] Here, we have both a final and interlocutory order. The final order is the non-publication and sealing order as it applies to the Toronto Star. The interlocutory order is the non-publication and sealing order as it applies to the plaintiffs.

[39] This is exactly the type of case that the *Lax* test, even if read narrowly, is meant to capture. The two appeals for each Toronto Star and the plaintiffs deal with the same non-publication and sealing order. In the unique circumstances of this case, it makes no administrative sense to have one portion of the appeal proceed at this court and require that leave be sought for the interlocutory portion. Inevitably, leave will be granted because the Toronto Star portion of the appeal will proceed at this court, and the two appeals are substantively the same.

[40] I would therefore, in these unusual circumstances, allow the appeal to proceed in this court and to be placed on this list to be argued with the Toronto Star appeal.

Conclusion

[41] I would dismiss the motion to quash the appeals. I would not order costs.

Released: December 17, 2021 DD

M.L. Benotto J.A.
Doherty J.A.
Huscroft J.A.