

I order that the Trustee in Bankruptcy of Rosedale pay to the foregoing persons the amounts noted opposite their names together with any accrued interest thereon.

Counsel may speak to me respecting costs.

*Order accordingly.*

### **Circuit World Corporation v. Lesperance et al.**

[Indexed as: Circuit World Corp. v. Lesperance]

*Court of Appeal for Ontario, Laskin J.A. (In Chambers) May 21, 1997*

**Employment — Labour relations — Picketing — Several union members breaching order limiting picketing under s. 102 of Courts of Justice Act by trespassing, damaging property and engaging in mass picketing — Judge finding five union members in contempt but declining to impose individual sanctions and instead prohibiting all picketing and protesting at employer's place of business — Stay of order pending appeal granted — Courts of Justice Act, R.S.O. 1990, c. C.43.**

During a legal strike, the employer successfully moved for an order to limit picketing under s. 102 of the *Courts of Justice Act*. Contrary to that order, several union members trespassed onto the employer's property, smashed windows, damaged cars, engaged in mass picketing and obstructed access to the workplace. The employer brought contempt proceedings against six union members. The judge found five of the union members in contempt but declined to impose any individual sanctions. Instead, he prohibited all picketing and protesting at the employer's premises. The union appealed. Pending the determination of the appeal, the appellants applied for an interim stay of the order.

**Held**, the application should be allowed.

The test for staying an order pending an appeal is the same as the test for an interlocutory injunction. The appellants raised the serious question whether the judge erred by, in effect, penalizing innocent union members by prohibiting them from peaceful picketing even though they were not found in contempt. Whether this was a proper sanction for a finding of contempt against five named individual appellants was far from a frivolous issue. The union would be irreparably harmed if a stay was not granted. Picketing is one of the few lawful methods striking employees can use to exert pressure on an employer to conclude a collective agreement. An outright ban on picketing diminished the union's leverage to settle the strike and thus altered the balance of power between the union and the employer. Such a loss could not be quantified in economic terms. The balance of convenience weighed strongly in favour of granting the stay requested. The union would suffer great harm if the stay was not granted. Members of the bargaining unit who were not found in contempt would be denied their right to engage in peaceful picketing during a legal strike. Pending appeal they should not be punished for the contemptuous acts of others. The union's bargaining position would otherwise be irretrievably weakened for months during the ongoing dispute. The employer

could not legitimately claim to be seriously harmed if the stay was granted. It had no right in ordinary circumstances to be free from peaceful, lawful picketing.

*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 54 C.P.R. (3d) 114, 111 D.L.R. (4th) 385, 164 N.R. 1, 60 Q.A.C. 241, **apld**

#### **Other cases referred to**

*810099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 49 C.P.C. (2d) 239 (Ont. Div. Ct.); *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, 31 B.C.L.R. (2d) 273, 44 C.C.C. (3d) 289, 30 C.P.C. (2d) 221, 53 D.L.R. (4th) 1, 88 D.T.C. 14,047, 87 N.R. 241, 71 Nfld. & P.E.I.R. 93, 220 A.P.R. 93, [1988] 6 W.W.R. 577; *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1923), 55 O.L.R. 127 (C.A.); *Corona Resources Ltd. v. LAC Minerals Ltd.* (1986), 21 C.P.C. (2d) 252 (Ont. C.A.)

#### **Statutes referred to**

*Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 102  
*Labour Relations Act*, R.S.O. 1990, c. L.2

APPLICATION for an interim stay of an order banning all picketing and protesting at a workplace.

*Ian J. Fellows*, for appellants.

*Mary J. Gersht*, for respondent.

LASKIN J.A. (in Chambers): — The appellants seek a stay of the order of Somers J. dated March 20, 1997, which banned picketing and protesting at the workplace of the respondent Circuit World Corporation. The appellants ask that the stay apply to all persons other than Ali, Ramnath, Nalamuthu, Jain and Wenaden, each of whom was found in contempt by Somers J.

Local 124 of the CAW-Canada holds the bargaining rights for employees of Circuit World. The bargaining unit consists of approximately 100 employees.

On January 9, 1997, the union began a legal strike. Tensions mounted when 27 union members crossed the picket line and the company hired replacement workers. Some picketers, angered by these events, blocked entrances to the workplace and intimidated the workers. Some workers had their car tires slashed, probably by one or more picketers.

On February 18, 1997, Circuit World moved for an order to limit picketing under s. 102 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The union did not oppose the motion and Festeryga J. granted an order restricting picketing to no more than six persons per entrance and no more than 24 persons in total. The picketers were ordered not to obstruct entry to or exit from the workplace, make threats, or trespass onto or vandalize any property of Circuit World's customers or workers.



The union generally obeyed the order of Festeryga J. until March 13, 1997. On that day, however, between 6:00 and 8:00 a.m., a number of unidentified union supporters trespassed onto Circuit World's property, smashed windows, damaged cars belonging to the company's employees, engaged in mass picketing and obstructed access to the workplace. All of this conduct contravened the order of Festeryga J. Circuit World immediately brought contempt proceedings against the six appellants. On March 20, 1997, Somers J. dismissed the motion for contempt against Lesperance but found the other five appellants in contempt for what occurred on the morning of March 13, 1997. He declined, however, to impose any individual sanctions. Instead he amended Festeryga J.'s order and prohibited all picketing and protesting at Circuit World. The union appealed his order. The hearing of the appeal has been expedited by order of Morden A.C.J.O. but still will not be argued until October 22, 1997. The partial stay sought by the union would, if granted, restore the order of Festeryga J. except for the five appellants found in contempt, pending the hearing of the appeal.

On the motion before me Circuit World filed affidavit material showing additional breaches of the order of Festeryga J. between March 13 and March 20, 1997. The company has not filed any material suggesting that the order of Somers J. has been breached. I infer, therefore, that his order banning picketing has been obeyed.

Nonetheless, relations between the union and the company appear to have deteriorated. On March 23, the union advised Circuit World that it would accept its most recent offer. Circuit World responded that the offer was no longer on the table. On April 3, the union filed an unfair labour practices complaint with the Ontario Labour Relations Board claiming that Circuit World was not negotiating in good faith. In mid-April, Circuit World began advertising for full-time employees. The financial situation of the bargaining members who have not returned to work is described in the union's factum as "critical". Against this background I turn to consider whether a stay is warranted.

The test for staying an order pending an appeal is the same as the test for an interlocutory injunction. The Supreme Court of Canada described the test as follows in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at p. 334, 111 D.L.R. (4th) 385:

First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the

parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

These three criteria are not watertight compartments. The strength of one may compensate for the weakness of another. Generally, the court must decide whether the interests of justice call for a stay: *International Corona Resources Ltd. v. LAC Minerals Ltd.* (1986), 21 C.P.C. (2d) 252 (Ont. C.A.). Nonetheless in many cases whether to grant a stay will depend on the third criterion, called the balance of convenience or the balance of inconvenience.

#### (1) *Serious Question*

This case is not an exception to the general rule that on a motion for a stay the court should not extensively review the merits of the appeal. Here the appellants must show only that the appeal raises a serious issue. This is a low threshold. In my view the appellants raise the serious question whether Somers J. erred by, in effect, penalizing innocent union members, by prohibiting them from peaceful picketing even though they were not found in contempt. Whether this was a proper sanction for a finding of contempt against five named individual appellants is far from a frivolous issue. I am satisfied that the appellants have met the first criterion for a stay.

#### (2) *Irreparable Harm*

In *RJR-MacDonald*, *supra*, the Supreme Court defined irreparable harm at p. 341 S.C.R. as "harm which cannot be quantified in monetary terms or cannot be cured, usually because one party cannot collect damages from the other". Circuit World submits that the only possible harm to the union from the order of Somers J. is economic and that this harm is reparable either by civil litigation or under the Ontario *Labour Relations Act*, R.S.O. 1990, c. L.2.

In my view this submission fails to give effect to the significance of picketing, which was eloquently described by Dickson C.J.C. in *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214 at p. 230, 53 D.L.R. (4th) 1:

Picketing is a crucial form of collective action in the arena of labour relations. A picket line is designed to publicize the labour dispute in which the striking workers are embroiled and to mount a show of solidarity of the workers to their goal. It is an essential component of a labour relations regime founded on the right to bargain collectively and to take collective action. It represents a highly important and now constitutionally recognized form of expression in all contemporary labour disputes. All of that is beyond dispute. In *Harrison v. Carswell*, [1976] 2 S.C.R. 200, a majority of this Court stated at p. 219:



Society has long since acknowledged that a public interest is served by permitting union members to bring economic pressure to bear upon their respective employers through peaceful picketing, but the right has been exercisable in some locations and not in others . . . .

Picketing is one of the few lawful methods striking employees can use to exert pressure on an employer to conclude a collective agreement. An outright ban on picketing diminishes the union's leverage to settle the strike and thus alters the balance of power between the union and Circuit World. Such a loss cannot be quantified in economic terms. I am therefore satisfied that the union will be irreparably harmed if a stay is not granted.

### (3) Balance of Convenience

In addressing the balance of convenience on a motion for a stay pending appeal the court must consider "the actual adjudication that has taken place and which must be regarded as *prima facie* right": see *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1923), 55 O.L.R. 127 (C.A.), per Middleton J.A. at p. 132; cited in 820099 *Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 49 C.P.C. (2d) 239 (Ont. Div. Ct.) at p. 243. This consideration favours Circuit World's position.

But the balance of convenience otherwise weighs strongly in favour of granting the stay requested. The union will suffer great harm if the stay is not granted. Members of the bargaining unit and others who were not found in contempt will be denied their right to engage in peaceful picketing during a legal strike. Pending appeal they should not be punished for the contemptuous acts of others. The union's bargaining position will otherwise be irretrievably weakened for months during the ongoing dispute.

On the other hand, Circuit World cannot legitimately claim to be seriously harmed if the stay requested is granted. Circuit World has no right in ordinary circumstances to be free from peaceful, lawful picketing. Its main concern is that a stay "increases the likelihood of violence, acts of intimidation and further breaches of the order of Festeryga J.". This concern is understandable in the light of what occurred on March 13, 1997. But it is not readily apparent why members of the union will be more inclined to breach a peaceful picketing order than to breach a no-picketing order. Though the conduct that occurred on March 13 was reprehensible, there is no evidence of a continual flagrant disregard of court orders by union members. Indeed the union members appear to have fully complied with the order of Somers J. since it was made. Those five appellants who were found in contempt of this order will be denied the benefit of the stay and will not be permitted to picket.

For these reasons, the balance of convenience and indeed the interests of justice warrant the partial stay requested by the appellants. Therefore the order of Somers J. will be stayed pending the hearing of the appeal except as it applies to the five appellants found in contempt. Should there be any breach of my order (that is, those parts of the order of Festeryga J. restored by my order) Circuit World may apply to this court for the relief it considers appropriate. In accord with the submissions of counsel, the appellants are entitled to their costs of this motion.

*Application allowed.*

## Litigation Guardian of Tsaoussis et al. v. Baetz

### Litigation Guardian of Tsaoussis v. Baetz

[Indexed as: Tsaoussis (Litigation Guardian of) v. Baetz]

Ontario Court (General Division), Leitch J. April 28, 1997

**Civil procedure — Settlement — Court setting aside court-approved settlement of infant plaintiff's claim on basis of evidence indicating that plaintiff more severely injured than had been believed at time of settlement — Test for setting aside court-approved infant settlement being whether infant's best interests met.**

**Limitations — Derivative claimants — Derivative claim of adult plaintiff extended until infant plaintiff attains age of majority — Family Law Act, R.S.O. 1990, c. F.3 — Limitations Act, R.S.O. 1990, c. L.15, s. 47.**

The infant plaintiff was injured in a 1990 motor vehicle accident when she was three-and-a-half years old. On the basis of the medical evidence available at that time, the court approved a settlement of the plaintiff's claim against the defendant for \$5,000 plus interest and costs. As the infant plaintiff grew up, it became apparent that she had significant intellectual and cognitive deficits. There was medical evidence linking the infant plaintiff's symptoms to brain damage sustained in the 1990 motor vehicle accident. The plaintiffs moved for an order setting aside the order approving the settlement and an order granting leave to the plaintiffs to proceed with an action against the defendant for damages in excess of \$2 million. The defendant asserted that, if the settlement were set aside, the derivative claim of the infant plaintiff's mother should be dismissed because it was statute-barred by the limitation period in the *Family Law Act*.

**Held**, the plaintiffs' motion should be granted; the defendant's motion for summary judgment dismissing the adult plaintiff's claim should be dismissed.

It was necessary to look at the new medical evidence which was not before the judge who approved the settlement, not to show that the assessment of the previously existing evidence was incorrect, but to allow an assessment as to whether

Ontario Energy Board

FILE No. EB-2007-0797

EXHIBIT No. 1C-1

DATE Nov 9, 2007

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