NOVA SCOTIA COURT OF APPEAL
Citation: *Oickle v. L & B Electric Ltd.*, 2004 NSCA 42

Date: 20040318
Docket: CA 208099
Registry: Halifax

Between:

Larry B. Oickle

Appellant

v.

L & B Electric Ltd. and Ross M. Bunnell

Respondents

Judges:	Cromwell, Chipman and Fichaud, JJ.A.
Appeal Heard:	February 11, 2004, in Halifax, Nova Scotia
Held:	Leave to appeal is granted and appeal is allowed to set aside the fine and appeal is dismissed against the costs order as per reasons for judgment of Fichaud J.A., Chipman and Cromwell, JJ.A. concurring.
Counsel:	G. F. Philip Romney, for the appellant Rubin Dexter and Martin C. Dumke, for the respondents

Reasons for judgment:

[1] Does a Supreme Court judge have inherent jurisdiction to fine someone who has not committed an offence or contempt of court?

Background

[2] L & B Electric Limited sued Larry Oickle for breach of duty as an employee and fiduciary. Mr. Oickle counterclaimed. During the pre-trial discovery, L & B produced to Mr. Oickle T4 slips of its employees and shareholders. Mr. Oickle then delivered the T4's to other employees of L & B for purposes unrelated to the litigation. Mr. Oickle's counsel had not advised Mr. Oickle to maintain confidentiality over the disclosed documents. L & B applied under **Civil Procedure Rule** 55 for contempt of court against Mr. Oickle, based on the breach of the implied undertaking that documents produced during discovery may not be used for a purpose outside the litigation.

[3] On the morning of September 22, 2003, Justice Richard in chambers ruled that Mr. Oickle had breached the implied undertaking, but stated "I refrain from granting an order for contempt against Mr. Oickle solely on the basis that he had no direct knowledge that what he did was in breach of an implied undertaking". The chambers justice then stated that, "to satisfy the general and ... the specific deterrent requirements here, I am going to impose a fine on Mr. Oickle of $2,000", enjoined Mr. Oickle from further breaches of the implied undertaking and said he would order solicitor/client costs.

[4] After lunch on September 22, both counsel reappeared before Justice Richard. Counsel pointed out that, as there had been no finding of contempt, there may not be power to fine under **Rule** 55. Justice Richard and counsel had the following exchange:

> MR. ROMNEY: ... and I'm not sure, I don't, I'm not sure whether it's inherent jurisdiction of the court or not, I really can't comment on that. But it seems to me that in accordance with your reasoning this morning Mr. Oickle was not found in contempt...
>
> THE COURT: No.

MR. ROMNEY: ... and in accordance with the **T & G** case and the **Tucket Sales** case that you could not find him in contempt. But I'm not sure whether you have the inherent jurisdiction to find [*sic*] him as you did, I'm not sure.

THE COURT: I think I have, I think I have.

MR. ROMNEY: I'm not sure, I really can't say.

THE COURT: It's pretty broad, that's why they call us the Superior Court. (Laughter)

MR. ROMNEY: Well I certainly haven't had time to research the question.

THE COURT: Well I would, I would - if there's, if there has to be another way of getting there that's fine. If you wish to frame it in terms of the court exercised its jurisdiction and then fine and ignore the rule, you can run that by Mr. Romney and if he has any further comment, I'll give you a chance tomorrow morning.

MR. ROMNEY: CertainlyYour Honour, My Lord there's various provisions of the *Judicature Act* that seem to override the particular provisions of the *Civil Procedure Rules* ...

THE COURT: Exactly, yes.

MR. ROMNEY: ... and I have looked at those but ...

THE COURT: Yeah, yeah. Well I, I know it's, I know it's there and I can do it; whether I can do it under that rule is not, not really important except procedurally ...

MR. ROMNEY: Correct.

THE COURT: ... now in order to correct the procedure, you, you draft your order without reference to 55.09.

MR. DUMKE:Yes My Lord.

> THE COURT: And we'll, we'll handle it from there. And I, I offer you again Mr. Romney if you, if you feel that there's, that there's something that still should be done I'll be, I'll be back tomorrow around 10:00 o'clock and, and I'll hear you then ...
>
> MR. ROMNEY: Fine, thank you.

[5] There was no appearance on the following day, September 23. On September 30, 2003, Mr. Oickle filed a Notice of Appeal to the Court of Appeal.

[6] On October 3, 2003 counsel reappeared before Justice Richard to deal with costs and the form of the order. The following exchange occurred:

> THE COURT: Now this hearing is a result of an application filed by the defendant for a taxation of costs pursuant to the decision that was rendered by me last Friday. I understand Mr. Romney that you were going to appeal?
>
> MR. ROMNEY: Yes My Lord.
>
> THE COURT: It would be nice to have something to appeal from so we may as well fix an order today.
>
> MR. ROMNEY: Fine My Lord.
>
> THE COURT: Is your appeal basically on the, on the costs or on the, the whole, the whole matter?
>
> MR. ROMNEY: The appeal right now is on the fine of $2000.
>
> THE COURT: O.K. O.K.
>
> MR. ROMNEY: That's the main point of the appeal.
>
> THE COURT: O.K. Fair enough. Why does that not surprise me ...

Counsel for L & B then made a submission that the court had inherent power to issue a fine. Counsel for Mr. Oickle stated:

MR. ROMNEY: My Lord I really don't want to interrupt my learned friend but I, I'm not sure why we're having this discussion on jurisdiction. If I recall correctly last Monday afternoon if I wanted to make further representations on jurisdictions I was to come back to see Your Honour last Friday. I'm not here to object to the jurisdiction of the court.

THE COURT: I see.

MR. ROMNEY: The notice says Taxation of Costs.

THE COURT: Yeah, ok. Fair enough, thank you.

MR. DUMKE:Fair enough. And, and I, I think that settles it, that issue.

THE COURT: At least at this level of court.

MR. DUMKE:At least at this level of court, however, I, I would like to note for the record that in fact my learned friend has made that representation that the jurisdiction of the court to order as ordered is not an issue.

[7] The parties then made submissions on costs. Justice Richard, in his ruling on costs, stated:

> It was not my intention by ordering solicitor-client costs to either enrich the defendant in this case or impoverish the plaintiff. It was merely to give the defendant adequate compensation for the costs that were incurred as a result of this breach of the implied undertaking rule. I indicated in my comments here this morning that I did not grant the contempt order. I would have granted the contempt order had you, Mr. Romney, instructed your client as to the limited use he could make of the discovery material. You didn't do that, there was no way that your client could have known that and therefore I couldn't equate that to a contempt because contempt in my mind is a situation where a person has the order of the court facing him and he says I will ignore that and do what I want to do what I please. That to me is contempt. This is something substantially less. ...
>
> Now I said the court has the luxury of changing its mind, and I'm going to. I'm going to not grant costs on a solicitor-client basis, but I'm going to fix an amount and I think I have jurisdiction to do that and looking at all the documents and all the matters that were before me in this interlocutory application, it would appear to me that an all- inclusive amount of $3000 would be very adequate in compensation. It constitutes a wake-up call to the plaintiff and people like that

> that you can't do this without attracting a fairly substantial penalty as well as costs in the circumstances so I will reiterate the fact that the fine for the implied undertaking rule is set at $2000 and costs to the defendant are set at $3000.

Issues

[8] Mr. Oickle's Notice of Appeal of September 30, 2003 appealed against (1) the fine of $2,000 and (2) the solicitor/client costs from the chambers justice's initial decision of September 22, 2003. The chambers justice's later decision of October 3 replaced the solicitor/client costs with a lump sum of $3,000.

The Fine

[9] The principal issue in this appeal relates to the $2000 fine.

[10] **The Undertaking:** In **Sezerman v. Youle** (1996), 150 N.S.R. (2d) 161 (C.A.), Justice Chipman (paras. 10-45, 75) reviewed the law respecting the implied undertaking against collateral use of information obtained on discovery. Justice Chipman (paras. 45, 75) adopted the definition of the implied undertaking stated in an article authored by John B. Laskin, as follows: (quoted from **Sezerman**, para. 6)

> [6] The application was made to the Chambers judge to stay the defamation action on the ground that its commencement constituted breach of an undertaking of the type referred to by Mr. John Laskin (as he then was), in an article entitled "**The Implied Undertaking In Ontario**" (1989-90), 11 The Advocates' Quarterly at p. 298:
>
> > In any event, recent decisions in Ontario appear to have made it clear that the following two propositions form part of Ontario law:
> >
> > (1) . . .
> >
> > There is an implied undertaking by a party to whom documents are produced that he or she will not use them for collateral or ulterior purposes; any such use of the documents is a contempt of court.
> >
> > (2) There is an implied undertaking by a party conducting an oral examination for discovery that the information so obtained

> will not be used for collateral or ulterior purposes; any such use is a contempt of court.

[11] Mr. Oickle used the T4 slips obtained during the documentary productions for purposes other than the litigation. This breaches the implied undertaking which, as stated in the passage quoted above, may be contempt of court.

[12] **Contempt:** The chambers justice dismissed the contempt application on the basis that Mr. Oickle had no direct knowledge that he was breaching the implied undertaking rule. That aspect of the decision has not been appealed. For that reason, I make no comment on the chambers justice's conclusion. But I note that there is authority in other jurisdictions that actual knowledge of the implied undertaking rule by the person in breach of that rule, is not required for a finding of contempt. In this respect, the breach of the implied undertaking has been distinguished from breach of a court order on the basis that the implied undertaking rule is part of the general law of which ignorance is no excuse: see, for example W. Williston and R.J. Rolls **The Law of Civil Procedure** (1970) Vol. II at p. 941; **Reichmann v. Toronto Life Publishing**, [1988] O.J. No. 961 (Ont. H.Ct.); **Randall v. Caldwell First Nation of Point Pelee**, [2002] F.C.J. No. 39 (T.D.); Jeffrey Miller **The Law of Contempt in Canada** (1997), p. 124.

[13] In **T.G. Industries Limited v. Williams**, 2001 NSCA 105, (2001), 196 N.S.R. (2d) 35 (C.A.) which was cited to the chambers justice in this case, the court distinguished criminal and civil contempt, civil contempt being the applicable standard in the present case. Justice Cromwell (paras. 13, 17, 19-31) stated that civil contempt for disobedience of a court order requires that the contemnor be aware of the order and intend to commit the act which constitutes breach of the order, but that the contemnor need not know that his act was illegal and need not intend to disobey. Jutisce Cromwell (paras. 25 and 31) did not consider any **Charter** issues involved with the mental element for contempt, as those matters had not been argued, but stated that a due diligence defence would answer a **Charter** challenge.

[14] Nothing in these reasons should be taken to alter the principles which this Court outlined in **T.G. Industries**. The chambers justice ruled that Mr. Oickle had not committed contempt. This has not been appealed. So I will proceed on the basis that there has been no contempt.

[15] **The Fine:** In argument to this Court, neither counsel cited any authority where a court issued a criminal sanction such as a fine, without first ruling that the defendant had committed an offence or quasi criminal offence, either statutory or the sole remaining common law offence, contempt of court.

[16] Counsel for the respondents submitted that the chambers justice had the inherent jurisdiction of a superior court to regulate proceedings before the court which included the imposition of a fine even without a finding of contempt of court.

[17] I disagree. The chambers justice certainly had the inherent jurisdiction of a superior court to regulate the process of the court, which would include the power to enjoin by order Mr. Oickle from further breaches of this undertaking. The chambers justice had the inherent jurisdiction which has long existed at common law, now codified in **Rule** 55, to consider whether Mr. Oickle's breach of the undertaking was contempt of court and, if so, to punish Mr. Oickle by fine for contempt. But the offence of contempt of court is the vehicle to the destination of this criminal sanction. Courts, even superior courts, do not have inherent jurisdiction to issue criminal sanctions without first determining that the defendant has committed an offence.

[18] This is apparent from the case law governing the superior court's inherent power to "punish for contempt" to aid the administration of justice. The power to punish both for contempt in the face of the court and for disobedience of orders outside the court has long been considered part of the inherent jurisdiction of the court.

[19] In **R. v. Vaillancourt**, [1981] 1 S.C.R. 69 at pp. 73-75, Justice Chouinard for the court stated:

> In *Re Gerson, Re Nightingale, supra*, Kerwin J., as he then was, commenting on ss. 165 and 180 *Cr. C.*, now ss. 116 and 127 respectively, said for the Court at p. 549:
>
> > The argument on this point was that the applicant could be prosecuted under either of these sections and that these proceedings being available ***the right of the Court to punish for a contempt*** had been abrogated. Without deciding whether either of these sections would apply in the circumstances, we are of opinion that even if that were so it is a

> necessary incident to every superior Court of justice to imprison for a contempt of Court committed in the face of it.

This inherent power has been recognized for several hundred years. In *R. v. Almon* [(1765), 97 E.R. 94], Wilmot J. expressed the following opinion at p. 99:

> The power which the Courts in Westminster Hall have of vindicating their own authority, is coeval with their first foundation and institution; it is a necessary incident to every court of Justice, whether of record or not, ***to fine and imprison for a contempt*** to the Court, acted in the face of it, 1 Vent. 1. And the issuing of attachments by the Supreme Courts of Justice in Westminster Hall, for contempts out of Court, stands upon the same immemorial usage as supports the whole fabrik of the common law; it is as much as the "lex terrae", and within the exception of Magna Charta, as the issuing any other legal process whatsoever.

In *In re Johnson* [(1887), 20 Q.B. 68], Bowen J. of the British Court of Queen's Bench observed at p. 74:

> The law has armed the High Court of Justice with power and imposed on it the duty of preventing *brevi manu* and by summary proceedings any attempt to interfere with the administration of justice.

In *Morris v. The Crown Office* [[1970] 1 All E.R. 1079], Lord Denning noted at p. 1081:

> The phrase "***contempt in the face of the Court***" has a quaint old-fashioned ring about it: ***but the importance of it, is this***: of all places where law and order must be maintained, it is here, in these courts. The course of Justice must not be deflected or interfered with. Those who strike at it, strike at the very foundations of our society. ***To maintain law and order, the judges have, and must have, power at once to deal with those who offend against it. It is a great power -- a power instantly to imprison a person without*** a trial -- but it is a necessary power. So necessary indeed that until recently the judges exercised it without any appeal.

In *In the matter of Lewis Duncan* [[1958] S.C.R. 41], Kerwin C.J., speaking for the Court, said at p. 43:

> The objection taken by Mr. Duncan to our jurisdiction to cite him for contempt has no foundation. By the provisions of the *Supreme Court Act*, R.S.C. 1952, c. 529, this Court is a common law and equity Court of

> record and its power to cite and, in proper circumstances, find a barrister guilty of contempt of Court for words uttered in its presence is beyond question. That power has been exercised for many years and it is not necessary that steps be taken immediately.
>
> And Kerwin C.J. cited the 3rd edition of *Halsbury*, vol. 8 (1954), at p. 5:
>
> The power to ***fine and imprison for a contempt*** committed in the face of the Court is a necessary incident to every court of justice.

[emphasis added]

[20] In **United Nurses of Alberta v. Alberta (Attorney General)**, [1992] 1 S.C.R. 901, at p. 931, Justice McLachlin (as she then was) stated a similar principle:

> 50 Both ***civil and criminal contempt*** of court rest on the power of the court to ***uphold its dignity and process***. The rule of law is at the heart of our society; without it there can be neither peace, nor order nor good government. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect. ***To maintain their process and respect, courts since the 12th century have exercised the power to punish for contempt of court.*** [Emphasis added]

[21] In **MacMillan Bloedel Ltd. v. Simpson**, [1995] 4 S.C.R. 725, Chief Justice Lamer considered the inherent jurisdiction of the court to punish conduct which offended the administration of justice:

> 20. The authoritative history of contempt of court was written by Sir John Fox in 1927 (*The History of Contempt of Court: The Form of Trial and the Mode of Punishment* (reprinted 1972)). In his introductory remarks, he states that contempt of court has been a recognized phrase in English law from the twelfth century to the present time, and continues (at p. 1):
>
> > ***The punishment of contempt is the basis of all legal procedure and implies two distinct functions to be exercised by the Court: (a) enforcement of the process*** and orders of the Court, disobedience to which may be described as 'civil contempt', and (*b*) ***punishment of other acts which hinder the administration of justice***, such as disturbing the proceedings of the Court while it is sitting (contempt in court) or libelling a Judge or publishing comments on a pending case (contempt out of court), which are both distinguished as 'criminal contempt'.

[emphasis added]

The distinction he draws between civil and criminal contempt does not precisely correspond with the distinction drawn in contemporary Canadian law, but this is of little import given the difficulties in establishing that distinction. He does note, also, that some contempts are both civil and criminal. Fox's work demonstrates that the punishment of contempt predated the development of criminal law.

. . .

29. The seminal article on the core or inherent jurisdiction of superior courts is I. H. Jacob's "The Inherent Jurisdiction of the Court" (1970), 23 *Current Legal Problems* 23. Jacob's work is a starting point for many discussions of the subject, figures prominently in analyses of contempt of court, and was cited with approval by Dickson C.J. in *B.C.G.E.U. v. British Columbia (Attorney General),* [1988] 2 S.C.R. 214. While the particular focus of Jacob's work is the High Court of Justice in England, he notes that "[t]he English doctrine of the inherent jurisdiction of the court is reflected in most, if not all, other common law jurisdictions, though not so extensively in the United States" (p. 23, fn. 1). Moreover, the English judicial system is the historic basis of our system and is explicitly imported into the Canadian context by the preamble of the *Constitution Act, 1867*. The superior courts of general jurisdiction are as much the cornerstone of our judicial system as they are of the system which is Jacob's specific referent.

30. Discussing the history of inherent jurisdiction, Jacob says (at p. 25):

...

> ... the jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called "inherent." This description has been criticised as being "metaphysical" [cite omitted], but I think nevertheless that it is apt to describe the quality of this jurisdiction. For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law. [Chief Justice Lamer's emphasis.]

[22] Chief Justice Lamer emphasized that the power to "punish for contempt" is one of the inherent powers of a superior court:

> 38. The core jurisdiction of the provincial superior courts comprises those powers which are essential to the administration of justice and the maintenance of the rule of law. It is unnecessary in this case to enumerate the precise powers which compose inherent jurisdiction, as the power to punish for contempt *ex facie* is obviously within that jurisdiction. The power to punish for all forms of contempt is one of the defining features of superior courts. ...
>
> 39. Borrie and Lowe, *supra*, state that "[t]he power that courts of record enjoy to punish contempts is part of their *inherent* jurisdiction" (p. 314 (emphasis in original)). After referring to Jacob's work, which I have discussed earlier, they continue:
>
> > Such a power [to punish for contempt] is not derived from statute nor truly from the common law but instead flows from the very concept of a court of law.
>
> Miller, *supra*, also links the contempt power directly to the core jurisdiction of superior courts (at p. 18):
>
> > From its ancient origins contempt of court has developed over the years as a creation of the superior courts, building on their inherent powers.
>
> And later (at pp. 49-50):
>
> > In the case of contempt this inherent jurisdiction was linked historically to the notion of an affront to the King's justice with the equivalence between the sovereign and the courts in matters of contempt being relatively straightforward.
>
> 40. Canadian contempt of court case law also attests to the intertwining of superior court core jurisdiction and the contempt power. Writing for the Court in *Vermette*, *supra*, a case involving *ex facie* contempt, McIntyre J. said (at p. 581):
>
> > The power to deal with contempt as part of the inherent and essential jurisdiction of the courts has existed, it is said, as long as the courts themselves. ... This power was necessary, and remains so, to enable the orderly conduct of the court's business and to prevent interference with the court's proceedings.

[23] The court's inherent power to regulate its process includes a power to "punish for contempt". The court's inherent power to punish in aid of the administration of justice channels through the standard of contempt. There is no inherent common law power to levy random criminal sanctions without contempt of court.

[24] The chambers justice's premise contradicts s. 9(a) of the **Criminal Code**:

> **9.** Notwithstanding anything in this Act or any other Act, no person shall be convicted or discharged under section 730
>
> (*a*) of an offence at common law,
>
> . . .
>
> but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or provincial court judge had, immediately before April 1, 1955, to impose punishment for contempt of court.

There remains no common law power to convict (and therefore to punish) for a crime other than contempt of court.

[25] No **Charter** argument was made, so I do not state any conclusions on the **Charter**. I note, however, that a fortuitous criminal sanction without the commission of an offence (either statutory or the common law offence of contempt) would raise issues under ss. 11(a), 11(d), 11(g), and a vagueness issue under s. 7. (See **United Nurses of Alberta**, para. 57.)

[26] **Waiver:** The respondents say that at the hearing on the afternoon of September 22, the chambers justice gave counsel for Mr. Oickle the opportunity to make submissions to challenge the court's jurisdiction to levy the fine, and that Mr. Oickle's counsel did not do so. The respondents suggest that this waives any objection to jurisdiction.

[27] In my view, there was no waiver because Mr. Oickle was not obliged to re-argue the issue to the chambers justice. It does not matter whether the chambers

justice had the power to alter his initial decision before the signature of the formal order. Once the chambers justice ruled, on the morning of September 22 that, “I am going to impose a fine on Mr. Oickle of $2,000", Mr. Oickle was entitled to pursue an appeal, and to restrict his further dealings with the chambers justice to costs and finalization of the form of order.

[28] **Summary:** For these reasons, in my view, the chambers justice did not have the inherent power to levy a fine without contempt of court. The chambers justice erred in law, which is reviewable under the standard of review. I would set aside the fine.

Costs

[29] In **Conrad v. Snair** (1996), 150 N.S.R. (2d) 214 (C.A.) Justice Flinn stated (para. 5):

> Since orders as to costs are always in the discretion of the trial judge, this appeal is subject to a clearly defined standard of review. This Court has repeatedly stated that it will not interfere in a trial judge’s exercise of discretion unless wrong principles of law have been applied, or the decision is so clearly wrong as to amount to a manifest injustice. [citations omitted]

[30] The chambers justice described the costs of $3,000 as a “wake up call” to admonish a party who has breached the implied undertaking against disclosure of documents obtained on discovery.

[31] **Rule** 63.02(1)(a) authorizes the Court to award a lump sum instead of taxed costs. **Rule** 63.04(2) paras. (c), (d), (e), (f) and (j) permit the Court to consider the inappropriate conduct of the unsuccessful party. In **353903 Ontario Ltd v. Black & MacDonald Ltd.** (2000), 187 N.S.R. (2d) 323 (C.A.), 2000 NSCA 45, Justice Bateman stated:

> While costs are generally intended for indemnification, in appropriate circumstances costs can serve to censure improper behaviour by a litigant.

The costs were an appropriate “wake up call” to censure Mr. Oickle and deter a further breach.

[32] Mr. Oickle breached the implied undertaking and the chambers justice properly enjoined further breaches. In my view, the chambers justice was within his discretion in fixing costs and the appeal against costs should be dismissed.

[33] In summary, I would grant leave to appeal and allow the appeal to set aside the fine and dismiss the appeal against the costs order. The appellant shall have costs on this appeal of $1,200 all inclusive, being 40% of the costs awarded by the chambers justice.

Fichaud, J.A.

Concurring:

Chipman, J.A.

Cromwell, J.A.