NOVA SCOTIA COURT OF APPEAL

Citation: *Gravelle v. Canada Mortgage and Housing Corporation*, 2023 NSCA 88

Date: 20231213
Docket: CA 522283
Registry: Halifax

Between:

David Eugene Gravelle, also known as David E. Gravelle, also known as David T. Gravelle

Appellant

v.

Canada Mortgage and Housing Corporation

Respondent

And

Michelle Saide Gravelle, also known as Michelle S. Hamilton, also known as Michele Sadie Hamilton, also known as Michelle Saide Hamilton

Respondents

Judge:	The Honourable Justice Anne S. Derrick
Appeal Heard:	December 4, 2023, in Halifax, Nova Scotia
Subject:	*Enforcement of Canadian Judgments and Decrees Act*, S.N.S. 2001, c. 30. Registration of judgments *nunc pro tunc*. The doctrine of *res judicata.*
Summary:	In January/February 2020, the respondent sought to register two Alberta judgments against the appellant in the Supreme Court of Nova Scotia under the *ECJDA*. The judgments had not yet exceeded the time threshold under s. 7(1) of the *Act*. The acting prothonotary declined to register the judgments. The respondent went before a Chambers judge who also did

not register the judgments. He converted the respondent's motion into an application for directions pursuant to s. 8 of the *Act*. Covid intervened. The respondent did not advance registration further until May/June 2022. In January 2023, the motions judge granted the respondent's application to register the judgments, backdating registration to February 25, 2020 "*nunc pro tunc*". The appellant claimed error by the motions judge on the basis the registration was statute barred as the time for enforcement had now expired in Alberta where the judgments originated.

Issues: (1) Did the motions judge commit a reviewable error by registering the Alberta judgments by order *nunc pro tunc*?
(2) Was the registration order *res judicata*?
(3) Did the motions judge err in awarding costs against the appellant?

Result: Appeal dismissed. The motion judge had the inherent jurisdiction to issue an order *nunc pro tunc*. His order remedied the failure of the prothonotary to register the Alberta judgments in January/February 2020. He was correct to have found the judgments should have been registered by the Supreme Court of Nova Scotia when the respondent first presented them, as all the statutory requirements for registration under the *ECJDA* had been satisfied. There was no *res judicata* issue. The award of costs against the appellant was appropriate.

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Respondents

Judges:	Bryson, Derrick, Beaton, JJ.A.
Appeal Heard:	December 4, 2023, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs, per reasons for judgment of Derrick, J.A.; Bryson and Beaton, JJ.A. concurring.
Counsel:	Michael Curry, for the appellant Joshua Santimaw, for the respondent

Reasons for judgment:

Introduction

[1] The *Enforcement of Canadian Judgments and Decrees Act* (*ECJDA*)[1] is a statutory scheme created to streamline the process for registering a domestic judgment throughout Canada. Its promulgation in Nova Scotia should have meant the respondent's application to register two Alberta judgments against the appellant in Nova Scotia would proceed smoothly. It didn't.

[2] Eventually, after some twists and turns, Justice Peter Rosinski of the Nova Scotia Supreme Court registered the judgments by order *nunc pro tunc*.[2] In other words, he backdated the registration. The appellant says he was in error to have done so because when he decided the matter on January 27, 2023 the judgments had expired. As the reasons that follow explain, I respectfully disagree the registration was invalid. I would dismiss the appeal.

The *Enforcement of Canadian Judgments and Decrees Act*

[3] The *ECJDA* provides that a "Canadian judgment"[3] may be registered under the *Act* for the purposes of enforcement. Where the judgment requires a person to pay money it can only be registered under the *Act* if it is a final judgment.[4] Registration in Nova Scotia is achieved by paying a fee prescribed by regulation and by filing the judgment in the registry of the Supreme Court of Nova Scotia.[5]

[4] The *ECJDA* imposes time limits on registration. Section 7(1) provides that:

> 7 (1) A Canadian judgment that requires a person to pay money must not be registered or enforced under this *Act*
>
> (a) after the time for enforcement has expired in the province or territory where the judgment was made; or
>
> (b) later than twenty years after the day on which the judgment became enforceable in the province or territory where it was made.

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[1] S.N.S. 2001, c. 30.
[2] *Canada Mortgage and Housing Corp. v. Gravelle*, 2023 NSSC 26.
[3] A Canadian judgment is a judgment, decree or order made in a civil proceeding by a court of a province or territory of Canada other than the province that requires a person to pay money (s.2(aa)(i)).
[4] *ECJDA*, s. 4(2).
[5] *Ibid*, s. 5.

[5] The appellant does not dispute the judgments the respondent sought to register in this case were final judgments. The controversy relates to time: the appellant says by the time Justice Rosinski made his decision, the judgments had expired. In the appellant's submission, the judgments could not be registered in compliance with the *ECJDA*.

[6] The appellant offered the alternative argument before Justice Rosinski, that if he found the judgments were properly registered in January/February 2020, they could no longer be enforced. I would note that enforcement is not an issue for this appeal.

Background Facts

[7] An order for summary judgment was obtained by CIBC against the appellant from the Alberta Court of Queen's Bench on August 26, 2010. On August 4, 2011, Amber Lafitte swore an affidavit on behalf of CIBC verifying a deficiency judgment in the amount of $383,496.32. A Writ of Enforcement was issued on August 12, 2011 in that amount.

[8] On September 27, 2019 an order was obtained from the Court of Queen's Bench changing the style of cause from CIBC to the respondent.

[9] These orders related to a substantial mortgage on which the appellant had defaulted.

[10] On January 17, 2020, pursuant to the *ECJDA* the respondent sought to register the two Alberta judgments in the Supreme Court of Nova Scotia. The filing was in the form of an affidavit deposed by counsel for the respondent that attached various documents including the orders from the Alberta Court of Queen's Bench and the Lafitte affidavit.

[11] The acting prothonotary for the Nova Scotia Supreme Court queried the fact that neither order—the one issued August 26, 2010 nor the amending order of September 27, 2019—set out the amount owing. In response, counsel for the respondent indicated the amount of the judgment was found in the Lafitte affidavit.

[12] The prothonotary declined to register the judgments. In an email of February 4, 2020 he explained why. He interpreted the *ECJDA* to authorize the registration of orders of other Canadian courts but not the registration of affidavits. He noted the orders provided for registration did not stipulate the amount to be enforced. He

suggested counsel for the respondent could take the matter to a judge in Chambers if he disagreed with his interpretation of the legislation.

[13] On February 25, 2020 counsel for the respondent made an *ex parte* motion in the Nova Scotia Supreme Court supported by affidavits of counsel that attached the Alberta judgments and the Lafitte affidavit. The appellant acknowledges the judgments had not yet exceeded the time threshold under s. 7(1) of the *ECJDA*.

[14] On March 4, 2020 counsel for the respondent appeared before Justice Timothy Gabriel in Chambers. Justice Gabriel noted the Lafitte affidavit attaching the calculation of deficiency judgment included a listing of property management expenses. Justice Gabriel did not register the judgments. He converted the *ex parte* application into an application for directions pursuant to s. 8 of the *ECJDA* in order to obtain further information from the respondent regarding the Alberta court's assessment and oversight of the property management expenses, and the reason the deficiency judgment amount was not included in an order.

[15] An already fraught process was then derailed in March 2020, at least temporarily, by Covid. It was not until May 13, 2022 that the respondent renewed its efforts to secure registration of the judgments in the Supreme Court of Nova Scotia by way of an amended *ex parte* application. A second amended *ex parte* application was filed on June 16, 2022. I will have more to say about this later.

[16] On September 20, 2022, the appellant filed a Notice of Contest. He opposed the application to register on the basis it was statute barred because, in his submission, the time for enforcement had now expired in Alberta where the judgments had originated.

[17] The appellant relied on s.7(1) of the *ECJDA*. I will reproduce the section for ease of reference:

> A Canadian judgment that requires a person to pay money must not be registered or enforced under this Act
>
> (a) after the time for enforcement has expired in the province or territory where the judgment was made; or
>
> (b) later than twenty years after the day on which the judgment became enforceable in the province or territory where it was made.

[18] Before Justice Rosinski the respondent argued the February 25, 2020 application to the prothonotary should have led to the judgments being registered then, before the expiry of the time limitation. Justice Rosinski agreed.

Justice Rosinski's Decision

[19] Justice Rosinski granted the respondent's application to register the two judgments, backdating the registration to February 25, 2020 "*nunc pro tunc*". He found:

- The respondent had to register its Alberta judgment in Nova Scotia before the time for enforcement had expired in Alberta – by August 26, 2020 or "possibly, as late as April 4, 2021".[6]
- The respondent had a valid Writ of Enforcement out of the Alberta Court of Queen's Bench.
- Although the respondent sought to register the judgments in the Nova Scotia Supreme Court by providing two certified copies on or about January 17, 2020, the prothonotary had declined to register, advising that he did not interpret the *ECJDA* as authorizing registration of affidavits.
- Counsel for the respondent was directed to make a Chambers application.
- The Chambers judge (Justice Gabriel) did not register the orders. He suggested the matter could be treated as an application for directions from the court under s. 8 of the *ECJDA*.
- The August 26, 2010 Order should have been registered by the prothonotary when the respondent sought to file it in January/February 2020 even though it did not expressly specify an amount of judgment.
- All the statutory requirements to register the August 26, 2010 judgment were fulfilled by the respondent, at the latest by, February 25, 2020 in compliance with s. 7 of the *ECJDA*.

[6] *Supra* note 2, at para. 13. It would seem Justice Rosinski was referring to twenty years from the date of the Lafitte affidavit that verified the amount of the deficiency judgment. That date would have been August 4, 2011 not April 4, 2011.

- The two Alberta judgments (2010 and 2019) were effectively registered in the context of the respondent's *ex parte* application filed February 25, 2020.

[20] Justice Rosinski noted the time for enforcement of the Alberta judgments had not expired by February 25, 2020. He concluded:

> [34] As a indicated earlier, it is in the interests of justice to declare, and I will effect such by *nunc pro tunc* order, that the August 26, 2010, and September 27, 2019, Court of Queen's Bench of Alberta Orders were "registered" as that term is used in the *Enforcement of Canadian Judgments and Decrees Act*, SNS 2001, c. 30, on February 25, 2020.[7]

[21] He ordered the appellant to pay $1500 in costs to the respondent.

Issues on Appeal

[22] The appellant says Justice Rosinski made reversible errors by:

1) Failing to consider or weigh the relevant elements required before making an order relying on the doctrine of *nunc pro tunc.*

2) Ruling on issues outside the scope of the hearing.

3) Failing to consider or follow the principles of *res judicata*.

4) Awarding costs.

[23] In my view the appellant's first two issues can be dealt with as one issue:

1) Did the motions judge commit a reviewable error by registering the Alberta judgments by order *nunc pro tunc*?

[24] There are two final issues to be addressed:

2) Was the registration issue *res judicata* as it had been decided by Justice Gabriel?

3) Did the motions judge err by awarding costs against the appellant?

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[7] *Supra* note 2.

Standard of Review

[25] I am of the view that Issues 1 and 2 involve questions of law making the standard of review one of correctness.[8]

[26] The order for costs against the appellant was an exercise of judicial discretion to which a deferential standard of review applies. This Court will not disturb a judge's exercise of discretion in awarding costs unless wrong principles of law have been applied, or the decision is so clearly wrong as to amount to a manifest injustice.[9]

Analysis

[27] Section 5 of the *ECJDA* sets out the procedure for registering a judgment:

> A Canadian judgment is registered under this *Act* by paying the fee prescribed by regulation and by filing in the registry of the Supreme Court of Nova Scotia
>
> (a) a copy of the judgment, certified as true by a judge, registrar, clerk or other proper officer of the court that made the judgment…

[28] The effect of registration is to make the registered judgment enforceable in Nova Scotia "as if it were an order or judgment of, and entered in, the Supreme Court of Nova Scotia".[10]

> **Issue #1** - Did the motions judge commit a reviewable error by registering the Alberta judgments by order *nunc pro tunc*?

[29] Justice Rosinski's *nunc pro tunc* order remedied the failure of the prothonotary to register the Alberta judgments in January/February 2020. He was correct to have found the judgments should have been registered by the Supreme Court of Nova Scotia when the respondent first presented them, as all the statutory requirements for registration under the *ECJDA* had been satisfied.

[30] This Court has recognized the intent of the *ECJDA* that judgments from other Canadian courts are not to be looked behind. As Justice Bryson held in *Quadrangle Holdings Ltd. v. Coady*:

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[8] *Housen v. Nikolaisen*, 2002 SCC 33.
[9] *Binder v. Royal Bank of Canada*, 2005 NSCA 94, at para. 52.
[10] *ECJDA*, s. 6.

> [54] The ECJDA was intended to ensure that courts do not approach interprovincial orders as truly "foreign" judgments under the common law. It's "underlying principle is that it is inconsistent with interprovincial comity for Canadian courts to pass judgment on the actions of the courts of other provinces". (Walker, Janet. Castel & Walker: *Canadian Conflict of Laws*, 6th ed., loose-leaf (updated May 2014), (Markham, Ont: LexisNexis, 2005) at page 14)[11]

[31] Justice Rosinski cited *Quadrangle*. He went on to find:

> [25] The August 26, 2010 Order "to pay money" should properly have been registered by this Court when presented in January/February 2020, even though the August 26, 2010, Order did not expressly specify an amount of judgment.[12]

[32] Justice Rosinski had the inherent jurisdiction to issue an order *nunc pro tunc*. In *CIBC v. Green* the Supreme Court of Canada enumerated factors to be considered in issuing such an order, stating that none of them are determinative:

> [90] … (1) the opposing party will not be prejudiced by the order; (2) the order would have been granted had it been sought at the appropriate time, such that the timing of the order is merely an irregularity; (3) the irregularity is not intentional; (4) the order will effectively achieve the relief sought or cure the irregularity; (5) the delay has been caused by an act of the court; and (6) the order would facilitate access to justice (citations omitted).[13]

[33] The appellant complains that Justice Rosinski did not articulate or consider these factors in making an order *nunc pro tunc*. Relying on *Green* the appellant says an order *nunc pro tunc* should not be made "where this would undermine the purpose of the limitation period or the legislation at issue".[14]

[34] The appellant is correct only to the extent of noting the omission by Justice Rosinski to explicitly refer to the factors. That aside, it is clear Justice Rosinski took into account the elements that underpin the appropriate application of the doctrine. He gave effect to the purpose of the *ECJDA* by recognizing that the Alberta judgments should have been registered at the latest on February 25, 2020, before the limitation period lapsed.

[35] Justice Rosinski was satisfied on the evidence "that Mr. Gravelle was required 'to pay money' for an ascertainable amount, under judgment in

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[11] 2015 NSCA 13.
[12] *Supra* note 2.
[13] 2015 SCC 60, at para. 90.
[14] *Ibid,* at para. 93

Alberta".[15] Where the appellant has no entitlement to immunity from payment under the judgments, it cannot be said the order *nunc pro tunc* amounts to prejudice. What occurred in this case prejudiced the respondent: the failure to register was an irregularity in what should have been a *pro forma* registration of the judgments in the Nova Scotia Supreme Court. Justice Rosinski's order facilitated the respondent's access to justice under the *ECJDA* by affording it the ability to pursue recovery of the money owed to it.

[36] In backdating the registration of the Alberta judgments to February 25, 2020, Justice Rosinski was not conducting a judicial review of the prothonotary's decision to decline registration. Nor was he reviewing the approach taken by Justice Gabriel in Chambers. In each instance, the merits of the registration issue were not addressed. In each instance, the question of whether registration should be effected had not been resolved.

[37] Neither judicial review nor an appeal would have been viable options for the respondent in its quest to have the Alberta judgments registered.

[38] The prothonotary acts in an administrative capacity, as an administrative officer of the Supreme Court of Nova Scotia whose authority is derived from the Nova Scotia *Civil Procedure Rules*. He questioned whether the respondent's documentation satisfied the requirements for registration. He suggested a judge could be asked to assess that. There was no decision from which judicial review could be taken.

[39] As for the respondent's appearance before Justice Gabriel in Chambers, in his decision Justice Rosinski reviewed what had transpired:

> [23] Having listened to the recording of that appearance in General Chambers (with counsel, in open court), the material aspects thereof include:
>
> > (i) the Chambers judge was not satisfied that there had been any judicial oversight and scrutiny of the deficiency judgment amount, and consequently the process to complete registration of these judgments would have to continue further before they could be registered;
> >
> > (ii) he suggested the matter could be treated as an application for directions from the court (s. 8 of the Enforcement Act) . The Chambers judge characterized it as "a question of procedure" and indicated that if

[15] *Supra* note 2, at para. 27.

> there was an opportunity for some judicial scrutiny, registration of the order would "be no problem".[16]

[40] It ultimately fell to Justice Rosinski to deal substantively with the respondent's application for registration. He did so without error.

[41] The appellant raises the issue of the delay between March 2020 when the respondent was before Justice Gabriel and June 16, 2022 when it filed a second amended *ex parte* Chambers application for registration. As the appellant notes, there is no explanation from the respondent as to why it allowed so much time to pass by before advancing its case. In its factum the respondent appears to lay the blame at the feet of the pandemic, referring to the restrictions imposed by the global pandemic on the operation of the courts. The respondent indicates an "essential services model" was instituted that was not completely lifted until February 14, 2022. However there is nothing that explains how this impeded the respondent from pressing on with its registration efforts.

[42] There is nothing in evidence to counter the impression the respondent was dilatory. The respondent has not shown that registration of the judgments could not be advanced sooner than 2022. The appellant says this should have had consequences. However, Justice Rosinski was well aware of the delay. He knew the respondent had been before Justice Gabriel, more than two years earlier. In one of his many extensive footnotes, he remarked on the delay, stating:

> Somewhat inexplicably, it was not until May 13 2022, that CMHC filed an amended *ex parte* application set for hearing on June 20, 2022, seeking an order under the Enforcement Act. On June 16, 2022, a second amended *ex parte* application was filed for an appearance September 6, 2022…[17]

[43] Justice Rosinski could have denied the respondent relief based on the delay but chose not to. He fully apprehended the relevant facts and exercised his inherent jurisdiction to backdate the judgments in accordance with applicable legal principles.

[44] I would dismiss this ground of appeal.

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[16] *Supra* note 2.
[17] *Supra* note 2, at footnote 11.

> **Issue #2** - Was the registration issue *res judicata* as it had been decided by Justice Gabriel?

[45] The appellant argues that Justice Rosinski improperly conducted a review of how Justice Gabriel dealt with the prothonotary's decision not to register the judgments. The appellant says Justice Gabriel reviewed the prothonotary's decision, and agreed with the prothonotary that more needed to be done by the respondent before the judgments could be registered. He asserts the principles of *res judicata* applied and prevented Justice Rosinski from delving into the non-registration.

[46] With respect, I find the *res judicata* argument has no traction. The doctrine does not apply. There must be a final decision from a court of competent jurisdiction before a litigant can invoke *res judicata*. Neither the prothonotary's nor Justice Gabriel's refusal to register the judgments was a final decision. The prothonotary's role was an administrative one. He made no order. Justice Gabriel made no determination of the merits nor did he issue any order.

[47] As stated by the Alberta Court of Appeal in *420093 B.C. Ltd. v. Bank of Montreal*:

> [18] A prior judicial decision will not raise an estoppel by *res judicata*, either issue estoppel or cause of action estoppel, unless (i) **it was a final decision pronounced by a court of competent jurisdiction over the parties and the subject matter**, (ii) the decision was, or involved, a determination of the same issue or cause of action as that sought to be controverted or advanced in the present litigation; and (iii) the parties to the prior judicial proceeding or their privies are the same persons as the parties to the present action or their privies.[18]
>
> [Emphasis added.]

[48] This Court has cited *420093 B.C. Ltd. v. Bank of Montreal* with approval in, for example, *Behner v. Bank of Montreal*[19] and *Kameka v. Williams*[20].

[49] This is not a case of re-litigation as the appellant has suggested. The respondent did what it was advised to do by the prothonotary in February 2020—it made a motion to a Chambers judge. The issue of registration was not resolved before Justice Gabriel. The respondent pursued registration again in 2022. After

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[18] 1995 ABCA 328.
[19] 2010 NSCA 54, at para. 25.
[20] 2009 NSCA 107, at para. 13.

the circuitous journey through the prothonotary and its first Chambers application, it was ultimately successful before Justice Rosinski in vindicating its rights under the *ECJDA*.

[50] I would dismiss this ground of appeal.

Issue #3 – Did Justice Rosinski err by awarding costs against the appellant?

[51] The parties agreed before Justice Rosinski to costs in the amount of $1500, inclusive of disbursements. The appellant contested the registration of the judgments and lost. Justice Rosinski's discretion to award costs in the amount agreed upon by the parties is entitled to deference. There is no basis for appellate intervention. I would dismiss the appeal against costs.

Disposition

[52] I would dismiss the appeal. I would order the parties to bear their own costs on appeal.

Derrick, J.A.

Concurred in:

Bryson, J.A.

Beaton, J.A.