

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Becker Bros. Trucking Inc., 2020 ONCA 316

DATE: 20200522

DOCKET: M51388

Paciocco J.A. (Case Management Judge)

BETWEEN

Her Majesty the Queen (as represented by the Ministry of Transportation)

Moving Party

and

Becker Bros. Trucking Inc.

Responding Party

Patrick Moore, for the moving party

James Manson, for the responding party

Heard: May 21, 2020 by teleconference

REASONS FOR DECISION

[1] Becker Bros. Trucking Inc. (“Becker Bros.”) was convicted of an offence contrary to s. 84(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, after a trial before a Justice of the Peace. That conviction was set aside on appeal by a Justice of the Ontario Court of Justice. Pursuant to s. 131 of *Provincial Offences Act*, R.S.O. 1990, c. P.33 (the “POA”), Her Majesty the Queen (the “Crown”) now seeks leave to appeal that decision to this court. Becker Bros. takes the position that this motion for leave to appeal must be made in writing, and not orally as the Crown contends. It therefore sought a case management hearing to determine the proper procedural mechanism to be followed on motions for leave to appeal under s. 131 of the *POA*. I have conducted the case management hearing and I am directing that the hearing be conducted orally.

[2] *The Rules of the Court of Appeal in Appeals Under the Provincial Offences Act*, O. Reg. 721/94 (the “*POA Rules*”), specifically rr. 3 and 4, apply to motions for leave to appeal under s. 131 of the *POA*. Rule 3 governs the Crown’s motion for leave in this case since the Crown is represented by counsel. It provides that such motions for leave to appeal are to be brought in Form 1. Motions for leave to appeal brought in inmate appeals or where the moving party is not represented by counsel are to be brought under r. 4, in Form 2.

[3] The *POA Rules* do not provide a complete code. Rule 2(1) of the *POA Rules* provides:

2(1) Except where otherwise provided by the Act, another statute or these rules, the Rules of Civil Procedure apply, where appropriate and with necessary modifications, to appeals under sections 131 and 139 of the Act.

[4] Rule 61.03.1 is the rule from the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, that applies to motions for leave to appeal to the Court of Appeal. It directs that, unless the court orders an oral hearing, motions for leave to appeal to the Court of Appeal are to be “heard in writing, without the attendance of the parties or lawyers”: r. 63.03.1(1). If the *POA* or the *POA Rules* do not otherwise provide, r. 63.01.1 of the *Rules of Civil Procedure* would govern the mode of the hearing for leave to appeal brought under s. 131 of the *POA*, and the hearing would presumptively be in writing.

[5] It is not contested that the *POA Rules* otherwise provide for the mode of hearing where the leave to appeal motion is brought in an inmate appeal, or by an unrepresented moving party, since Form 2, applicable in such leave motions, invites the moving party to request that their leave motion be heard in person, or in writing. However, as indicated, in this case the Crown is represented, so r. 3 of the *POA Rules* and Form 1 apply. Becker Bros. argues that neither r. 3 nor Form 1 address whether the hearing is to be oral or in writing. Therefore, r. 63.03.1 of the *Rules of Civil Procedure* fills the gap, requiring this leave to appeal motion to presumptively be in writing.

[6] Becker Bros. submits that this outcome is reinforced by r. 2(2) of the *POA Rules*, which specifies that r. 61.03 of the *Rules of Civil Procedure*, dealing with motions for leave to the Divisional Court, does not apply to appeals under s. 131 of the *POA*. Since r. 2(2) of the *POA Rules* does not oust r. 61.03.1 of the *Rules of Civil Procedure* applicable to motions for leave to appeal to the Court of Appeal, by implication r. 61.03.1 is meant to fill the gaps in r. 3 of the *POA Rules*.

[7] Becker Bros. urges that the application of r. 61.03.1 is further supported by the fact that neither r. 3 of the *POA Rules* nor Form 1 provide for the exchange of *facta*, a gap that is filled by r. 61.03.1, further confirming its application.

[8] Notwithstanding the able arguments made, I am persuaded that motions for leave to appeal brought under s. 131 of the *POA* are presumed to be heard orally. As Becker Bros. concedes, this is the settled practice in the Court of Appeal: see, e.g., *York (Regional Municipality) v. Irwin*, 2020 ONCA 44, 97 M.P.L.R. (5th) 189; *Ontario (Environment, Conservation and Parks) v. Thomas Cavanagh Construction Limited*, 2019 ONCA 686, 28 C.E.L.R. (4th) 48; *Antorisa Investments Ltd. v. Vaughan (City)*, 2012 ONCA 586, 1 M.P.L.R. (5th) 240. Although the *POA Rules* could have been clearer, I am persuaded that r. 3 supports this practice by providing for an oral hearing.

[9] Specifically, r. 3.7 directs, “A motion for leave to appeal shall be heard by a judge.” I recognize that the phrase “heard by a judge” could embrace a written

hearing, but the use of the term “heard” strongly suggests an oral hearing. If the intention was to require leave motions to be in writing instead of orally, other language would have been used. For example, r. 4(1) of the *POA Rules*, which invites written motions, provides that the moving party “may present the case for leave to appeal and argument in writing”.

[10] Form 1 supports this conclusion. The Form 1 notice of motion notes that “a motion will be made before the presiding judge at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, on (day), (date) at (time) or as soon thereafter the time as the motion can be heard...”. The phrase “made before” connotes or suggests an appearance. So, too, does the fact that the moving party must specify a time, date and location for the hearing. It is noteworthy that r. 61.03.1 of the *Rules of Civil Procedure*, pursuant to which leave motions are presumed to be in writing, does not require the moving party to specify a time or date for the leave motion.

[11] It would be curious if r. 4 of the *POA Rules* were to specify a mode of hearing but r. 3 of the *POA Rules* did not. Why would the mode of hearing be addressed for leave motions in inmate appeals and by those who are not represented, but not addressed for leave motions by represented moving parties? Reading r. 3 consistent with the usual meaning of the terms used resolves this curiosity.

[12] It is not surprising that r. 4 of the *POA Rules* and Form 2 are more explicit and clearer about the mode of hearing. Rule 4 of the *POA Rules* and Form 2 are

to be used by those who are unrepresented and require more precise direction. As the practice in this court demonstrates, for lawyers, familiar with the strong legal tradition of oral hearings, the language used in r. 3 and Form 1 can readily be understood to provide for oral hearings, removing the need to fall back on the *Rules of Civil Procedure*.

[13] I do agree with Becker Bros. that there is a gap in r. 3 relating to the exchange of *facta*. In this context, r. 61.03.1 of the *Rules of Civil Procedure* does assist, and its provision for the exchange of *facta* applies.

[14] I am therefore directing that this motion for leave pursuant to s. 131 of the *POA* shall be heard orally. I do not foreclose the possibility that the court may, in an appropriate case, hear a motion for leave to appeal where the moving party is represented by counsel in writing. In this case, however, I am not persuaded to depart from the court's usual practice of hearing such motions orally. The parties have agreed on a timetable, including the exchange of *facta*. The motion for leave is returnable on June 18, 2020. Costs in this appearance are reserved until the motion for leave is determined.

“David M. Paciocco J.A.”