COURT OF APPEAL FOR ONTARIO

CITATION: Goberdhan v. Knights of Columbus, 2023 ONCA 269
DATE: 20230414
DOCKET: M54165 (C70946)

Nordheimer J.A. (Motion Judge)

BETWEEN

Neil Goberdhan

Plaintiff
(Respondent/Responding Party)

and

Knights of Columbus

Defendant
(Appellant/Moving Party)

Tudor Carsten and Giovanna Di Sauro, for the moving party

Joel P. McCoy, for the responding party

Heard: in writing

ENDORSEMENT

[1] Knights of Columbus brings this motion for an order permitting it to file a five-page reply factum. Neil Goberdhan, the responding party, does not oppose the motion provided certain conditions are imposed, as I shall describe below.

[2] The issue in the appeal involves whether the motion judge erred in dismissing the appellant's motion to stay this action in favour of arbitration. The

respondent had brought this action claiming damages for wrongful dismissal. The appellant contends that the respondent, regardless of whether he is or is not an employee or independent contractor, is required by contract to undergo mandatory arbitration for this dispute.

[3] The appellant seeks to file a reply factum to respond to the respondent's position, in its factum, that s. 7(6) of the *Arbitration Act, 1991*, S.O. 1991, c. 17 precludes an appeal of the motion judge's order. The appellant relies heavily on the decision of Brown J.A. in *Prism Resources Inc. v. Detour Gold Corporation*, 2022 ONCA 4 as authority for the proposition that "there is a strong presumption that leave to file a reply factum" should be granted in civil appeals.

[4] The *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 do not provide for the filing of a reply factum, except on a motion for leave to appeal to this court. I do not share my colleague's enthusiasm for imposing what is, in essence, a judicial amendment to the *Rules of Civil Procedure* that would create an automatic right to file a reply factum. My colleague says that the filing of a reply factum "would assist the panel to understand, before the oral hearing, precisely how the parties join issue on the key matters on appeal." In my view, that understanding ought to arise from the main facta. If the main facta leave any doubt on how the parties join issue, that is the principal reason we provide for oral argument. That is the appropriate stage in the process where the panel hearing the appeal can canvass any uncertainty, or questions, they have regarding the parties' positions.

[5] There can be no doubt that written submissions are very important in any appeal. In particular, they provide the necessary material for the panel to prepare for the issues raised and to understand the parties' respective positions on those issues. However, there are limits on the usefulness of any element of advocacy, whether written or oral. More does not always mean better.

[6] In this case, for example, the application of s. 7(6) of the *Arbitration Act* can be responded to by the appellant in oral argument. It is not a situation where the panel will not be alert to the issue given its presence in the respondent's factum. If the appellant has any jurisprudence upon which it wishes to rely to address this point, those authorities can be included in its book of authorities to be filed.

[7] I would also note, on this point, that the respondent raised the application of s. 7(6) of the *Arbitration Act* immediately upon receiving the appellant's Notice of Appeal. Indeed, the respondent contemplated bringing a motion to quash the appeal on that basis, although he never did. In those circumstances, it is unclear to me why the appellant would not have addressed this issue in its factum.

[8] The other problem that routine filing of reply facta creates is revealed in this case. As I noted at the outset, counsel for the respondent has said that it would not oppose the appellant's motion if two conditions were met. One is that each side should bear their own costs of the motion and the other is that the respondent should be permitted to file a sur-reply factum. It is this latter condition that creates

the broader problem. The arguments that are marshalled in favour of permitting a reply factum can easily be adjusted to favour filing a sur-reply factum. At some point the back and forth must end. We have traditionally fixed that end point at one factum for each party. I do not see any compelling reason to depart from that traditional point on a regular basis.

[9] I do not suggest that there will never be a case where a reply factum would be justified. Those cases will be exceptional, however. I note, on this point, that r. 40(8) of this court's *Criminal Appeal Rules* expressly provides that "in exceptional circumstances" the appellant can seek permission to file a reply factum. I would add that, while r. 61.03.1(11) of the *Rules of Civil Procedure* permits the filing of a reply factum on a motion for leave to appeal to this court, that is because there is no entitlement to an oral hearing on such motions.

[10] This case is not an exceptional case justifying the filing of a reply factum. The motion is dismissed. I make no order as to costs.

"I. V. B. Nordheimer J.A."