COURT OF APPEAL FOR ONTARIO

CITATION: J.K. v. Ontario, 2017 ONCA 332
DATE: 20170426
DOCKET: C63171, M47411

MacFarland, van Rensburg and Huscroft JJ.A.

BETWEEN

J.K.

Plaintiff
(Appellant/Responding Party)

and

Her Majesty the Queen in Right of the Province of Ontario

Defendant
(Respondent/Moving Party)

Heather Burnett and Jonathan Sydor for the moving party

Kirk M. Baert and James Sayce for the responding party

Heard: February 17, 2017

On motion to quash an appeal from the order of Justice Paul M. Perell of the Superior Court of Justice, dated December 22, 2016, with reasons reported at 2016 ONSC 8040.

ENDORSEMENT

[1] This is a motion to quash the within appeal on the basis that the order which is the subject of the appeal is interlocutory as opposed to final and any appeal from

it lies to the Divisional Court with leave, pursuant to s. 19(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[2] J.K. is the representative plaintiff in a proposed class proceeding brought against Her Majesty the Queen in Right of the Province of Ontario ("HMQ") on behalf of "all persons who were/are detained and/or incarcerated at one of the [youth detention centres] from January 1, 2007 to the present and were placed in secure isolation while under the age of 18." He was at various times detained at three different youth detention centres.

[3] As noted by the motion judge at para. 3 of his reasons:

> For the purposes of the pending certification motion, J.K. delivered an affidavit in which he recounts some of his experiences, including a description of the youth detention centres and of his confinements in secure isolation, which is also described as solitary confinement.

[4] The issue dividing the parties is set out in paras. 4 through 6 of the motion judge's reasons as follows:

> [4] The Crown wishes to cross-examine J.K., and it wishes to obtain production of a variety of what are described as "Youth Records" under the *Youth Criminal Justice Act*, S.C. 2002, c.1. J.K., however, refuses to produce the documents, and he submits that the Superior Court does not have jurisdiction to order him to produce the documents because of s. 118 of the *Youth Criminal Justice Act*, which prohibits access to Youth Records unless authorized under that *Act*.
>
> [5] In response to J.K.'s motion for certification, the Crown seeks an order: (1) declaring that the Youth

> Records are necessary for the fair determination of the certification motion; and (2) directing J.K. to consent to an application in the Youth Justice Court for access to all of his records maintained by the three facilities, his probation records and various other records maintained by the Ministry of Community and Youth Services (the "MCYS").
>
> [6] Authorizations are available from judges of the Youth Justice Court and J.K. submits that the Superior Court does not have jurisdiction to order him to consent to an application by the Crown to obtain the Youth Records. Further, J.K. submits that if this court has jurisdiction to order him to produce the requested Youth Records, the court ought not to exercise that jurisdiction because the Crown has not satisfied the onus on it to show that the Records are relevant to the certification motion and that, in any event, the request is too broad and beyond what might be produced for the certification motion.

[5] The records that the Crown seeks production of are set out in para. 18 of the motion judge's reasons. There are ten different types of documents requested that the motion judge notes "are a small subset of the set of documents that comprise youth records." Additionally, the Crown requested production of the Serious Occurrence Reports from J.K.'s probation records, as well as the Secure Isolation Report Summaries and related correspondence from the MCYS offices and, finally, J.K.'s criminal history file from the Canadian Police Information Centre (CPIC).

[6] The Crown argued that the Youth Records were relevant to the certification motion with respect to:

(a) Whether J.K. was in secure isolation;

(b) If J.K. was in secure isolation, particulars of the institution and the time in isolation;

(c) Whether the placement was in conformity with the governing legislation;

(d) Whether J.K. is an appropriate representative plaintiff; and

(e) To test J.K.'s credibility on the matters about which he deposed in his affidavit.

[7] The motion judge was satisfied that the Crown had "shown the relevance of its request for Youth Records." The only exception among the requested records was J.K.'s CPIC record, which he concluded would offer "little relevant information."

[8] The motion judge was further satisfied that he was not precluded by the *Youth Criminal Justice Act* from directing a litigant before him to make an application to the Youth Justice Court. A conclusion on the propriety of that determination is not necessary for the disposition of this motion to quash.

[9] The motion judge concluded, at para. 39:

> If J.K. does not apply to the Youth Justice Court or if he does not apply in good faith making a sincere request for the requested Youth Records, which documents are needed for the purposes of his own proposed class action, then I will stay his proposed class action. If he applies in good faith and the Youth Justice Court judge

> dismisses his request, then once again I will stay his proposed class action.

[10] The formal order provides:

> THIS COURT ORDERS that this action shall be stayed unless the Plaintiff produces the following Youth Records: [thereafter follows a listing of the records ordered produced]

[11] The order is an unusual one. In mandatory language it orders the action stayed unless a condition is met - that condition being that J.K. produce the Youth Records.

[12] More usually, where a party brings a motion for the production of documents, an order issued in response will provide for the production of certain documents, failing which some penalty or other will be imposed on the defaulting party.

[13] The Crown, in the motion that it brought in response to J.K.'s certification motion, sought an order that would achieve two things:

(1) Declare that the Youth Records were necessary for the fair determination of the certification motion; and

(2) Direct J.K. to consent to an application in the Youth Justice Court for access to all of his records maintained by the three facilities where he had been incarcerated, his probation records and various other records maintained by MCYS.

[14] In its materials, the Crown refers to the order as the "production order" and says in its factum that:

> The Production Order requires the Appellant to produce to the defendant Crown certain records relating to his experiences with SI at the Facilities ("J.K.'s SI Records"), failing which the case management judge shall stay the action.

[15] It further states that it is a matter of settled law that production orders are interlocutory and thus that this court does not have jurisdiction to hear the appeal.

[16] The responding party submits at para 18 of his factum that the "Young Offender Records Order" is final for four reasons:

(a) The Young Offender Records Order is impossible to fulfill;

(b) J.K. has lost substantive rights that could be determinative of the action;

(c) Jurisdictional matters such as this are final; and

(d) Non-party production orders are final.

[17] Courts long have repeated the mantra that originated in *Hendrickson v. Kallio*, [1932] O.R. 675 (C.A.), at p. 678:

> The interlocutory order from which there is no appeal is an order which does not determine the real matter in dispute between the parties—the very subject matter of the litigation, but only some matter collateral.

[18] Nevertheless, the question whether an order is final or interlocutory continues to vex courts. Had the order in question been differently worded and

followed the more usual form for such orders resulting from a motion for production of documents, I think that there would be little doubt but that the order was interlocutory. If, for example, the order read that J.K. was to produce his Youth Records, failing which the action would be stayed, such order would be interlocutory. As Sharpe J.A. noted in *Inforica Inc. v. CGI Information Systems and Management Consultants Inc.,* 2009 ONCA 642, 97 O.R. (3d) 161, at para. 26:

> I recognize that failure to satisfy an order for security for costs may lead to a dismissal of the claim, but the sanction for non-compliance with an order cannot alter the nature of the order itself. Many procedural or interlocutory orders – for particulars, for production of documents, for the payment of costs ordered in interlocutory proceedings – may carry the ultimate sanction of dismissal of the non-complying party's claim. But if the claim is dismissed, the dismissal flows from the party's failure to comply with the interlocutory or procedural order, not from the order itself, and does not alter the interlocutory or procedural nature of the order that led to dismissal: see *Laurentian Plaza Corp. v. Martin* (1992), 7 O.R. (3d) 111 (C.A.).

[19] In my view, to suggest that the order in issue is anything more than a production order with a sanction in the event of non-compliance would be to put form over substance.

[20] As was said by this court in *Fram Elgin Mills 90 Inc. v. Romandale Farms Limited*, 2016 ONCA 404, 131 O.R. (3d) 455, at para. 30:

> The nature of the underlying motion is an important consideration in deciding whether an order is final or interlocutory.

[21] The order was made in the context of a production motion brought within the motion for certification. What was sought was a declaration that the Youth Records were necessary for the fair determination of the certification motion and that the plaintiff be required to produce them. That was the substance of the motion; it was not a motion for a stay of proceedings. The stay was to be imposed only if the Youth Records were not produced.

[22] This analysis would not change even if compliance with the order by J.K. were impossible, as J.K. alleges. *Laurentian Plaza Corp. v. Martin* (1992), 7 O.R. (3d) 111 (C.A.), at p. 116, clearly holds that an order otherwise interlocutory will not be a "final order" merely because non-compliance with a part of the relevant order would determine a substantive right. The application of this rule even to an interlocutory order with which compliance allegedly is impossible is appropriate because, as the same passage of *Laurentian Plaza Corp.* explains, the purpose of the categorization of orders in this context is to provide an efficient method through which to divide labour between this court and the Divisional Court.

[23] Therefore, the response to the four arguments raised by the responding party is as follows:

(a) The "impossibility" concern, in the context of this motion, is irrelevant to the categorization of this order;

(b) J.K. has not, by the terms of this order, lost any substantive rights that could be determinative of the action;

(c) There is no "jurisdictional" issue engaged by the terms of the order at this stage;

(d) J.K. is a party to the proceeding and he is the person ordered to produce the documents.

[24] For these reasons, in my view, the order in question is interlocutory, and any appeal lies to the Divisional Court with leave. Accordingly, the appeal is quashed.

[25] Costs to HMQ fixed in the sum of $5,192.50, inclusive of disbursements, plus HST where appropriate.

MacFarland JA

K. van Rensburg J.A.

Juriansz JA