

Popov v. Jones
Court File No. CV-10-398179

V.Kats, counsel for the plaintiffs
R. VanKessel, counsel for the defendant, Blake Jones
J. Ormston, counsel for the defendant, Marcel Jones
S. Turk, counsel for the defendant Shawn Jones

REASONS FOR DECISION

These are my reasons for granting the plaintiffs' motion seeking an adjournment of the motion brought by the defendant Blake Jones ("Blake") in which Blake seeks an order discharging a certificate of pending litigation. The motion also sought the adjournment of a motion brought by the defendant, Marcel Jones ("Marcel") seeking identical relief, but in relation to different property. Marcel was not opposed to the adjournment of his motion, in light of the scheduling limitations of the court on the return of the motion.

Generally, the motion for the adjournment was opposed by Blake on the primary basis that the motion was marked preemptory to the plaintiffs by order of Master Graham dated November 23, 2010 (clarified on February 9, 2011), that there was real and actual prejudice to Blake arising from the adjournment in light of his limited ability to deal with his property to cover his living expenses, particularly in light of his commencement or continuation of university education and that the CIBC bank documents sought by the plaintiff were not admissible.

I advised the parties following the hearing of submissions that I was adjourning the motion and I provided the parties with a fixed date on a special appointment basis for the hearing of both Blake's motion and Marcel's motion, for reasons to follow. These are the reasons for the adjournment.

1. It is clear from the attendance before Master Abrams in October, 2010 that she formed the view that Blake's motion proceed to hearing after the plaintiffs' motion under r. 30.10 for production from CIBC.

2. The non party production motion was ultimately heard by Master Glustein, who among other things, ordered production of the CIBC bank records. Marcel and the defendant, Shawn Jones ("Shawn") have appealed Master Glustein's order on the merits. Blake appealed the costs aspect of Master Glustein's order. None of the appellants have sought to bring a motion to stay the order pending appeal. The appeal is pending on May 3, 2011.

3. The plaintiffs have not obtained the CIBC bank records ordered by Master Glustein. The documents are ready but in light of Shawn's advice that he intends to move for a stay of Master Glustein's order pending appeal, CIBC has not delivered the documents to the plaintiffs. The plaintiffs claim these documents are needed for the motions seeking to discharge the certificates of pending litigation. The defendants submit that the documents are not admissible on the motion since they were obtained after the plaintiffs cross examined and, under rule 39.02. such records would not be admissible, unless leave were granted. The plaintiffs in my view should be entitled to pursue the introduction of this evidence for use on the motion. By refusing the adjournment, the plaintiffs' ability to respond to the motions would be potentially prejudiced.

4. The evidence respecting prejudice to Blake was not compelling, in the near term basis. It would appear that Blake is married and enjoys some level of support from his spouse. It was not entirely clear, despite some evidence of indebtedness, that his situation is precarious or such that an adjournment would be prejudicial. The attendance at university is a matter that has been ongoing and, in light of his counsel's refusal to provide further details of the particular situation to both the court and the plaintiffs, I am unable to find that there would be prejudice to Blake arising from the adjournment.

5. Blake's motion was marked peremptory to the plaintiffs. However, in my view, that does not oust this court's jurisdiction to control the litigation process to prevent injustice. In my view, I retain discretion to adjourn the motion notwithstanding Master Graham's order or to vary or set aside the aspect of his order marking Blake's motion peremptory to the plaintiffs. I understand that the plaintiffs have appealed that aspect of Master Graham's order. I do not see that the motion for the adjournment by the plaintiffs is an attempt to avoid the effect of the order or to effectively have me "hear" the appeal of a fellow Master. In my view, there are many instances where one Master may make a decision on the basis of the facts and material before him or her, which basis may be different at a later date. I would observe that Master Graham initially marked the motion peremptory on November 23, 2010 well before the non party production motion was heard and disposed of (Master Glustein released his decision on February 3, 2011). It is reasonable to expect that, in making the order he did, Master Graham contemplated that the production sought by the plaintiffs would have been addressed in a final manner upon the return of Blake's motion.

6. It is my view that both of Blake's and Marcel's motions should be heard at the same time for efficiency and convenience. The motions in my view ought to have been scheduled on a special appointment basis. (the combined motions time of all three motions in this action returned on February 25, 2011 totalled 3 hours and 45 minutes). They were not and the moving parties declined, on a conference call held with me on February 24, 2011 to adjourn the motion to a special appointment. It was my view that such motions, although individually qualifying for the regular motions list, should not be scheduled in a manner that takes upwards of half of the court time available for regular motions. In my view, the regular motions list should be reserved for the higher volume, shorter motions.

6. The final reason for granting the adjournment was simply the lack of time. Counsel for the parties were aware that the court docket was overbooked for the day. Blake's motion was scheduled for 2 hours. It was or would have been the last motion reached. There was insufficient time for the motion to be heard that day and, in fact, court closed at 5:05 p.m.

For these reasons, the motions were adjourned. I have booked a special appointment for the return of Blake's motion and Marcel's motion on May 13, 2011. I declined to mark the motion peremptory, as it is my view that special appointments with fixed dates are expected to proceed. I have seized myself of the two motions seeking to discharge the certificates of pending litigation, at the request of and on the consent of the parties.

Master MJ Sproat
Released March 3, 2011

Amended March 4/11