

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

WISEAU STUDIO, LLC and TOMMY WISEAU d.b.a. WISEAU-FILMS

Plaintiffs/Defendants by Counterclaim

-and-

RICHARD HARPER, FERNANDO FORERO MCGRATH, MARTIN RACICOT d.b.a.
ROCKHAVEN PICTURES, ROOM FULL OF SPOONS INC., PARKTOWN STUDIOS INC.,
RICHARD STEWART TOWNS

Defendants/Plaintiffs by Counterclaim

**FACTUM OF THE DEFENDANTS/PLAINTIFFS BY COUNTERCLAIM
(Plaintiffs' Motion for Leave to Appeal)**

April 11, 2018

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(Motion by plaintiffs for leave to appeal)**

OVERVIEW

1. The plaintiffs move, 77 days late, for leave to appeal an interlocutory order dissolving an *ex parte* injunction. The improperly granted *ex parte* injunction was dissolved on November 1, 2017 because, amongst other reasons, the plaintiffs failed to make full and fair disclosure to the Court.
2. In dissolving the injunction, Justice Koehnen provided thorough reasons detailing numerous findings of fact regarding the plaintiffs' material non-disclosure. His Honour also provided detailed reasons dismissing the injunction based on the tri-partite *RJR-MacDonald* test for granting an interlocutory injunction. There is no reason to doubt the correctness of Justice Koehnen's reasons, and the law is settled on both points of law.

PART I – FACTS

3. The defendants accept the following relevant statements set out in the plaintiffs' factum as correct:

- a. On June 14, 2017, the plaintiffs appeared before Justice Diamond and obtained an ex parte injunction restraining the defendants from promoting or releasing their documentary film *Room Full of Spoons* (the "Documentary"). Justice Diamond ordered that the matter be brought back for a 30 minute hearing on June 23, 2017.

Wiseau Studio et al v Richard Harper, 2017 ONSC 6535 [*Wiseau Decision*], at para 7, Motion Record of the Plaintiffs [PMR], Volume [V]-1, Tab 3, p 14.

Factum of the Plaintiffs dated March 23, 2018 [Second Factum] at para 9, p 3.

- b. On June 23, 2017, the matter came before Justice Akbarali. Some of the defendants appeared in person and noted that they had not yet had an opportunity to retain counsel. Justice Akbarali set a return date to argue the full motion on October 10, 2017, and extended the interim injunction until then.

Wiseau Decision, *ibid* at para 8, PMR, V-1, Tab 3, p 14.

Second Factum at para 10, p 3.

- c. Justice Koehnen heard the matter on October 10, 2017 and released his reasons for decision on November 1, 2017 dissolving the ex parte injunction (the "**Reasons**").

Second Factum at para 11, p 3.

4. The defendants submit that paragraphs 5 to 12 below constitute additional facts relevant to the determination of this motion.

Consequences of the Plaintiffs' Material Failure of Disclosure

5. His Honour dissolved the injunction because "the plaintiffs fell seriously short of the sort of disclosure required for an ex parte injunction." Justice Koehnen gave detailed Reasons explaining the plaintiffs' material non-disclosure. He provided several instances of the plaintiffs' material non-disclosure that on their own, warranted the injunction to be lifted.

Wiseau Decision, *ibid* at paras 12-13, 52-53, PMR, V-1, Tab 3, pp 14, 21.

6. While the plaintiffs' failure to make full and fair disclosure was sufficient to dissolve the *ex parte* injunction, Justice Koehnen went on to write that "[i]n the event I am wrong in this, I go on below to apply the test for granting an interlocutory injunction to the facts of this case". He then found that the plaintiffs failed to satisfy the *RJR-MacDonald* test for an injunction.

Wiseau Decision, ibid at paras 53, 55, PMR, V-1, Tab 3, pp 21-22.

7. On January 17, 2018, Justice Koehnen released his costs endorsement in connection with the Reasons (the "**Costs Endorsement**"). The Costs Endorsement condemned the plaintiffs' conduct in, *inter alia*, failing to provide full and fair disclosure to the Court and failing to produce Mr. Wiseau for cross-examination on his affidavits. Justice Koehnen held that "it is important for counsel and parties to appreciate that conduct of this nature has consequences. The failure to sanction such conduct with meaningful cost awards would not only encourage it but incentivize parties to engage in it".

Wiseau Studio et al v Richard Harper, Costs Endorsement, additional reasons to Wiseau Decision [Costs Endorsement], at paras 16-17, PMR, V-1, Tab 4, p 41.

8. To date, the plaintiffs have not paid the \$97,034.68 to the defendants as costs of the motion, which amount became due on February 16, 2018.

Affidavit of Felicity Fenton sworn April 9, 2018 [April Fenton Affidavit] at para 13, Defendants Motion Record [DMR], Tab 1, p 6.

Order of Justice Koehnen dated November 1, 2017 [Order] at para 5, PMR, V-1, Tab 2, p 10.

The Plaintiffs Seek to Appeal the Decision

9. On February 1, 2018, the plaintiffs served a notice of motion seeking leave to appeal the Reasons and Costs Endorsement of Justice Koehnen (the "**Motion**").

Notice of Motion for Leave to Appeal, PMR, V-1, Tab 1, pp 1-6.

10. On March 12, 2018, the plaintiffs served a motion record and factum in connection with the Motion. The plaintiffs' motion record enclosed, *inter alia*, (i) an affidavit of Tommy

Wiseau sworn March 8, 2018 (the “**March Wiseau Affidavit**”) and (ii) an un-issued version of the order in connection with the Reasons and Costs Endorsement, which the parties had approved one week earlier as to form and content.

April Fenton Affidavit, at paras 2, 5, Tab 1, p 2.

Affidavit of Adam Jacobs sworn March 22, 2018 [Jacobs Affidavit], Exhibit Q, PMR, V-5, Tab 16-Q, p 1379.

11. Upon being served with the plaintiffs’ motion materials, the defendants’ sought to cross-examine Mr. Wiseau on the March Wiseau Affidavit. This evidence spoke to the plaintiffs’ position (which has now been abandoned) that they were entitled to an extension of time to seek leave to appeal.

April Fenton Affidavit at paras 5-6, Exhibit C, DMR, Tabs 1, 1-C, pp 2-3, 15.

12. However, Mr. Wiseau (again) refused to produce himself for cross-examination. The defendants requisitioned a case management conference to discuss an expeditious resolution of this issue. The parties had their first case management conference on March 19, 2018. Thereafter, the plaintiffs withdrew the March Wiseau Affidavit.

April Fenton Affidavit at para 8, Exhibit E, DMR, Tabs 1, 1-E, pp 3-4, 23-26.

PART II – ISSUES AND LAW

13. The following issues are raised in this motion:
- a. Whether the plaintiffs are out of time to seek leave to appeal the Reasons;
 - b. If the plaintiffs are not out of time to seek leave to appeal the Reasons, whether leave to appeal the decision the Reasons should be granted; and
 - c. Whether leave to appeal the Costs Endorsement should be granted.

A. THE PLAINTIFFS ARE OUT OF TIME TO SEEK LEAVE TO APPEAL THE REASONS

14. On February 1, 2018, the plaintiffs served their notice of motion seeking leave to appeal the Reasons (77 days late) and the Costs Endorsement (on time).

The General Rule: Clock Starts At Pronouncement

15. The *Rules of Civil Procedure* provide that a notice of motion seeking leave to appeal a decision must be delivered “within 15 days after making of the order or **decision** from which leave to appeal is sought, unless a statute provides otherwise”. The deadline to appeal the Reasons was November 16, 2017.

Rules of Civil Procedure, r. 61.03(1)(b), Plaintiffs’ Book of Authorities [PBOA], Tab 1 (emphasis added).

16. The time period for a motion seeking leave to appeal begins to run on the date the order under appeal is pronounced by oral or written reasons, not from the date that it is signed and entered (the “**General Rule**”).

Fontaine v Canada (Attorney General), 2012 ONCA 206 at para 57, PBOA, Tab 5 [Fontaine v Canada] citing *Byers (Litigation Guardian of) v Pentex Print Masters Industries Inc.*, [2003] OJ No 6 [Byers v Pentex], PBOA, Tab 6.

17. The only time in which the General Rule does not apply is when the court alters or modifies its merit judgment. Here, the merit judgment was the dissolution of the injunction. After the release of the decision of Justice Koehnen on November 1, 2017, nothing of substance remained undecided, and the General Rule therefore applies.

Byers v Pentex, *ibid* at para 41, PBOA, Tab 6.

Fontaine v Canada, *ibid* at para 61, PBOA, Tab 5.

18. The only item that was not agreed to as between counsel until March 5, 2018 was paragraph 2 of the Order. This provision relates to the defendants’ attribution of certain works in the Documentary in which the plaintiffs have copyright by adding an end credit to that effect. At all material times, the parties agreed there should be a provision respecting attribution but disputed the exact wording relating to same. Ultimately, the

version of paragraph 2 that the parties agreed upon blends together the findings in paragraphs 92 and 155 of the Reasons. This does not appear to be an issue that would be engaged by any appeal.

***Wiseau Decision* at paras 92, 154, PMR, V-1, Tab 3, pp 28, 37.**

Jacobs Affidavit, Exhibits A, B, P, Q, PMR, V-5, Tabs 16-B, P, Q, pp 1293, 1296, 1373, 1379.

19. In any event, paragraph 3 of the Order renders this purported issue moot. This paragraph states that Justice Koehnen remains seized of matters that arise in implementing the Order. The way in which the defendants would attribute the plaintiffs in the Documentary fell within the implementation of the Order.

Order at para 3, PMR, V-1, Tab 2, p 10.

20. The plaintiffs' suggestion that the form of order was not agreed upon until March 20, 2018 and that the parties "were required to write to the Motions judge on March 19, 2018" in order to have the Order issued and entered is simply incorrect.

Second Factum at para 71, p 24.

21. Once counsel had a telephone call to discuss the parties' understanding as to what should form paragraph 2 of the Order and the relevant paragraphs of the Reasons that they relied on in support of same, the parties agreed to the form of order on March 5, 2018.

Jacobs Affidavit at paras 22-24, PMR, V-5, Tab 16, p 1286.

22. The defendants instructed their process server to enter the form of order as approved as to form and content in the normal course on March 5, 2018. Since the parties had a case management call scheduled on March 19, 2018 to discuss Mr. Wiseau's refusal to produce himself for cross-examination on the March Wiseau Affidavit, the *defendants* suggested that Justice Koehnen sign the form of order in order to assist the plaintiffs file the within motion for leave to appeal, since the order was not yet ready for pick-up by the defendants' process server.

April Fenton Affidavit at paras 2-4, 10 Exhibits B, G, DMR, Tabs 1, 1-B, 1-G, pp 2, 3, 5, 6, 13, 35.

23. As set out in the following section, the plaintiffs' position that the General Rule does not apply is squarely inconsistent with the position that they took prior to March 23, 2018.

Plaintiffs Admit that General Rule Applies

(i) *Plaintiffs state there was "no urgency" to settling order in December 2017*

24. On December 22, 2017, when counsel for the plaintiffs did not respond in a timely manner to the defendants' repeated requests to approve the draft order as to form and content (which counsel for the defendants prepared and circulated as early as November 3, 2017) the plaintiffs' counsel stated that "[t]here is no urgency to settling the order now, or next week." By December 22, 2017, the time to seek leave to appeal the Reasons had expired by over one month.

Jacobs Affidavit, Exhibits A and F, PMR, V-5, Tabs 16-A, F, pp 1291, 1311.

(ii) *Mr. Wiseau admits his understanding for calculating time was incorrect*

25. Mr. Wiseau deposed in the March Wiseau Affidavit that he did not seek leave to appeal the Reasons because he thought that the time to seek leave tolled while the parties were engaged in settlement discussions, which he further testified was "incorrect".

Paragraph 7 and 8 of Affidavit of Tommy Wiseau sworn March 12, 2018, April Fenton Affidavit at para 6, Exhibit C, DMR, Tabs 1, 1-C, pp 3, 15.

26. Even if Mr. Wiseau's understanding had any merit, which it does not, settlement discussions broke down on December 4, 2017. Mr. Wiseau retained new counsel on December 29, 2017, over a month before the plaintiffs served the notice of motion.

Jacobs Affidavit, Exhibit C, PMR, V-5, Tab 16-C, p 1301.

Notice of Change of Lawyer, DMR, Tab 2, p 43.

(iii) *The plaintiffs admit being late for seeking leave to appeal the Reasons*

27. Before withdrawing the March Wiseau Affidavit, the plaintiffs admitted that they did, in fact, require an extension of time to seek leave to appeal the Reasons. In their original

factum (served March 12, 2018), the plaintiffs stated that the “the notice of motion was served within the 15-day period required by the *Rules of Civil Procedure* to seek leave to appeal from the Costs Order, **but not from the Injunction Order**” (emphasis added).

Factum of the Plaintiffs dated March 12, 2018 [First Factum] at paras 3, 14, 17, April Fenton Affidavit at paras 5, 7, Exhibit D, DMR, Tabs 1, 1-D, pp 3, 17-20.

28. The plaintiffs now take the opposite position (after withdrawing the March Wiseau Affidavit) that they do not need an extension of time for leave to appeal the Reasons.

Second Factum at para 65, p 22.

The Plaintiffs Have Abandoned their Request for an Extension of Time

29. At the same time the plaintiffs withdrew the March Wiseau Affidavit, the plaintiffs abandoned their prayer for relief extending the time to seek leave to appeal the Reasons. They have filed no evidence capable of sustaining same, and such evidence does not exist.

Compare First Factum at para 69, April Fenton Affidavit, Exhibit D, DMR, Tab 1-D, p 21 with Second Factum at para 74, p 26.

B. IN THE ALTERNATIVE, LEAVE TO APPEAL THE REASONS SHOULD NOT BE GRANTED

30. If this Honourable Court does not find that the plaintiffs are too late to seek leave to appeal the Reasons, which is denied, there is no basis for granting leave to appeal the Reasons.

31. The defendants agree with the plaintiffs that test for leave to appeal is that the plaintiffs must establish that there is a good reason to doubt the correctness of the order and the appeal raises matter of general importance.

***Rules of Civil Procedure*, RRO 1990, Reg 194, r. 62.02(4)(b), PBOA, Tab 1, p 172-173.**

32. The test for granting leave to appeal from an interlocutory order is onerous. Leave should not be granted if the decision is well-reasoned and the issues raised are not of general importance. As detailed below, Justice Koehnen provided the parties with a well-reasoned decision, and the issues raised are not of general importance.

Bell Expressvu Ltd. Partnership v Morgan, [2008] OJ No 4758, 67 CPC (6th) 263 (Div Ct) at para 1, Book of Authorities of the Defendants [DBOA], Tab 1.

There is No Reason to Doubt the Correctness of the Order

(i) *Material non-disclosure on ex parte injunction results in dissolution*

33. On the first branch of the test, the moving party must establish that the correctness of the order is open to “very serious debate”. Here, there is no such debate. The plaintiffs moved for an *ex parte* injunction in June 2017 and they massively failed to make full and fair disclosure of material facts and law, entitling the Court to dissolve the injunction.

Bassi v Chowdhry, 2016 ONSC 3627 at paras 20-21 [*Bassi v Chowdhry*] citing *Nazari v OTIP RAE Insurance Co.*, [2003] OJ No. 3442 (Ont SCJ), DBOA, Tab 2.

34. The Reasons cite numerous instances of the plaintiffs’ failing to make material disclosure to court. Rule 39.01(6) of the *Rules of Civil Procedure* state that on a motion without notice, the moving party must make full and far disclosure of all material facts, and the failure to do so is in itself sufficient grounds for setting aside any order obtained in the motion.

Rules of Civil Procedure, r. 39.01(6), PBOA, Tab 1, p 109.

Wiseau Decision, see e.g., at paras 18-22, 26, 28-29, 32-38, 45-50, 52, PMR, V-1, Tab 3, pp 16-21.

35. Justice Koehnen accurately set out the legal test for material non-disclosure on an *ex parte* motion as follows: “A fact is material and should be disclosed if it is relevant to the balancing of interests involved in granting an injunction. It is not necessary that the fact affect the outcome of the motion.”

Wiseau Decision at para 42, citing *United States v Friedland* [1996] OJ No 4399 at para 36 and *Fox v Fox*, 2012 ONSC 3842 at para 32.

36. The plaintiffs’ complaints with the reasons are unfounded. For example, the plaintiffs take issue with the finding that Mr. Wiseau’s affidavit sworn June 13, 2017 (the “**June Wiseau Affidavit**”) alleged that the Documentary “mocks, derides and disparages the Film”. While that exact phrase did not appear in the June Wiseau Affidavit, Mr. Wiseau did in fact make those complaints:

- a. At paragraph 2 of the June Wiseau Affidavit, Mr. Wiseau testifies that “the documentary contains **disparaging**, and false statements about the plaintiffs’ famous cult film *The Room* and me personally”,
- b. at paragraph 39 of the June Wiseau Affidavit, Mr. Wiseau testifies that “the defendants dug into details of my personal life, **ridiculed** my prior and subsequent film projects, as well as *The Room*... **mock[ed]** and **deride[d]** me personally.”

***Wiseau Decision*, at paras 16, 92, 154, PMR, V-1, Tab 3, pp 15, 28, 37.**

Affidavit of Tommy Wiseau Sworn June 13, 2017 at paras 2, 9, 39, PMR, V-1, Tab 5-C, pp 73-74, 83 (emphasis added).

37. In seeking the injunction, Mr. Wiseau characterized himself as a serious filmmaker and stated that the Film is a “global phenomenon with millions of fans worldwide”. The plaintiffs alleged that if the injunction was not granted, they would suffer irreparable harm, which included “harm to their reputation and honour”. However, they failed to disclose that the Film’s cult status and popularity stemmed entirely from the abysmal quality of the movie, which is heavily documented on, *inter alia* the BBC, the Huffington Post, Entertainment Weekly, etc., including articles in which Mr. Wiseau *himself* is interviewed. This failure of disclosure alone warranted the Honourable Court dissolving the *ex parte* injunction.

Notice of Motion of the Plaintiffs for the June 14, 2017 Hearing at paras 1, 11, PMR, V-1, Tab 5-A, pp 47, 49.

***Wiseau Decision* at paras 17, 18, 21(a), 24, 26 PMR, V-1, Tab 3, pp 15-17.**

38. The Court noted that the plaintiffs’ alleged “irreparable harm” based upon “loss of copyright exclusivity” in the *ex parte* motion. However, the Court found as a matter of fact, the plaintiffs failed to disclose that the Film was available in its entirety on YouTube for approximately four years and that they took no steps to remove it until the defendants raised the issue, constituting material non-disclosure.

***Wiseau Decision* at paras 18, 37, PMR, V-1, Tab 3, pp 16, 19.**

Notice of Motion of the Plaintiffs for the June 14, 2017 Hearing, at para 11, PMR, V-1, Tab 5-A, p 49.

(ii) *There is no basis to dissect Justice Koehnen's reasoned RJR analysis*

39. The plaintiffs' complaints regarding the Court's analysis of the *RJR-MacDonald* analysis are of no moment. The order dissolving the injunction were made on the basis of the non-disclosure.

***Wiseau Decision* at paras 52-53, PMR, V-1, Tab 3, p 21.**

***Bank of Montreal v Woldegabriel*, [2002] OJ No 2520 (Ont SCJ) at paras 14-16, DBOA, Tab 3.**

40. In *Bassi v Chowdhry*, this Court refused to grant leave to appeal the decision dissolving an injunction that was obtained on an *ex parte* basis on the basis of material non-disclosure. While the motions judge found the injunction could be discharged on that basis, he also went on to consider the three part test for injunctions and found that the injunction should be dissolved.

***Bassi v Chowdhry*, 2016 ONSC 3627 at paras 13, 15-16, DBOA, Tab 2.**

41. The Court in *Bassi v Chowdhry* found that it was open to the motions judge to come to the conclusions he did based on the evidence before him and that the Judge made no error in law. Further, the Court held that such an appeal does not raise matters of such importance that leave to appeal should be granted.

***Bassi v Chowdhry*, *ibid* at para 21, DBOA, Tab 2.**

The Proposed Appeal Does Not Involve Matters of General Importance

42. While there is no basis to doubt the correctness of the order, the plaintiffs make four submissions in support of their contention that the proposed appeal engages issues of general importance relevant to the development of the law and administration of justice.

***Ignjatovic v Vukojevic*, 2017 ONSC 2247 at para 9, citing *Rankin v McLeod, Young, Weir Ltd.* (1986), 57 OR (2d) 569, PBOA, Tab 4.**

43. The plaintiffs' request for more guidance on what constitutes full and fair disclosure on *ex parte* injunctions involving copyright law issues is not a matter of general importance. The law is settled on disclosure in *ex parte* injunctions. A fact is material and should be disclosed if it is *relevant* to the balancing of interest involved in granting an injunction.

***Wiseau Decision* at paras 41-42, PMR, V-1, Tab 3, pp 19-20.**

44. The remaining three arguments all relate to Justice Koehnen's findings on the tripartite test.

45. The plaintiffs' complaint that the Court made findings on the merits in the "serious issue to be tried" leg of the *RJR-MacDonald* test is nonsensical. Justice Koehnen specifically held that he was "not intending to bind any other judge before whom the issue may come for a different purpose and with a different record". Further, while the threshold to meet for the first question in *RJR-MacDonald* is a low one, the judge must make a preliminary assessment of the merits of the case.

***RJR MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311 at para 54, PBOA, Tab 10.**

***Wiseau Decision* at para 57, PMR, V-1, Tab 3, p 22.**

46. The plaintiffs also complain about Justice Koehnen's application of the Supreme Court of Canada's decision in *CCH Canadian Ltd. v Law Society of Upper Canada*, [2004] 1 SCR 339 ("**CCH**"), the leading case on fair dealing (full defence to copyright infringement).

***CCH Canadian Ltd. v Law Society of Upper Canada*, [2004] 1 SCR 339, PBOA, Tab 13.**

47. The Supreme Court of Canada's decision in *CCH* sets out the law for fair dealing. The plaintiffs' complaints about Justice Koehnen's findings of industry practice fail to address the authorities submitted to the court. The defendants relied upon the Documentary Organization of Canada's 2010 publication "Copyright and Fair Dealing –

Guidelines for Documentary for Documentary Filmmakers”, which was before Justice Koehnen.

***Wiseau Decision* at para 98, PMR, V-1, Tab 3, p 28.**

Defendants’ factum dated October 4, 2017 at paras 67-69, PMR, V-5, Tab 12, p 1028.

48. The plaintiffs’ final complaint regarding Justice Koehnen’s conclusions relate to moral rights. Justice Koehnen held that there was no infringement of the plaintiffs’ moral rights, separate and apart from his holding that a defence might apply.

***Wiseau Decision* at paras 119, 121-122, PMR, V-1, Tab 3, p 32.**

C. THERE IS NO BASIS TO APPEAL THE COSTS ENDORSEMENT

49. Leave to appeal cost orders should only be granted in the “most obvious cases and very sparingly”. For leave to appeal to be granted, the judge must be shown to have been acted on a wrong principle, misapprehended significant facts, or made the underlying determination in a non-judicial manner. A test of reasonableness applies to such an order.

***Men at Work General Contractors Ltd. v MacDonald*, 2015 ONSC 383 at paras 14-15 (Div Ct), DBOA, Tab 4.**

50. Justice Koehnen dissolved the injunction because the plaintiffs failed to make full and fair disclosure alone. The law is clear that this entitles the defendants to a heightened costs award. There is no basis to set aside this decision.

***Costs Endorsement* at paras 5-6, PMR, V-1, Tab 4, p 40.**

51. The only submission the plaintiffs make in support of their request to seek leave to appeal Costs Endorsement is that Justice Koehnen erred in the Reasons. This submission, however, is without merit, as previously discussed.

52. Justice Koehnen found that the plaintiffs acted improperly by breaching their disclosure obligations to the Court and refusing to make Mr. Wiseau available for cross-examination because the plaintiffs “probably thought they could do so because they

believed the defendants did not have the resources to resist an injunction effectively, if at all." This finding of fact should not be disturbed.

Costs Endorsement at para 16, PMR, V-1, Tab 4, p 41.

RELIEF REQUESTED

53. The defendants therefore respectfully request:
- a. An Order dismissing this motion; and
 - b. Costs of this motion inclusive of taxes and disbursements on a substantial indemnity basis in the amount of \$5,000, payable forthwith.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 11th DAY OF APRIL 2018



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SCHEDULE “A”

LIST OF AUTHORITIES

1. *Bank of Montreal v Woldegabriel*, [2002] OJ No 2520 (Ont SCJ)
2. *Bassi v Chowdhry*, 2016 ONSC 3627
3. *Bell Expressvu Ltd. Partnership v Morgan*, [2008] OJ No 4758, 67 CPC (6th) 263 (Div Ct)
4. *Byers (Litigation Guardian of) v Pentex Print Masters Industries Inc.*, [2003] OJ No 6.
5. *CCH Canadian Ltd. v Law Society of Upper Canada*, [2004] 1 SCR 339
6. *Fontaine v Canada (Attorney General)*, 2012 ONCA 206
7. *Ignjatovic v Vukojevic*, 2017 ONSC 2247
8. *Men at Work General Contractors Ltd. v MacDonald*, 2015 ONSC 383
9. *RJR MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Rules of Civil Procedure, RRO 1990, Reg 194.

Full and Fair Disclosure on Motion or Application Without Notice

39.01(6) Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application. R.R.O. 1990, Reg. 194, r. 39.01 (6).

Notice of Motion for Leave

61.03 (1) Where an appeal to the Divisional Court requires the leave of that court, the notice of motion for leave shall,

- (a) state that the motion will be heard on a date to be fixed by the Registrar;
- (b) be served within 15 days after the making of the order or decision from which leave to appeal is sought, unless a statute provides otherwise; and
- (c) be filed with proof of service in the office of the Registrar, within five days after service. R.R.O. 1990, Reg. 194, r. 61.03 (1); O. Reg. 61/96, s. 5 (2); O. Reg. 14/04, s. 29 (1).

Grounds on Which Leave May Be Granted

62.02(4) Leave to appeal shall not be granted unless,

- (a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the panel hearing the motion, desirable that leave to appeal be granted; or
- (b) there appears to the panel hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in the panel's opinion, leave to appeal should be granted. R.R.O. 1990, Reg. 194, r. 62.02 (4); O. Reg. 82/17, s. 14 (2, 3).

WISEAU *et al*
Plaintiffs

and

HARPER *et al*
Defendants
Court File No. CV-17-577020

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT TORONTO

**FACTUM OF THE DEFENDANTS/PLAINTIFFS BY
COUNTERCLAIM
(Plaintiffs' Motion For Leave to Appeal)**

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