IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Oleynik v. Memorial University of Newfoundland*, 2025 NLCA 15
Date: April 29, 2025
Docket Number: 202301H0054

BETWEEN:

ANTON OLEYNIK

APPELLANT

AND:

MEMORIAL UNIVERSITY OF NEWFOUNDLAND

FIRST RESPONDENT

AND:

MICHAEL HARVEY, in his capacity as the INFORMATION AND PRIVACY COMMISSIONER OF NEWFOUNDLAND AND LABRADOR

SECOND RESPONDENT

Coram: L.R. Hoegg, W.H. Goodridge and K.J. O'Brien JJ.A.

Court Appealed From:	Supreme Court of Newfoundland and Labrador, General Division 202101G4960 (2023 NLSC 126)
Appeal Heard:	September 24, 2024
Judgment Rendered:	April 29, 2025

Reasons for Judgment by: W.H. Goodridge J.A.
Concurred in by: L.R. Hoegg and K.J. O'Brien JJ.A.

Counsel for the Appellant: Self-Represented
Counsel for the First Respondent: Koren A. Thomson
Counsel for the Second Respondent: Andrew A. Fitzgerald K.C.

Authorities Cited:

CASES CITED: *Memorial University of Newfoundland v. Oleynik*, 2023 NLSC 126; *Tucker v. AXA General Insurance*, 2014 NLCA 36; *Kathirgamanathan v. Newfoundland and Labrador (Western Regional Integrated Health Authority)*, 2023 NLCA 34; *Langor v. Spurrell*, 1997 CanLII 14712 (NLCA); *Noton Enterprises Limited v. Philpott's Realty Co. Limited*, 2022 NLCA 38; *Canada (Transportation Safety Board) v. Carroll-Byrne*, 2022 SCC 48; *Kielley v. General Hospital Corporation*, 1997 CanLII 14716 (NLCA); *Newfoundland (Attorney General) v. Churchill Falls (Labrador) Corp*., 1977 CarswellNfld 57 (NLCA); *Beanland v. Beanland*, 1997 CanLII 14616 (NLCA); *Newfoundland (Attorney General) v. Churchill Falls (Labrador) Corp.*, 1977 CarswellNfld 74 (SCTD), aff'd 1977 CarswellNfld 57 (NLCA); *Kathirgamanathan v. Western Regional Integrated Health Authority*, 2021 NLSC 89, rev'd on other grounds 2023 NCLA 34; *Szeto v. Dwyer*, 2010 NLCA 36; *Hiscott v. Hall*, 2015 NLCA 1.

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D, rules 48.10(c), 29.09(1)(c).

W.H. Goodridge J.A.:

OVERVIEW

[1] Anton Oleynik appeals a decision denying him the right to cross-examine affiants and legal counsel, in the context of an application by Memorial University of Newfoundland ("Memorial") to have him declared a vexatious litigant. Memorial had filed affidavits from five individuals in support of its application. Mr. Oleynik applied for leave to cross-examine these five affiants, as well as Memorial's legal counsel. The application was dismissed, with written reasons (*Memorial University of Newfoundland v. Oleynik*, 2023 NLSC 126, (the "Decision")).

[2] Mr. Oleynik argues that the applications judge erred in denying leave to cross-examine, and in particular:

- Erred by misapplying the principles set out in *Tucker v. AXA General Insurance*, 2014 NLCA 36, regarding the granting of leave to cross-examine.

- Erred by denying procedural fairness – "denied [me] … the right to know the case to be met" (Appellant's Factum, at para. 30(d)(iii)).

- Demonstrated procedural unfairness by awarding Memorial $5,000 lump sum costs on the application to cross-examine.

[3] For the reasons set out below, Mr. Oleynik has not persuaded the Court that the applications judge made any reversible error in denying leave and in dismissing the application to cross-examine Memorial's affiants and its counsel, and in awarding lump sum costs.

BACKGROUND

[4] The application seeking leave to cross-examine Memorial's five affiants was filed April 27, 2023; the additional request to cross-examine Memorial's counsel was filed July 11, 2023; Mr. Oleynik's written brief of argument was filed August 28, 2023; the hearing proceeded September 25, 2023; the Decision was delivered orally September 26, 2023; the written reasons were filed September 27, 2023.

[5] The applications judge summarized Mr. Oleynik's arguments to support his request for leave to cross-examine in the Decision:

> [12] In his Interlocutory Application and accompanying Brief, Oleynik argues that the Court should allow him to cross-examine the affiants regarding the credibility and reliability of their statements, alleging:
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> - The evidence provided is derived from perceived bias;
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> - That he has the right to know the case to be met; and,
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> - There are omissions and inconsistencies in the affidavits.

[6] The applications judge was not persuaded that the areas of Mr. Oleynik's intended cross-examination of Memorial's affiants were relevant to the issues he had to decide. Also, the applications judge observed that Mr. Oleynik "provides no legal justification for granting this extraordinary request [to cross-examine counsel for Memorial] but argued irrelevant points and expressed conspiracy theories" (Decision, at para. 40).

THE LAW

[7] The decision to allow or deny leave to cross-examine affiants on an application is within the discretion of the judge hearing the matter. While that discretion must be exercised judicially, an appellate court will generally not intervene if the judge had valid grounds for the discretionary decision (*Kathirgamanathan v. Newfoundland and Labrador (Western Regional Integrated Health Authority)*, 2023 NLCA 34 ("*Kathirgamanathan on Appeal*"), at para. 101). An appellate court will be justified in intervening in a judge's exercise of discretion only if the judge misdirects himself/herself or if the decision is so clearly wrong as to amount to an injustice (*Langor v. Spurrell*, 1997 CanLII 14712 (NLCA), at para. 33; and *Noton Enterprises Limited v. Philpott's Realty Co. Limited*, 2022 NLCA 38, at paras. 41-45). This standard of review was outlined recently in *Canada (Transportation Safety Board) v. Carroll-Byrne*, 2022 SCC 48:

> [41] ... A discretionary decision...is generally entitled to deference and may only be interfered with if there is a legal error (considered to be an error in principle), a palpable and overriding factual error (viewed as a material misapprehension of the evidence) or a failure to exercise discretion judicially (which includes acting arbitrarily or being "so clearly wrong as to amount to an injustice"). ...

[8] Applications are not like trials where in-person testimony, with cross-examination, is the general rule. With applications, the general rule is that evidence is given, in the first instance, by way of affidavit, with the right to cross-examine on an affidavit subject to the discretion of the court (see *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D, at rules 48.10(c), 29.09(1)(c); *Kielley v. General Hospital Corporation*, 1997 CanLII 14716 (NLCA), at para. 18; and *Newfoundland (Attorney General) v. Churchill Falls (Labrador) Corp*., 1977 CarswellNfld 57 (NLCA) ("*Churchill on Appeal*"), at paras. 14-17). A party seeking leave to cross-examine in the context of an application must satisfy the court that there is a valid reason for doing so (*Beanland v. Beanland*, 1997 CanLII 14616 (NLCA), at paras. 32-35).

[9] In *Kielley*, this Court denied leave to appeal where the issue on appeal was whether the judge erred in granting an application to introduce new evidence without first having afforded the opposing party the opportunity to cross-examine the affiant. In his reasons, Green J.A. reiterated that the decision to allow or deny cross-examination on an interlocutory application is within the discretion of the judge hearing the matter:

> [33] … True, the possible denial of procedural justice to a litigant is always of concern; however, the decision to allow cross-examination or the calling of evidence on an interlocutory application is fundamentally within the discretion of the judge hearing the matter. While that discretion must, of course, be exercised judicially to ensure that the hearing is conducted in a fair manner, within those general parameters the judge has a wide discretion to take into account the specific circumstances in making his or her decision. …

[10] In *Newfoundland (Attorney General) v. Churchill Falls (Labrador) Corp.*, 1977 CarswellNfld 74 (SCTD), aff'd 1977 CarswellNfld 57 (NLCA), the judge denied leave to cross-examine affiants in the context of an interlocutory application for service *ex juris*. Similar to what the applications judge did in the current matter for Mr. Oleynik, the judge addressed each one of the various reasons advanced for justifying the cross-examination and explained why each was rejected. The judge found that the reasons advanced in support of the request for cross-examination trespassed too deeply into the merits of the plaintiff's case. The judge explained that cross-examination of affiants should only trespass into the merits of the case to the extent necessary to determine the immediate issue raised on the application (at para. 66).

[11] In *Churchill on Appeal*, this Court found no error in the judge's denial of leave to cross-examine:

> [16] … He exercised his discretion … and refused to allow cross-examination on these affidavits because he felt that the reasons given for cross-examination went too deeply into the merits of the plaintiff's case and did not concern themselves with the primary issue "of whether the order for service *ex juris* ought to have been issued in the first place or ought to be discharged". Thus, he was not given in his opinion valid reasons for ordering the cross-examination.
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> [17] In my view this was a proper exercise of his discretion, and I would dismiss this ground of appeal.

[12] In *Tucker*, this Court considered a request for leave to cross-examine an affiant in the context of an application for reinstatement of a notice of appeal. Leave to cross-examine was denied on the basis that the areas of proposed cross-examination had no relevance – the cross-examination would not have benefited the Court in deciding the application. In his reasons, White J.A. set out relevant principles to assist judges in exercising discretion when addressing an application for leave to cross-examine an affiant:

> [27] In determining whether to allow cross-examination, there is some judicial guidance as to what a court should consider:
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> a. Whether the facts in the affidavit are in issue (see *Royal Bank of Canada v. Jones*, 2000 BCSC 520 at para. 42; *Brown v. Garrison*, (1967) 63 W.W.R. 248 (BCCA) at p. 250);
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> b. Whether cross-examination is necessary to challenge the facts deposed to in the affidavit (see *Beanland v. Beanland*, (1997) 151 Nfld. & P.E.I.R. 51 (NLCA) at para. 35; *Christian Brothers Institute Inc. v. John Doe (G.E.B. #36)*, 2004 NLCA 27, 237 Nfld. & P.E.I.R. 56 at para. 19; and /or
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> c. Whether the affidavit is contentious or the statements deposed to are in dispute (*R. v. Dean*, 1996 CanLII 3102 (BCCA) at para. 9; *Cadboro Invt. Ltd. v. Can. West Ins. Co. (1987)*, 19 B.C.L.R. (2d) 352 (BCCA) at para. 22; *General Electric Company v. United States*, 1980 ABCA 316 (CanLII) at para. 6.

[13] More recently, in *Kathirgamanathan on Appeal*, this Court found no error when a judge denied leave to cross-examine affiants in the context of an application to strike pleadings that were allegedly based on inadmissible evidence. The judge refused leave because the facts relevant to the application, for the most part, were not contentious, and because the applicant was intending to use the cross-examination as a fact-finding investigation rather than focus on the merits of the application. In his reasons (*Kathirgamanathan v. Western Regional Integrated Health Authority*, 2021 NLSC 89, rev'd on other grounds 2023 NLCA 34) the judge stated:

> [27] After hearing from both counsel, I was satisfied that it would be inappropriate to grant leave to cross-examine the deponents. There was no serious dispute on the facts set out in the affidavits. It also appeared to me that cross-examination in this matter would have opened the door to what would amount to be fact-finding, or the type of questioning that would more properly be left to discovery or other forms of

> disclosure and production. Accordingly, I declined leave to cross-examine the deponents.

ANALYSIS

[14] The applications judge had the discretion to refuse leave to cross-examine; he correctly directed himself on the guiding principles from *Tucker;* he correctly applied these principles from *Tucker*; he provided valid and detailed reasons for his Decision. He therefore exercised his discretion judicially.

[15] The applications judge noted correctly that, when assessing relevance of the proposed cross-examination, the focus must remain on the issues in the underlying application and not the merits of the case (Decision, at para. 8). The applications judge addressed each of the reasons advanced by Mr. Oleynik for the intended cross-examination and concluded that the cross-examination would not assist the Court in deciding the merits of the underlying application.

[16] Mr. Oleynik suggested that that cross-examination was necessary "to prevent the further transmission and publication of the Appellant's personal and confidential information" (Mr. Oleynik's Factum, at paras. 177-179) and to explore Memorial's Respectful Workplace Policy (Mr. Oleynik's Factum, at paras. 184-185). On the first point, it is not clear how cross-examination would prevent transmission or publication of personal information. On the second point, the cross-examination on the Policy was not necessary to the application and would have been of no assistance to the applications judge in deciding the issue before him.

[17] The applications judge recognized the importance of proportionality in the application, noting that the purpose of the *Rules of the Supreme Court, 1986,* as a whole is to ensure the expeditious and cost-effective determination of disputes and that the "*Rules* are not a menu to allow parties *carte blanche* choose whatever procedural options they want, regardless of the impact on the proceedings as a whole" (Decision, at paras. 36-37; see also *Szeto v. Dwyer*, 2010 NLCA 36, at para. 53).

[18] Regarding Mr. Oleynik's argument that the affiants were biased against him, the applications judge correctly pointed out that there is no expectation of impartiality on the part of an opposing party. Being a witness for an adverse party, on its own, does not justify granting leave to cross-examine. The applications judge added that the examples Mr. Oleynik gave to support his allegation of bias did not

engage the issue in the underlying application and did not suggest that the Court would benefit from the cross-examination (Decision, at para. 24).

[19] Regarding Mr. Oleynik's argument that he had the right to know the case he had to meet, the applications judge correctly pointed out that cross-examination in the context of an application is not intended to serve as a fact-finding or discovery investigation (Decision, at para. 26). The applications judge correctly pointed out that Mr. Oleynik had available the usual mechanisms for pre-hearing discovery, disclosure and production (Decision, at para. 26).

[20] Regarding Mr. Oleynik's argument that there were omissions and deficiencies in the affidavits, Memorial was not expected to present exhaustive affidavits containing every detail of every fact. Mr. Oleynik, as an applicant, had the right to file his own affidavit with any details that were relevant to the application. The applications judge added that Mr. Oleynik's general allegations of omissions and deficiencies within affidavits failed to give any examples and failed to indicate how the affidavits were contentious, or how the statements deposed to were in dispute (Decision, at para. 22). The applications judge added that the facts relied upon by Memorial were largely a matter of public record and did not depend on the credibility of the affiants (Decision, at para. 24).

[21] Mr. Oleynik argued that the applications judge's $5,000 costs order against him showed that the applications judge treated the parties with an uneven hand and demonstrated procedural unfairness. On September 26, 2023, after the parties were heard on the vexatious litigant application, counsel for Memorial sought a lump sum cost award of $50,000 inclusive of costs for the application for cross-examination (Appeal Book, Tab 12, at 253). The applications judge issued separate reasons on both applications and gave separate lump sum costs award on each. This Court in *Hiscott v. Hall*, 2015 NLCA 1, at paragraph 13, confirmed that an appellate court owes considerable deference to a trial judge's costs award, including the findings of fact supporting the award. The applications judge's discretion in awarding lump sum on the cross-examination application was exercised on a principled basis and explained in his Decision.

[22] Lastly, Mr. Oleynik submitted that he was owed the highest level of procedural fairness as this litigation concerned his employment status and the safety of his family in Ukraine. However, the application and present appeal did not concern the determination of any of the underlying litigation. It concerned the refusal of an application to cross-examine affiants in the context of an application for a

vexatious litigant order. The connection to Mr. Oleynik's employment status and the safety of his family in Ukraine was not established.

CONCLUSION

[23] The applications judge made no error in ruling that Mr. Oleynik failed to establish a basis that would justify the Court ordering cross-examination of Memorial's affiants or counsel. Further, there was no denial of procedural fairness. The decision to deny cross-examination, and to make the cost award, were within the discretion of the applications judge and he exercised that discretion judicially.

[24] In the circumstances, I would dismiss this appeal.

COSTS

[25] I would award Memorial its costs on this appeal under Column 3.

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W.H. Goodridge J.A.

I concur : _____

L.R. Hoegg J.A.

I concur : _____

K.J. O'Brien J.A.