

CANADA / JUDGMENT

Bradford v. Bradford

2023 BCSC 2185

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Supreme Court of British Columbia

DECIDED

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2023 BCSC 2185 Bradford v. Bradford

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bradford v. Bradford,

2023 BCSC 2185

Date: 20231212

Docket: 20090

Registry: Terrace Registry

Between:

Felicity Louisa Jane Bradford a.k.a. Felicity Louisa Jane Keenleyside

Claimant

And:

Benjamin Arthur Bradford

Respondent

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment on Costs

Counsel for the Claimant:

A. Lax

Respondent on his own behalf:

B.A. Bradford

Place and Date of Hearing:

Terrace, B.C.

October 30, 2023

Place and Date of Judgment:

Terrace, B.C.

December 12, 2023

Introduction

- [1] Reasons for judgment after the trial of this family proceeding were issued on May 24, 2023 and are reported at 2023 BCSC 877. Counsel requested at the end of the trial to speak to costs after the reasons were released. Counsel and the respondent have now done so. The claimant seeks double costs given her offers to settle.

Background

- [2] After a 10 year marriage the parties separated in 2016. On October 10, 2018, they were divorced and entered into a consent order. The consent order provided:
10. Benjamin shall pay support in the amount of \$1,090 per month to Felicity commencing on November 5, 2018 and continuing on the first day of each and every month thereafter until further order of the court or the agreement of the parties.
- [3] The issues at trial were the respondent's application to terminate such spousal support and, if not terminated, to determine the parties' respective incomes.
- [4] The claimant was successful at trial both with respect to determining the respondent's income and in obtaining continued spousal support until August 1 2025. The respondent did not appeal. The trial order has yet to be entered.
- [5] The respondent was represented by counsel at trial. However, he chose to appear on his own behalf at this application. He sought to introduce new evidence apparently in an effort to re-open the trial. He challenged the credibility findings made at trial. He also challenged how DivorceMate treats rental income.

Preliminary Issues

- [6] The respondent has filed an affidavit of James Kester, a family friend of the claimant and respondent, who was not a witness at trial. He alludes to travelling frequently but does not establish he was not available to testify at trial. Mr. Kester states the claimant "has lied to the court about many material facts in [the] case". He gives his impression of her work habits and raises her behavior as a Canadian Ranger. He then states: "I ask that court costs not be awarded as she has lied and misled the court".

- [7] The affidavit contains hearsay and opinion and is not admitted into evidence.
- [8] The respondent relies on that affidavit as well as his submissions challenging the claimant's credibility and rearguing the trial. He alleges there is newly discovered information consisting of vague allegations that the claimant has abused the Canada Emergency Response Benefit and the Employment Insurance System (the "EI System"). I note the respondent unsuccessfully challenged the claimant's use of the EI System at trial.
- [9] There is no application to re-open. The respondent asked for the application to proceed as if he had applied to re-open given that he wished to finalize the matters at this hearing. He did not seek to adjourn the application, either to bring such an application or on the basis that the claimant filed the notice of application one day late.
- [10] Although no application is brought to reopen, even if the respondent had brought one the test for re-opening is not met. The proposed evidence would not have changed the result and could have been obtained before the trial. No miscarriage of justice has been shown. (See: *Hansra v. Hansra*, 2017 BCCA 199, paras. 44-48, 55-59; *Sauer v. Scales*, 2010 BCSC 983, *Zhu v. Li*, 2007 BCSC 1467 and *Moradkhan v. Mofidi*, 2013 BCCA 132 at para. 31.)
- [11] As for the respondent's comments on DivorceMate, he submits it "calculates rental income as if it is truly net income and all but ignoring mortgage expenses tilts the playing board, especially for those who need a rental to pay their ex-spouse". The determination of income under the Spousal Support Advisory Guidelines (Ottawa: Department of Justice, 2008) relies on ss. 15-20 of the Federal Child Support Guidelines, SOR/97-175 [FCSG]. Income is defined "under the heading "total income" in the T1 General Form issued by the Canada Revenue Agency and is adjusted under Schedule III" (FCSG, s. 16).
- [12] Rental income is addressed in line 126 of an individual's T1 return. The income relied on by DivorceMate is the payor's net rental income after deduction of expenses such as interest and bank charges, repairs and maintenance, property taxes and the like. It does not "ignore" mortgage expenses. The respondent's submission on the issue of rental income is without merit.

Law and Analysis

- [13] The claimant seeks costs under Supreme Court Family Rules, R. 16-1(7) and (9) and double costs under R. 11-1(5) because of her offers to settle of March 16, 2022 (the "March 16 Offer") and January 25, 2023 (the "January 25 Offer") and her offer to settle costs of July 6, 2023 (the "July 6 Offer").
- [14] Beginning in July 2019, the respondent entered into an adult home share contract with the Terrace and District Community Services Society. He provides residential care and supervision to a developmentally disabled adult. The March 16 Offer relates to a chambers hearing set for March 21, 2022 to address what portion of the respondent's home care funds should be imputed to him for support purposes. The respondent submitted no amount of

such funds should be imputed to him and sought a declaration to that effect. The claimant offered to settle that issue on the basis that \$13,000 of the respondent's home care funds be imputed to him. The application of the respondent was dismissed, and the matter was referred to a further hearing to determine what portion of the home care funds should be imputed income: *Bradford v. Bradford*, 2022 BCSC 595.

[15] The January 25 Offer was made to settle all issues in the trial set for January 30, 2023. The offer was not accepted. In it the claimant offered to settle spousal support at \$1,090 per month for four years from January 2023. The amount totalled \$54,500. At trial this Court ordered spousal support of \$2,214 per month for 34 months from November 2022, a total of \$75,276. The claimant also offered to settle the imputed amount from the home care funds payments at \$10,000. The order made at trial was that \$18,000 was to be imputed.

[16] The July 6 Offer was an offer to settle costs. I shall return to this offer after addressing the earlier offers.

[17] Rule 11-1 of the Rules provides:

(1) In this rule, "offer to settle" means

(c)

(i) is made in writing by a party to a proceeding,

(ii) has been served on all parties of record, and

(iii) contains the following sentence: "The[party(ies)]....., ...[name(s) of party(ies)]....., reserve(s) the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding."

(4) The court may consider an offer to settle when exercising the court's discretion in relation to costs.

Cost options

(5) In a family law case in which an offer to settle has been made, the court may do one or more of the following:

(a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle;

(b) award double costs of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle;

- (c) award to a party, in respect of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;
- (d) if the party who made the offer obtained a judgment as favourable as, or more favourable than, the terms of the offer, award to the party the party's costs in respect of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle

Considerations of court

- (6) In making an order under subrule (5), the court may consider the following:
 - (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
 - (b) the relationship between the terms of settlement offered and the final judgment of the court;
 - (c) the relative financial circumstances of the parties;
 - (d) any other factor the court considers appropriate.

[18] The March 16 Offer and the January 25 Offer both had the required statement under R. 11-1(1)(c)(iii). The January 25 Offer relating to costs did not.

[19] The law regarding the Court's exercise of its discretion to award double costs was reviewed in *Hartshorne v. Hartshorne*, 2011 BCCA 29 at paras. 25-26:

[25] An award of double costs is a punitive measure against a litigant for that party's failure, in all of the circumstances, to have accepted an offer to settle that should have been accepted. Litigants are to be reminded that costs rules are in place "to encourage the early settlement of disputes by rewarding the party who makes a reasonable settlement offer and penalizing the party who declines to accept such an offer" (*A.E. v. D.W.J.*, 2009 BCSC 505, 91 B.C.L.R. (4th) 372 at para. 61, citing *MacKenzie v. Brooks*, 1999 BCCA 623, *Skidmore v. Blackmore* (1995), 1995 CanLII 1537 (BC CA), 2 B.C.L.R. (3d) 201 (C.A.), *Radke v. Parry*, 2008 BCSC 1397). In this regard, Mr. Justice Frankel's comments in *Giles* are apposite:

[74] The purposes for which costs rules exist must be kept in mind in determining whether appellate intervention is warranted. In addition to indemnifying a successful litigant, those purposes have been described as follows by this Court:

- "[D]eterring frivolous actions or defences": *Houweling Nurseries Ltd. v. Fisons Western Corp.* (1988), 1988 CanLII 186 (BC CA), 37 B.C.L.R. (2d) 2 at 25 (C.A.), leave ref'd, [1988] 1 S.C.R. ix;
- "[T]o encourage conduct that reduces the duration and expense of litigation and to discourage conduct that has the opposite effect": *Skidmore v. Blackmore* (1995), 1995 CanLII 1537 (BC CA), 2 B.C.L.R. (3d) 201 at para. 28 (C.A.);

- "[E]ncouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases: *Bedwell v. McGill* 2008 BCCA 526, 86 B.C.L.R. (4th) 343 at para. 33;
- "[T]o have a winnowing function in the litigation process" by "requir[ing] litigants to make a careful assessment of the strength or lack thereof of their cases at the commencement and throughout the course of the litigation", and by "discourag[ing] the continuance of doubtful cases or defences": *Catalyst Paper Corporation v. Companhia de Navegacao Norsul*, 2009 BCCA 16, 88 B.C.L.R. (4th) 17 at para.16.

[26] Rule 37B(6) of the Rules of Court (which is now R. 9-1(6) of the Supreme Court Civil Rules and remains the same as its predecessor) lists the following factors to be considered in making an award for double costs under R. 37B(5)(b):

- (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or on any later date;
- (b) the relationship between the terms of settlement offered and the final judgment of the court;
- (c) the relative financial circumstances of the parties;
- (d) any other factor the court considers appropriate.

[20] The factors to be considered were recently summarized by Justice Horsman (as she then was) in *Haley v. Haley*, 2023 BCSC 285:

9 The first factor requires the court to determine whether the offer was one that ought reasonably to have been accepted at the time it was open for acceptance, not by reference to the result ultimately achieved at trial. The factors relevant to the assessment of reasonableness include the timing of the offer, whether it had some relationship to the claim as opposed to being a nuisance offer, whether it could be easily evaluated, and whether some rationale for the offer was provided: *H.K. v. W.K.*, 2018 BCSC 1447 at para. 66 [*H.K.*].

10 The second factor is the relationship between the offer and the result at trial. In considering this factor, the court should determine whether the declining party would have been financially better off, on a global basis, if they had accepted the offer as compared to their recovery at trial. Precise alignment between an offer to settle and final judgment is not required: *H.K.* at para. 68.

[21] The claimant was the substantially successful party on the first hearing before Justice C. Ross on the issue of imputing of income from the home care contract and then again in terms of quantum of the imputed sum at trial. She was also substantially successful at trial on her claim for spousal support both as to entitlement and amount in comparison to the offer to settle.

- [22] The March 16 Offer was concise. It was provided four clear days before the chambers hearing on March 21, 2022. It noted that the respondent received \$30,132 per year for home care and proposed \$13,000 of that amount be imputed to his income. Given the form of offer there was enough time for the respondent to consider the offer.
- [23] As for the January 25 Offer, it was provided six days before trial. It was four pages long and provided detailed background information summarizing the parties' respective positions as well as a discussion of the reasoning for the offer. The form of the offer was clear and it was provided sufficiently in advance for the respondent to consider it and respond.
- [24] The respondent did not assert he lacked sufficient time to consider either offer.
- [25] Both offers are ones the respondent should reasonably have accepted. Both offers were favourable to the respondent in comparison to the hearing results and both provided that each party would bear their own costs. The respondent would have been better off financially to have accepted the offers.
- [26] Much of the respondent's submission hinged on the allegations of misconduct by the claimant in giving misleading evidence supported by the alleged "newly discovered evidence". Given my conclusion on that issue, I need not address the submissions on such affecting entitlement to costs.
- [27] The respondent however also submits an order for costs and double costs would be unfair referring to *Gold v. Gold*, 106 D.L.R. (4th) 452 at 457, 1993 CanLII 1248 (B.C.C.A.) where Justice McEachern for the Court of Appeal stated:

The question, then, is: when should the Court order otherwise? With respect, when the court should order otherwise is a matter of discretion, to be exercised judicially by the trial judge, as directed by the Rules of Court. To lay down any strict guidelines or even to attempt to give exhaustive examples is not, I think, helpful because the facts and issues in each family law case vary so greatly. Factors such as hardship, earning capacity, the purpose of the particular award, the conduct of the parties in the litigation, and the importance of not upsetting the balance achieved by the award itself are all matters which a trial judge, quite properly, may be asked to take into account. Assessing the importance of such factors within the context of a particular case, however, is a matter best left for determination by the trial judge.

- [28] Hardship to the respondent is not an issue nor is his earning capacity. There is no evidence that his alleged financial hardship is "of such magnitude that it would be significantly unfair when considered in the context of the successful party's right to recover costs" (*Burton v. Carter* 2023 BCSC 206 para. 6 quoting *R. (K.A.M.) v. G. (W.H.)*, 2014 BCSC 783 at para. 19). Throughout the litigation the respondent has sought to avoid being responsible for any continuing spousal support. He has not been open to resolution despite the efforts of the claimant to avoid the expense of a hearing in 2022 and of the trial itself. An award of costs and double costs in the circumstances of this case given the assets and income of the respondent does not raise an issue of a balance being upset.

[29] I turn next to the claimant's July 6 Offer to settle her costs. It was delivered on July 6, 2023 and proposed that costs of \$18,000 be paid by July 31, 2023, otherwise \$20,000 if paid thereafter. The claimant's offer states:

Costs

Attached find a draft bill of costs. Based on our offer to settle made just in advance of trial we would in my view be entitled to double costs of trial. That is an increase from \$8000 for trial days to \$16,000 for trial days. Given the ultimate resolution, we would also be prepared to argue for double costs of the interim application and the imputed income, on the basis that the eventual result we got was better than the order the court made. That would be another \$2000. These amounts are not reflected in the draft bill of costs, and would increase the costs to \$24,000. Even without any costs whatsoever for the interim application, we would likely be awarded \$22,000 in costs (including double costs for trial days).

We make the following offer to settle costs and other lingering issues of non-payment of arrears:

- (1) Mr. Bradford shall pay costs of \$18,000 if paid by July 31, 2Q23. Otherwise he will owe \$20,000 in costs.

If your client does not provide his income tax return, or does not agree to the above, we will put the matter back before Justice Punnett and we will seek costs of that further application in addition to costs/double costs as outlined above. If he has not paid the correct amount for July by that time we will also seek financial penalties against him for his failure to do so .

[30] As noted, the July 6 Offer did not include the exact clause required by R. 11-1(1)(c)(iii). However, in *Roach v. Dutra*, 2010 BCCA 264, the Court of Appeal held that a failure to do so is not necessarily fatal. In *Roach* the offer to settle stated "[w]e reserve the right to bring this letter to the attention of the judge as a matter of costs in accordance with Rule 37 and 37A" (at para. 32). The Court of Appeal stated:

35 It is not disputed that the terms of Ms. Roach's offer substantially complied with the requirements of an offer under Rule 37B(1)(c): it was made in writing; it was delivered to Mr. Dutra (through his counsel); and it contained a sentence in terms similar to those set forth in subrule (1)(c)(iii). Nor is there any suggestion that Mr. Dutra was misled by the offer in any way, or that he believed that he could disregard the offer with impunity with respect to costs because it did not track subrule (1)(c)(iii) word-for-word. Rather, Mr. Dutra takes what appears to be the highly technical point that if an offer does not contain the exact wording set out in subrule (1)(c)(iii), it does not come within the definition of an "offer to settle" within the meaning of Rule 37B(1) and, therefore, cannot attract an award of double costs.

37 The question, therefore, is whether the trial judge erred in finding that the offer to settle made by Ms. Roach constituted an offer to settle within the meaning of Rule 37B(1). Is any deviation from the precise wording of subrule (1)(c)(iii), no matter how slight, fatal to a successful claim for double costs?

38 The main points in favour of a strict approach to the interpretation of subrule (1)(c)(iii) are: (1) the wording of the subrule, which defines an "offer to settle" to mean an offer which contains the sentence set out therein; and (2) the fact that, if an offer complies precisely with the Rule, there can be no doubt that it is an offer within the meaning of the Rule such that the party receiving the offer will know, with certainty, that failure to accept the offer may result in an order of double costs. In other words, as is usually the case, a strict interpretation of the Rule leads to greater certainty in terms of result than a more flexible interpretation.

39 The arguments against a strict interpretation of the subrule include: (1) the history of Rule 37B, which indicates that it was intended to be applied more flexibly than its predecessors (Rules 37 and 37A), and (2) the perceived injustice of applying an overly formulaic or technical approach where the offer is worded in terms effectively the same as those in the subrule, and where there is no reasonable prospect that the party receiving the offer was misled in any way by the fact that it did not comply strictly with the wording of subrule (1)(c)(iii).

53 In my view, this offer satisfies all of these criteria. It is clearly made on behalf of Ms. Roach to Mr. Dutra, it is in writing, and it expressly reserves the right to bring the offer to the attention of the court on the issue of costs, which is done, in practice, once judgment has been rendered.

54 I endorse the trial judge's admonition that counsel would be well advised to ensure that the language of their offers complies precisely with subrule 1(c)(iii) (and, in future, Rule 9-1) to avoid any possibility of their offers being found deficient. In this case, the offer was made just days after the new rule came into effect. It may be that the same measure of flexibility will not be accorded to offers in the future which are non-compliant. That is especially so if it proves that flexibility in the application of the Rule undermines its purpose of encouraging settlement of disputes in a fair, timely and cost-efficient manner, in accordance with the object and spirit of the Rules as a whole.

55 In summary on this point, I am not persuaded that the trial judge erred in finding that this offer met the requirements of Rule 37B such that he was entitled to award Ms. Roach double costs for the final three days of trial .

[31] I am not satisfied the claimant sufficiently articulated a claim for double costs on the offer to settle costs. The references to double costs relate to the interim application and the trial, and then later in the offer it notes that they will put the matter back before the Court seeking "costs of that further application in addition to costs/double costs as outlined above". In addition, Roach dates back to the change in the rule and notes that in future precise compliance with subrule 1(c)(iii) is recommended.

- [32] More significantly, however, is an offer to settle costs is not contemplated by the Rules. Rule 11-1 addressing costs applies to offers made during the family law case itself--not the hearing of a costs assessment. The required wording under R. 11-1(1)(c)(iii) specifically refers to a party bringing an offer to settle to the attention of the Court for "consideration in relation to costs after the court has pronounced judgement on all other issues in this proceeding".
- [33] Rule 16-1 of the Rules refers to conduct of the family law case to be assessed in accordance with Appendix B unless other circumstances apply. Appendix B addresses the trial process. That is consistent with R. 11-1 referring to the family law case and the final judgment. In addition, the Rules define a family law case as "a proceeding in which one or more of the following orders is sought" and then lists orders under the Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3, the Family Law Act, S.B.C. 2011, c. 25 and other family-related hearings. Again, the subject of R. 11-1 is the trial proceeding--not costs relating to an offer to settle costs. Such an offer and a claim for double costs is not within the purview of the regime of costs under the Rules.
- [34] As well, it would require the Court to fix the costs without reference to the registrar in order to assess the "offer".
- [35] On this point the claimant also submits the Court should fix the costs based on the draft bill of costs without reference to the registrar.
- [36] The Court of Appeal in *Gichuru v. Smith*, 2014 BCCA 414, leave to appeal to SCC ref'd, 36221 (16 April 2015), addressed the summary assessment of an award of special costs by the trial judge. In addressing the authority of the Court to summarily determine costs under R. 14-1(15) of the Supreme Court Civil Rules (R. 16-1(14) is similar under the Supreme Court Family Rules), the Court stated:
- [106] Whether a judge should determine the quantum of costs as authorized under R. 14-1(15) is a matter of judicial discretion. It is a discretion that must be exercised in light of Rules 14-1(2) (for party and party costs) and 14-1(3) (for special costs). It is a discretion which should be exercised sparingly: see *Buchan Appeal* at para. 13. There is good reason for that approach. The court officer best placed to determine if the fees billed by a lawyer are objectively reasonable is usually the registrar. The registrar's extensive knowledge and experience assessing legal bills is seldom matched by that of a trial judge.
- [107] An exception to that general proposition can arise in cases when the judge is intimately familiar with the litigation, or the time and costs of a registrar's hearing cannot be justified. In this regard, the words of Southin J.A. in *Interclaim* are often cited:

- [27] As this division is also the division which heard the appeals mentioned in paragraph 13, we are substantially familiar with what happened below. I have in mind also that these litigants have taken unto themselves, from the pool of judicial resources available in this Province, more than can be said to be their fair share. They are not alone in doing such things but litigants must be encouraged to be economical of judicial time.
- [38] I accept the submission of Mr. Willms that this is a proper case for the exercise of the power to fix a sum to be paid in lieu of taxation. This litigation has already consumed, as I have already indicated, far too much of the public resource of judicial time as it is. To send the claim to taxation will engage a large amount of the time of a taxing officer whose decision might be appealed and matters will go on and on. Among other things, the taxing officer would have to learn about this litigation all that we already know, a duplication of effort which does no one any good. ...
- [108] However, the fact the judge has heard the trial does not necessarily lead to the conclusion that the assessment be done summarily or that the best use of judicial resources is for the judge to embark on the assessment of costs. The time the judge spends on the assessment is time the judge does not have for other matters.
- [109] A related concern is that the party who might have to pay the costs will prolong any assessment by requiring microscopic review of the services undertaken by counsel for the successful party: Buchan at para. 25. This concern must be weighed against the right of a party to challenge the reasonableness of the opposing party's proposed costs. This right derives from the rules of natural justice: see Williston at para. 53.
- [110] It is true that a more detailed review may be tedious and expensive. That does not mean such a review is unfair to the successful litigant, particularly given that significant amounts may be in issue. While R. 1-3(1) sets out that the object of the Rules is to secure the just, speedy and inexpensive determination of every proceeding on the merits, R. 1-3(2) mandates that the proceedings be conducted in a way that is proportionate to the amounts involved in the proceeding, the importance of the issue in dispute and the complexity of the proceeding. The amount involved may be an important consideration in determining whether a summary procedure is appropriate.

Summary of General Principles

- [154] We would briefly summarize the principles as discussed above. The decision to fix the quantum of costs under R. 14-1(15) is a matter of judicial discretion that should be sparingly exercised. The court officer best placed to conduct an assessment is usually the registrar, whose knowledge and experience in assessing legal bills is extensive and seldom matched by that of a trial judge. An exception may arise in cases when the judge is intimately familiar with the litigation or the time and cost of a registrar's hearing cannot be justified or where the parties consent. The fact that a judge has heard the trial does not necessarily lead to the conclusion that the best use of judicial resources is for the judge to assess costs. A

concern that a party who might have to pay costs will prolong the costs assessment by requiring a microscopic review of the services provided by counsel must be balanced against the right of that party to challenge the reasonableness of the proposed costs.

- [37] The claimant seeks summary resolution of costs because of the amount involved and because such will be a more efficient resolution of the costs issue. The claimant is willing to waive disbursements to facilitate the summary resolution of Appendix B costs. The respondent has not consented to a summary resolution of costs.
- [38] As noted, a decision to fix the quantum of costs summarily is a matter of judicial discretion to be exercised sparingly. A registrar is best placed to conduct such an assessment. I decline to summarily assess costs. They should be assessed in the usual manner. If the parties cannot agree on costs a reference to the registrar is required.
- [39] The claimant is entitled to her costs as a matter of ordinary difficulty in accordance with Appendix B. The claimant shall recover double costs with respect to the interim application from the date of the offer of March 16, 2022 and double costs for the trial proper from the date of January 25, 2023. She is also entitled to her costs of this application as a matter of ordinary difficulty.
- [40] Approval of the form of this order by the respondent is dispensed with.

"The Honourable Mr. Justice Punnett"

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