

CANADA / JUDGMENT

Lefebvre v. HOJ Industries Ltd.

[1992] 1 SCR 831**COURT**

Supreme Court of Canada

DECIDED

2 March 1992

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Lefebvre v. HOJ Industries Ltd. Collection Supreme Court Judgments Date 1992-03-02 Report

[1992] 1 SCR 831 Case number 21586 Judges La Forest, Gérard V.; L'Heureux-Dubé, Claire; Sopinka, John; Gonthier, Charles Doherty; Cory, Peter deCarteret; McLachlin, Beverley; Iacobucci, Frank On appeal from Ontario Subjects Action Notes SCC Case Information: 21586 Decision Content Lefebvre v. HOJ Industries Ltd., [1992] 1 S.C.R. 831 Gilles Lefebvre Appellant v. HOJ Industries Ltd. Respondent and between Marek Machtinger Appellant v. HOJ Industries Ltd. Respondent Indexed as: Lefebvre v. HOJ Industries Ltd. File No.: 21586. 1992: March 2.* Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ. motion for re-hearing of appeal Practice -- Re-hearing -- Counsel for appellants not present when matter heard -- Procedure for setting hearing dates -- No duty on Court to inform counsel of hearing dates -- Counsel failing to carry out duty to ascertain inscribed date -- Re-hearing granted as matter of indulgence -- Granting of motion not a precedent -- Rules of the Supreme Court of Canada, SOR/83-74, r. 51. Statutes and Regulations Cited Rules of the Supreme Court of Canada, SOR/83-74 [am. SOR/91-347], rr. 44(4), 51. MOTION for a re-hearing of an appeal heard in the absence of counsel for the appellants. Motion granted. Howard A. Levitt, Constance C. Olsheski and R. Stacey Ball, for the appellants. John R. Sproat, for the respondent. //The Court// The following are the reasons for the order delivered by The Court -- Counsel for the applicants (appellants in the appeal) makes this application for a re-hearing pursuant to Rule 51 of the Rules of the Supreme Court of Canada, SOR/83-74. Counsel brings this application because he was not present on November 5, 1991 when the matter had been set down for argument and was argued. Faced with the non-appearance of counsel for the appellants on that date, the Court considered whether the afternoon case might be heard first and attempted through a Court official to communicate with counsel for the appellants. It was not possible to contact counsel for some time. As the hearing of the case had been properly scheduled and called, the Court decided to proceed and heard oral argument on behalf of the respondent only. Counsel for the applicants states that neither he nor anyone in his firm ever received any prior notice of the hearing date for the appeal. He also states that on November 5, 1991 he received a telephone call from an official of the Supreme Court of Canada informing counsel that the appeal was about to proceed in his absence

and subsequently learned that the Court proceeded in his absence. Because this turn of events appears to be most unusual if not unique in the recent history of the Court, we think it helpful to describe briefly the general procedure in the Court for setting hearing dates for appeals and then describe what occurred in this matter. The following is the procedure involved in setting hearing dates for appeals. Once an appeal has been inscribed for hearing in a particular session, it is the party's responsibility to follow up and to determine the date of the hearing and to attend and argue on the date specified. Although it is not the Court's responsibility to notify the parties of the date of hearing of an appeal, Registry officials do so as a matter of courtesy to the parties and to ensure the efficient use of Court time. In this respect, the Court's practice is to advise all parties, by telephone, through their counsel's Ottawa agents, of the proposed date for hearing of an appeal, and, when the agenda is finalized, of the official date. This first contact is generally made four to five weeks prior to the beginning of a session and is to determine whether counsel is available to argue the appeal on that date. If, after advising their principals, the Ottawa agents are informed that counsel is not available on the proposed date, the agents are expected to contact Registry officials so that an alternate date can be found. If the Ottawa agents contact the Registry to confirm that the proposed date is satisfactory or if the Registry is not advised that counsel is unavailable to argue the case on that date, Registry officials assume that the date is acceptable and proceed to prepare the draft agenda for the session. When the agenda is finalized and approved by the Chief Justice, Registry officials again contact the Ottawa agents by telephone to advise them of the official date. In this matter, in late August 1991, the Ottawa agents of the appellants were contacted by a Court official and advised of the probable date of the hearing. In early October 1991, another call was made to the Ottawa agent to confirm that the appeal would be heard on November 5, 1991 at 10:30 a.m. Also a list of appeals inscribed for hearing during the October 1991 session was made available to counsel at the Registry offices on September 18, 1991. This appeal was placed on the list as number 44; and the list shows the names of all parties together with the names of counsel and their agents. In addition, the agenda of court sittings for the week beginning November 4, 1991, extracted from the entire agenda for the October 1991 session which was available to counsel on request as of October 3, 1991, showed case number 44 scheduled for November 5, 1991. Finally, it should be noted that Rule 44(4) of the Rules of the Supreme Court of Canada provides that the appellant must serve a notice of hearing upon all parties within ten days from the completion of the list of appeals to be heard during the session. No such notice was served by counsel for the applicants. Counsel for the applicants supports his application for a re-hearing on the following grounds:

1. The solicitor for the Applicants/Plaintiffs was not duly informed of the date of the hearing by this Honourable Court of the appeal;
2. The Applicants/Plaintiffs were deprived of their proper opportunity to provide oral argument on the appeal in this matter;

3. Affording the opportunity for the Applicants/Plaintiffs to appear at the hearing will promote the interests of justice and the appearance of justice being done to both parties. Counsel for the respondent does not oppose the application for a re-hearing and says his client will accept whatever outcome the Court thinks appropriate. In this respect, we should like to commend counsel and his client for the constructive approach they have taken in this matter. In our view, counsel for the applicants has seriously misunderstood the duties imposed on counsel who practise before this Court. It is counsel who must ascertain when their case has been inscribed for hearing; there is no duty on the Court to inform them, although an effort is made to contact them informally as already mentioned. The Court cannot and should not be affected by any breakdown in communications between counsel and their Ottawa agents. The obligation to inquire and ascertain the inscribed date for a hearing rests on counsel for the parties irrespective of whatever arrangements and duties may exist as between counsel for the parties and their Ottawa agents. Counsel for the applicants simply did not carry out his duty to ascertain the date set down whatever his reasons or recourse may be. However, in all the circumstances and especially because this, as mentioned above, is a rare and unusual situation, the Court has decided to grant the application for a re-hearing as a matter of indulgence. However, the Court wishes to make it clear that granting the application is not to be taken in any way as a precedent for granting similar applications in the future. Indeed, it is our hope that, by setting forth the circumstances of this matter and the duties and responsibilities of counsel, such a situation will not recur. Following the hearing of the application, the Court announced that it would, as a matter of indulgence, grant the application subject to terms to be set forth in reasons to follow. The sole matter remaining is the issue of costs. On this matter, we are of the view that, in all the circumstances, the respondent shall have costs for (a) the hearing held on November 5, 1991 on a solicitor-client basis in any event of the cause, and (b) the motion for a re-hearing on a party-and-party basis in any event of the cause. These costs are payable by counsel for the applicants and will not be charged to his clients. Accordingly, the application for a re-hearing is granted with costs as outlined above. Judgment accordingly. Solicitors for the appellants: Howard Levitt & Associates, Toronto. Solicitors for the respondent: Miller, Thomson, Toronto. *Reasons delivered March 26, 1992.

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