

CANADA / JUDGMENT

Mayer v. Mayer Estate

2020 BCCA 282

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 282 Mayer v. Mayer Estate

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Mayer v. Mayer Estate,

2020 BCCA 282

Date: 20201008

Docket: CA46193

Between:

Erika Mayer

Appellant

(Plaintiff)

And

The Estate of Siegfried Otto Mayer and Ursula Breidt

Respondents

(Defendants)

Before:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated

June 6, 2019 (Mayer v. Mayer Estate, Vernon Docket S52628).

Oral Reasons for Judgment

The Appellant, appearing in person

(via videoconference):

E. Mayer

Counsel for the Respondent, Ursula Breidt

(via videoconference):

C.C. Caldwell

D. Montgomery

Place and Date of Hearing:

Vancouver, British Columbia

October 8, 2020

Place and Date of Judgment:

Vancouver, British Columbia

October 8, 2020

Summary:

This appeal arises from an order in chambers dismissing the appellant's application to reopen the underlying trial to hear fresh evidence or, alternatively, to declare a mistrial. The evidence that the appellant sought to adduce was an email between the respondent's daughter-in-law and the respondent's counsel. The appellant argues that the judge erred in law and in fact in dismissing the application, alleging that the fresh evidence shows that the respondent committed perjury, and that it should have been admitted for the purpose of making adverse findings of credibility with respect to the respondent. As the trial turned largely on the issue of credibility, the appellant argues that the fresh evidence would have altered the result at trial. The respondent asks for special costs in this appeal on account of the appellant's various allegations of perjury, which the respondent argues are baseless and reprehensible. Held: Appeal dismissed with special costs of the appeal to the respondent. The order appealed was discretionary, and the judge's views are entitled to deference. The proposed fresh evidence went only to general credibility and would have had no impact on the result. Viewed contextually, the allegations of perjury justified an award of special costs.

GRAUER J.A.:

Introduction

- [1] The claim of the appellant, Erika Mayer, against the estate of her father, Siegfried Mayer, and his common-law spouse, Ursula Breidt (who is now 83), was dismissed at trial by Mr. Justice Crossin. His trial reasons are indexed at 2018 BCSC 2225. This decision was not appealed.
- [2] The appellant subsequently applied to reopen the trial to admit new evidence or alternatively, for an order declaring a mistrial. Justice Crossin dismissed that application as well: *Mayer v Mayer Estate*, 6 June 2019, Vernon Reg. No. S52628 (SC) (the "application reasons"). It is from this second dismissal that Ms. Mayer appeals.
- [3] In her estate claim, the appellant had sought a one-half interest in the house that Mr. Mayer and Ms. Breidt lived in and owned as joint tenants for many years. On Mr. Mayer's death, that house had passed to Ms. Breidt as the surviving joint tenant, and had not become part of the deceased's estate. The appellant had claimed her interest by way of an alleged constructive trust or a resulting trust, or by way of a declaration that the joint tenancy had been severed. She also relied on "the doctrine of unjust enrichment" and pleaded the provisions of the Wills Variation Act, RSBC 1996, c 490.
- [4] Justice Crossin found that Ms. Mayer had failed to establish any of the grounds that founded her claim, which turned principally upon statements allegedly made by the deceased. In doing so, Justice Crossin made a number of findings of credibility. He was unimpressed by the evidence of the appellant and her husband and concluded that, notwithstanding what he described as the appellant's "concerted attack" (application reasons at para 16) upon the honesty of Ms. Breidt, Ms. Breidt's credibility "was left comfortably intact at the end of the day" (trial reasons at para 37).
- [5] The new evidence the appellant sought to have admitted was an email between Ms. Breidt's daughter-in-law, who had been helping Ms. Breidt with the litigation, and Ms. Breidt's counsel, Ms. Caldwell. The appellant obtained the email from the deceased's computer, which had been turned over to her. When the appellant connected the computer to the Internet, emails were downloaded from an account that had been shared by her father and Ms. Breidt, including the email in question.
- [6] The appellant asserted that the content of the email impugned Ms. Breidt's general credibility by contradicting evidence she had first given in an affidavit, and repeated on discovery and at the trial. As the trial turned largely on credibility, the appellant submitted it should be reopened to admit the new evidence, or a mistrial should be declared. Ms. Breidt contended that the email was protected by solicitor-client privilege and, in any event, did not impact her credibility.
- [7] The evidence in question concerned the purpose for which Ms. Breidt had transferred two sums of money to her husband: one transfer of \$25,000, and another of \$44,000. There was and remains no doubt that Ms. Breidt in fact transferred those amounts to Mr. Mayer.

- [8] In her affidavit, prepared by counsel and sworn in support of an unsuccessful application for judgment by way of summary trial, Ms. Breidt deposed that she transferred the sum of \$25,000 "in order to assist [the deceased] with payment of his tax debt". She deposed that she transferred the sum of \$44,000 "for payment of his tax debts in May 2012". On discovery, however, she did no more than confirm that she had stated those things in her affidavit. She was asked, in short, what her affidavit stated, not what had happened. At trial, she testified in chief that her husband had used the funds to pay bills and pay off debt.
- [9] Under cross-examination at trial, when it was put to her that her affidavit was false because her husband did not have tax debts at the time in question, she responded "maybe", acknowledging that she did not pay attention to what he did with the money. When asked about that and other statements in her affidavit that cross-examining counsel suggested were false, Ms. Breidt responded that she had thought it was the truth.

The Application Reasons

- [10] In dismissing the appellant's post-trial application, Justice Crossin observed that the email in question, the relevance of which related solely to the general credibility of Ms. Breidt, was *prima facie* a communication that was subject to solicitor-client privilege. Ms. Breidt had brought a concurrent application seeking a declaration to that effect. The judge was of the view that, in light of the conclusion he had reached, he did not need to determine whether that email, clearly *prima facie* privileged, remained privileged.
- [11] The judge then reviewed his trial reasons, observing at para 14 that the fundamental evidence in support of the appellant's claim at trial were statements of the deceased allegedly made to the appellant and her husband, putting their credibility and reliability in issue. Justice Crossin had concluded (trial reasons at paras 55-59) that the statements, even if made, did not advance the appellant's cause. But in any event, he had grave doubts concerning the reliability of the evidence.
- [12] As we have seen, Justice Crossin had concluded that Ms. Breidt's credibility was left "comfortably intact". He found that any conflicts in her evidence were not consequential, and were explained by her in an understandable and straightforward manner (trial reasons at paras 52-54). Even so, he considered her credibility of much less importance because the appellant's case rested on statements the deceased had allegedly made, rather than anything Ms. Breidt had said or done.
- [13] In the application reasons, Justice Crossin then turned to the new evidence about what the transfers that Ms. Breidt had deposed she made in order to assist the deceased in paying tax indebtedness about the transfers. The appellant's position was that the email demonstrated that this was false, and that Ms. Breidt knew when she swore the affidavit that there had been no tax debt. The judge approached it this way:

- [19] It became common ground in the trial that the deceased had gambled away his money in the years leading up to his death. The parties offered a great deal of evidence concerning the financial affairs of Mr. Mayer and Ms. Breidt over the years, including the fact that at one point the defendant [Ms. Breidt] gave Mr. Mayer money to pay for what she understood from the deceased to be his tax indebtedness. These transfers occurred in 2011 and 2012.
- [20] The defendant swore an affidavit to this effect on July 11, 2016, for the purpose of the summary trial.
- [21] It emerged during the litigation that it appeared, from a close analysis of the deceased's financial affairs, that he may have been untruthful, and in fact at the time of the transfers in 2011/2012, did not in fact have tax debts, and probably used the funds for something else.
- [22] It was put to the defendant she lied in her affidavit when she stated she had given the funds to the deceased to pay his tax debts. It was put to her it was a lie because the deceased in fact had no tax debt at the time he asked for the funds. The purport of the defendant's evidence in response to this suggestion was that she believed what was in her affidavit was true, that the deceased had in fact told her it was for tax debt, and it may be that what he said was untrue.
- [23] The affidavit in issue spoke to her state of mind at the time of the transfer as a result of what she was told by Mr. Mayer. The point of the evidence was, in my assessment of matters, simply part of the unfolding of the narrative at the relevant time and frankly of marginal relevance in any event. Whether the defendant suspected or was told at some point after the transfer that there was in fact no tax debt at the time of the transfer is, in my opinion, of no consequence in assessing the accuracy of the affidavit or the credibility of the defendant.
- [24] My views concerning this line of questioning at trial and my conclusions in that regard are captured in the previously referenced para. 53 of my reasons, but I repeat that now for emphasis:
- [53] I find any conflicts in her evidence were not consequential and, in any event, fully explained by the defendant in an understandable and straightforward manner. Ms. Breidt dealt with these inconsistencies with aplomb, grace, and logic. It is my view any inconsistencies in her evidence were innocent and not the product of mala fides that adversely impacted the defendant's credibility. Her evidence sounded a distinct ring of truth.
- [25] The plaintiff [the appellant] has not proffered any new evidence in this application that in any way impacts on this finding.
- [26] The principles that are brought to bear on an application to reopen the trial and receive new evidence are well known. A most succinct statement is to be found in *Akkor v. Roulston*, 2009 BCSC 1584, where Madam Justice Wedge summarized matters as follows:
- [20] A trial judge's ability to re-open an issue to hear new evidence before the formal judgment has been entered is an unfettered discretion that is to be used sparingly.

[21] The test for reception of new evidence following the completion of trial and the delivery of judgment is not controversial. The party seeking to adduce such evidence must satisfy the court on a balance of probabilities that (i) a miscarriage of justice would probably occur without the rehearing and (ii) that the evidence or argument he now wishes to present would probably change the result of the trial.

(cited with approval in *Moradkhan v. Mofidi*, 2013 BCCA 132 at para 24)

[27] It is apparent that I conclude the application of the plaintiff falls well short of meeting [these] criteria. In addition, certainly the circumstances do not give rise to a mistrial. In the result, I dismiss the plaintiff's application.

Grounds of Appeal

[14] The appellant, who is no longer represented by counsel, alleges four errors in judgment. Three of them are essentially the same allegation: that the judge erred in law and in fact in failing to admit the proffered new evidence, which the appellant characterizes as objective evidence of perjury on the part of Ms. Breidt. This, the appellant maintains, led to a miscarriage of justice, and could bring the administration of justice into disrepute. I will treat these as one ground, extracting from them a second ground, being that the judge erred in failing to grant the application for an order of mistrial.

[15] The fourth ground raised by the appellant in fact relates to the trial judgment, alleging that the trial judge erred in law in dismissing the appellant's application to vary the deceased's estate based on a misapprehension of the evidence. As no appeal was taken from the trial judgment, I take this as being intended to highlight an aspect of what the appellant submits is the miscarriage of justice that flows from Justice Crossin's alleged error in failing to admit the new evidence. I consider it to be subsumed under the previous three grounds.

[16] The appellant seeks an order setting aside the application judgment and, presumably, an order remitting the matter to the trial judge, with costs throughout.

[17] In the event the appeal is dismissed, the respondent seeks special costs of the appeal.

Discussion

[18] The questions, then, as I see them, are two: first, whether the judge committed a reviewable error in dismissing the application to reopen the trial to admit the new evidence; and second, whether the judge erred in principle in declining to order a mistrial.

[19] The parties do not dispute the law articulated by Justice Crossin concerning the discretion of a trial judge to reopen a trial to hear new evidence before a formal order has been entered. I would observe, however (although nothing turns on it in this case), that since the *Moradkhan* decision cited by the judge, this Court has expressly disapproved of the term "unfettered" in describing a judge's discretion to reopen a trial: see *Hansra v Hansra*, 2017 BCCA199, and *Bajwa v Habib*, 2020 BCCA 230 at paras 50-52. As Justice Frankel put it in

Hansra:

[44] It is beyond doubt that a trial judge who has pronounced reasons for judgment has the ability, before a formal order has been entered, to reopen a matter. This power is often said to involve the exercise of an "unfettered discretion". Although the word "unfettered" continues to be used in the context of reopening, the discretion to do so is in fact fettered, in the sense that, "as with any exercise of discretion, it must be exercised 'judicially', in a principled and consistent way": *Fan v. Chana*, 2011 BCCA 516 at para. 61, 345 D.L.R. (4th) 453 (per Levine J.A.). This is reflected, in particular, in decisions of this Court in which the discretion has been held to have been exercised improperly. In my view, the time has come to jettison the adjective "unfettered" which, by definition incorrectly describes the discretion.

[20] Bearing that in mind, Justice Garson's summary of the applicable principles in *Moradkhan* nevertheless remains helpful (I have jettisoned the adjective "unfettered" from the second bullet point):

[31] I would summarize the main principles applicable to such an application in the following way:

- it is generally speaking in the interests of justice to consider that a trial is complete when each side has closed their case and the judge has delivered his or her judgment;
- a judge's discretion to reopen a trial should be exercised with restraint;
- a party may not use the rule to re-argue, re-cast, or re-state his or her case, rather the rule is available to remedy what might otherwise be a substantial injustice;
- it is not intended that a party should be able to lead substantial new evidence, nor does the rule generally permit the leading of new expert evidence;
- the reasons that the evidence was not led or submissions not made in the first place may be relevant to the exercise of the judge's discretion, particularly where the failure to do so in the first place was a considered or pragmatic decision; and
- the discretion should only be exercised if the reception of the new evidence would probably change the result of the trial.

I would add to this list that a judge may reasonably exercise such discretion where a relatively discreet error in math or some mechanical consideration of the evidence is clearly in error. Finally, the overarching consideration is whether it is in the interests of justice that the court reopen the case. (See also *Brown v. Douglas*, 2011 BCCA 521, 314 B.C.A.C. 143.)

[21] In appealing the judge's decision not to reopen the trial, and not to declare a mistrial, the appellant faces two significant hurdles.

- [22] First, as both questions, whether to reopen a trial to admit further evidence or declare a mistrial, are discretionary, the standard of review is highly deferential. As Justice Garson put it in *Shoolestani v Ichikawa*, 2016 BCCA 452:
- [16] The appellate standard of review in respect of the appeal of discretionary orders was articulated by the Supreme Court of Canada in *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19 at para. 27:
- [27] A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice: *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1375. Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 76-77.
- [17] An appellate court may not interfere with a discretionary decision on the grounds that it would have exercised the discretion differently: see *Law Society of British Columbia v. Canada (Attorney General)*, 2002 BCCA 49 at para. 7, per Finch C.J.B.C. Intervention is only justifiable upon identification of a demonstrated error: see *Dhillon v. Pannu*, 2008 BCCA 514, per Tysoe J.A., leave to appeal ref'd [2009] S.C.C.A. No. 58.
- [18] Mr. Justice Rothstein said in *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2 at para. 43 that "[t]he test for appellate review of the exercise of judicial discretion is whether the judge at first instance has given weight to all relevant considerations".
- [23] Second, the proposed new evidence was relevant only to the question of Ms. Breidt's general credibility. It was not relevant to any specific issue of fact or law upon which the appellant's claim turned. What and when Ms. Breidt knew about the deceased's true purposes in seeking the transfers of funds from her was not of any consequence to the claim for a half interest in the house. What the appellant seeks, then, is to have the general credibility of the parties re-weighed, on which issue even greater deference is owed to the trial judge. See, for instance, *Bradshaw v Stenner*, 2012 BCCA 296 at para 21.
- [24] In advancing her appeal, the appellant characterizes the new evidence as demonstrating perjury on the part of Ms. Breidt, and relies upon cases such as *Burcevski v Ambrozic*, 2010 ABQB 570, discussing the ability to reopen a trial where the judgment was founded upon fraud. There, the court had before it, and granted, an application to strike out a claim alleging that a previous judgment had been obtained by fraud in the form of perjured evidence. Justice Kent had this to say:
- [49] The cases say that to permit a retrial of a case because of fraud or perjury, two factors must exist. First, there must be new evidence. Here, with a couple of exceptions, there is not new evidence. There are many documents that existed at the time of trial and readily available because they were registered at the Land Titles Office. Some information which *Burcevski* says is new or recently discovered was discoverable at the time of the first trial. For example,

he says the identity of Ambrozic's lawyer, Sharon Dalton, was recently discovered. A search at the Land Titles Office for the documents related to 1911 - 34 Avenue S.E. would have uncovered her name. The only new evidence is the account found in the box in Burcevski's basement which is a document from Mr. Harrison's files and the evidence from Ms. Kirchmann. It is only that evidence that I may consider in applying the second factor.

- [50] That factor is the test I must apply to the new evidence. For fraud, the most recent authority says the evidence must be practically conclusive. None of the new evidence meets that test. The account and the evidence from Ms. Kirchmann are, at best, small pieces of evidence a judge would weigh in arriving at a conclusion. The account is addressed to Nada Burcevski c/o Dimitri Burcevski. All that does is beg the question who received the account, Ambrozic or Burcevski.
- [51] I acknowledge that [Kaliel v. Aherne [1946] 2 DLR. 388 (Alta. SCAD)] says that in a case of alleged perjury the evidence must be material and show that the plaintiff has a reasonable probability of succeeding. Here Burcevski claims both fraud (concealing evidence) and perjury. I understand why the test may be different. If the alleged fraud is perjury, that goes to an assessment of the credibility of witnesses. New evidence would require a new exercise in weighing all the evidence. That takes me to Ms. Kirchmann's evidence. While a trial judge would weigh it along with all other evidence, it is of little value...

[Emphasis added.]

- [25] Here, the appellant submits that the new evidence she seeks to adduce demonstrates perjury, and, therefore, did require a new exercise in weighing all of the evidence, citing also Mitsubishi Heavy Industries Ltd v Canadian National Railway, 2011 BCSC 1536.
- [26] The starting point, then, is the proposition that the new evidence establishes that Ms. Breidt perjured herself. But taken contextually, it does not establish any such thing. This was explained by Justice Crossin, who did not find perjury, or even a meaningful inconsistency. On the contrary, he found that nothing in the new evidence proffered by the appellant impacted his conclusion that Ms. Breidt's evidence "sounded a distinct ring of truth" (trial reasons at para 53).
- [27] Moreover, as was the case in Burcevski, the proposed new evidence was of no value in terms of the issues raised in the case.
- [28] As Justice Crossin noted in his trial reasons, and reiterated in his application reasons, the appellant's claims were based not on what Ms. Breidt had said or done, but on the appellant's own evidence, and that of her husband and some others, about what the deceased had said. The judge noted that even if he accepted those statements as described, which he was disinclined to do because of his concern about the reliability of the evidence, they did not support the appellant's claims. Nothing about the proposed new evidence changes any of that.

- [29] The judge accordingly concluded that the proposed new evidence was of no relevance to his findings on credibility in so far as they could affect the result. There was, in short, no value to weighing the new evidence together with the other evidence.
- [30] The appellant has been unable to demonstrate any error with this conclusion, and the judge's view is entitled to deference.
- [31] The appellant nevertheless lists 12 pages of references to the trial transcript comprising excerpts of Ms. Breidt's evidence that, she submits, ought to have led the judge to doubt her credibility. These excerpts, the appellant submits, demonstrate that Ms. Breidt's evidence "was characterized by significant, substantial and frequent lapses in memory and recall." The appellant distinguishes this from the evidence of witnesses called by the appellant, in which, she submits, there were few, if any, flaws.
- [32] From this, it is apparent that the appellant is seeking largely to re-argue the case as originally tried before Justice Crossin, particularly as to credibility, which is not open to her. Nothing she has brought forward supports the proposition, required for her to succeed, that admitting the new evidence would probably change the outcome of the case. Justice Crossin specifically found that not to be so, and again, his conclusion is entitled to deference.
- [33] The appellant has not identified any relevant consideration that the judge failed to weigh. The most she can say is that we ought to weigh all of that evidence differently, leading to a different conclusion. But as the Supreme Court of Canada put it in *Housen v Nikolaisen*, 2002 SCC 33 at para 23, "it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence."
- [34] Whether the evidence should be admitted was a matter for the discretion of the judge, who was in a much better position than this Court to assess the potential impact of the evidence, particularly as it reflected on credibility. He did not misdirect himself on the law, nor, in the circumstances, could it be said that his decision is so clearly wrong as to amount to an injustice. On the contrary, his conclusion seems entirely reasonable.
- [35] In my view, neither the proposed new evidence, nor the arguments raised by the appellant today, raise any proper basis upon which this Court could interfere with the judge's conclusions, even if this Court might have weighed things differently.
- [36] This same difficulty arises in connection with the appellant's application for an order of mistrial. As we have seen, that, too, is a discretionary decision. It depends upon a demonstrated need to prevent a miscarriage of justice due to irretrievable damage to the trial process. It is an extraordinary remedy. But, for the reasons discussed above, the appellant is not in a position where she can demonstrate that, in view of the proposed new evidence, she has been deprived of a fair trial. Again, no error has been demonstrated, and the judge's exercise of his discretion is entitled to deference.
- [37] I would therefore dismiss the appeal.

[38] I turn to consider the respondent's claim for special costs of the appeal.

Costs

[39] The test for special costs is set out in *Garcia v Crestbrook Forest Industries Ltd* (1994), 9 BCLR (3d) 242 (CA). At para 17, after an extensive review of the authorities, Justice Lambert, for the Court, concluded:

... It is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be characterized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.

[40] In *Bronson v Hewitt*, 2011 BCSC 102 at paras 117-18, Justice Goepel, then of the Supreme Court, observed that unproven allegations of dishonesty can amount to reprehensible conduct sufficient to justify an award of special costs:

A party who alleges serious misconduct against another in a civil law suit must be prepared to prove such allegations or reap the consequences in the form of an order for special costs:

Kurtakis v. Canadian Northern Shield Insurance Co. (1995), 17 B.C.L.R. (3d) 197 (C.A.)

[41] Ms. Breidt points to the many allegations raised by the appellant in this proceeding of perjury and fraud on her part, and of collusion between her and her counsel. In her factum, the appellant accused Ms. Breidt of perjury of the most serious type, and of presenting testimony "which is knowingly false" to gain a financial benefit. She maintained those allegations in her oral submissions.

[42] The appellant persisted in these allegations notwithstanding the very clear statement by Justice Crossin that the new evidence did not impair his favourable conclusion as to Ms. Breidt's truthfulness, and notwithstanding comments from this Court that questioned the merits of her appeal in the context of her application for an extension of time to file transcripts and the appeal record.

[43] Most importantly, the appellant persisted in these allegations notwithstanding the absence of any evidence to support them. To suggest that a witness's evidence is unreliable because of lapses in memory and recall is one thing. To suggest that a witness has committed perjury by giving knowingly false testimony, and that her counsel has suborned that perjury, is quite another. Any concerns the appellant had about that, arising from the email she discovered, should have been dispelled by the evidence Ms. Breidt adduced in response to her application, and by the comments of the application judge. Moreover, the appellant maintained that Ms. Breidt had repeated her "perjury" both on discovery and at trial, which is simply not the case.

[44] In my view, the appellant's persistence in maintaining such serious allegations, reflecting so harshly on Ms. Breidt and on her counsel, without any sound basis for doing so and in the face of warnings, constitutes sufficiently reprehensible conduct to merit rebuke in the form of an award of special costs of this appeal to the respondent.

Disposition

[45] For these reasons, I would dismiss the appeal, with special costs of the appeal to the respondent.

[46] BAUMAN C.J.B.C.: I agree.

[47] FITCH J.A.: I agree.

[48] BAUMAN C.J.B.C.: The appeal is dismissed with special costs to the respondent.

"The Honourable Mr. Justice Grauer"

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