

CANADA / JUDGMENT

Mount Seymour Park Housing Cooperative v. Williamson

2003 BCSC 1261

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mount Seymour Park Housing Co-operative v. Williamson,

2003 BCSC 1261

Date: 20030814

Docket: S020823

Registry: Vancouver

Between:

MOUNT SEYMOUR PARK HOUSING CO-OPERATIVE

Plaintiff

And:

NOELLA WILLIAMSON

Defendant

Before: The Honourable Madam Justice Ross

Reasons for Judgment

Counsel for the Plaintiff

C.G. Haddock

The Defendant

C. Karlsson

Date and Place of Hearing:

June 2, 2003

Vancouver, B.C.

INTRODUCTION

- [1] This is an application for judgment pursuant to Rule 18A brought by the plaintiff Mount Seymour Park Housing Co-operative ("Co-op"). The action arises out of a long standing dispute between the Co-op and the defendant Noella Williamson concerning Ms. Williamson's housing charges. The Co-op increased Ms. Williamson's housing charges and Ms. Williamson has refused to pay the new charges levied by the Co-op. The Co-op asserts that Ms. Williamson's lease has been terminated, her shares redeemed and her membership terminated. It submits that she is no longer entitled to possession of her unit with the result that it now seeks an order granting it immediate possession of the unit and judgment for arrears.
- [2] The issues to be determined are whether the Co-op is entitled to relief pursuant to the Commercial Tenancy Act R.S.B.C. 1996, c.57 on the basis that it has terminated Ms. Williamson's lease, and whether it is entitled to relief pursuant to the Cooperative Association Act S.B.C. 1999, c.28 on the basis that Ms. Williamson's shares have been redeemed and/or that her membership has been terminated.

FACTS

- [3] Ms. Williamson became a member of the Co-op on April 18, 1984. She signed a lease that same day. Ms. Williamson resides alone in suite 46, which is a two bedroom suite.
- [4] Ms. Williamson is seventy-five years old and suffers from chronic obstructive pulmonary disease, congestive heart failure, chronic asthmatic bronchitis, severe fibromyalgia, chronic dyspepsia, spastic colon and degenerative arthritis of the cervical spine.
- [5] Because of those medical conditions, she requires exercise and medical equipment in her suite. At this time, she has a rebounding exerciser, ropes, neck exerciser, oxygen machine with 50 gallon tank and large air purifier in her suite. She keeps the exercise equipment in the small second bedroom and requires that extra room for that purpose.
- [6] The Co-op is charged by its Operating Agreement with CMHC with making the best use of the resources that are given and one person in a two bedroom unit is deemed to be over-housed. When Ms. Williamson began to reside in the Co-op in 1984, she was granted special consideration and exemption from their over-housing policy because she required a two-bedroom suite for medical reasons.

- [7] The Co-op has an Operating Agreement with CMHC. Each year, the Co-op receives a lump sum subsidy from CMHC which the Co-op administers to members requiring assistance. Members of modest means may apply to the Co-op, providing appropriate income verification documentation and receive from the Co-op a subsidy towards their housing charges.
- [8] Ms. Williamson has received subsidy from the CMHC through the Co-op.
- [9] In 1990, the Co-op and Ms. Williamson had entered into a dispute regarding the appropriate amount of housing charge and the appropriateness of Ms. Williamson being alone in a two bedroom unit contrary to the over-housing policy.
- [10] Ms. Williamson made a complaint to the British Columbia Council of Human Rights. The parties settled their differences. One of the terms of the settlement was that Ms. Williamson was able to remain in the two bedroom unit.
- [11] Pursuant to the Operating Agreement, CMHC has the ability to increase or decrease the amount of assistance provided to the Co-op on a mortgage rollover. Article 2.13 of the Operating Agreement sets out as follows:

The level of Federal assistance will increase or decrease according to changes in the interest rate resulting from mortgage rollover.

- [12] In early 1999 the Co-op did a mortgage rollover. As a result of the rollover, the Co-op's entitlement to Federal assistance was drastically reduced. In order to raise money to meet the Co-op's financial obligations, the Co-op raised its minimum housing charges.
- [13] The Directors recommended to the general membership that housing charges be raised to a minimum level in order to meet the Co-op's financial obligations and mortgage payments. The members of the Co-op, by majority, accepted the recommendations of the Board of Directors and implemented a housing charge policy regarding minimum housing charges and other matters.
- [14] As a result of the changes to the minimum housing charge, Ms. Williamson's charges increased substantially. While prior to the change she had been paying \$217 per month, she was now required to pay \$450.00 per month in addition to \$27.00 for hydro and \$10.00 for laundry. This amount, however, continued to represent the maximum subsidy available.
- [15] Ms. Williamson refused to pay the increased charge because she believed that it was computed in a manner that violated the settlement agreement made in 1993 to resolve the Human Rights complaint and because she believed the charge was contrary to the Operating Agreement. The Co-op did not agree and continued to assess the new charges with the result that Ms. Williamson fell into ever increasing arrears.
- [16] Ms. Williamson commenced human rights proceeding in 1999 about the new charges. That proceeding was dismissed. A second human rights proceeding was commenced in 2000 that was likewise dismissed. A third proceeding was commenced on May 16, 2003, this time

prepared with the assistance of counsel. The complaint alleges adverse effect discrimination on the basis of disability because of the Co-op's adoption of a policy of applying minimum housing charges in relation to the size of the suite. The proceeding has been accepted for filing. Ms. Williamson was agreeable to having the complaint heard on an expedited basis.

[17] In the meantime, the Co-op had continued its efforts to collect the arrears from Ms. Williamson. Eventually the board of Directors began steps to terminate her lease for arrears.

[18] Ms. Williamson's lease with the Co-op contains the following provisions:

- (b) The member agrees to pay the Co-op monthly in advance during the term of this Lease the housing charge as shall be determined and assessed by the Board of Directors as hereinafter provided, and the housing charge will be payable on the first of each and every month commencing on the first day of the month of occupancy.

HOUSING CHARGE (rent)

3. The member covenants and agrees with the Co-op as follows:

- (a) To pay the housing charge to the Co-op at the office of the Co-op, or at such other place as the Co-op may from time to time designate in writing, with no right of set off or abatement under any circumstances. The housing charge shall be paid monthly as provided in paragraph 1 hereof and such monthly housing charge will be that sum which is equivalent to 1/12th of its annual assessment made by the Co-op annually on the Member. IT IS UNDERSTOOD AND AGREED that such annual assessment may vary from fiscal year to fiscal year of the Co-op and that the Board of Directors of the Co-op, in determining the amount of such annual assessment on the Member for each fiscal year, and thereby the monthly housing charge payable hereunder, shall estimate the sum of money which, in its judgment will be required by the Co-op during each fiscal for the maintenance of the corporate existence of the Co-op and the carrying charges on the lands and the development, including taxes, and the sums in lieu of taxes, licences, assessments, insurance, cost of adequate reserves for repairs, replacements, upkeep, maintenance and operation and all fees and costs incurred in the management of the lands and the development and such amount, if any, as may be required to meet any deficit in the preceding fiscal year....

RULES AND REGULATIONS

- (b) To obey, observe and strictly conform to...all regulations and house rules now or hereafter established by the Co-operative and to the Memorandum of Association of the Co-op and the Rules for the time being of the Co-op, to the same extent as if all such were herein incorporated, and the Co-op shall have the right to change, repeal or amend the said regulations or house rules or any of them. All regulations and house rules shall apply to all members uniformly without preference or discrimination.

TERMINATION RIGHTS

4. The Co-Op shall have the right, through its Board of Directors to terminate and determine this Lease if:

MEMBER - BREACH OF RULES

- (a) The Member commits a breach of any covenant or condition of this lease or the member is in violation or in breach of any of the Member's obligations and duties under the Rules of the Co-op or under the House Rules.

CESSATION OF MEMBERSHIP

- (c) The Member at any time during the term hereof ceases to be the legal and beneficial owner of the shares in the capital stock of the Co-op recognized by the Board of Directors of the Co-op as appertaining to the Unit or the Member ceases to be a Member of the Co-operative.

NON-PAYMENT OF HOUSING CHARGE

- (g) The Member defaults in the payment of any housing charge or assessment herein provided for or defaults in the performance of any other of the covenants or conditions herein and fails to correct the default for ten days after receipt of written notice from the Board of Directors of the default.

TERMINATION NOTICE

5. If the Co-op determines to terminate this lease, it shall serve the Member with at least thirty (30) days written notice of termination and such notice shall state the date on which the lease shall terminate. The Co-op may immediately after the termination date re-enter the Unit and remove all persons and property from it using such force as may be necessary and the Co-op may reposses (sic) the Unit as though this lease had never been made.

MUTUAL AGREEMENTS

TERMINATION

10. If this Lease is terminated or if the Co-op has the right to find a new Member for the Unit and to dispose of the shares of the Co-op appertaining to the Unit, the Co-op shall be the sole and irrevocable agent and attorney of the Member for the purpose of finding a new Member to own the share appertaining to the Unit and to occupy the Unit herein contained unless released therefrom by resolution adopted by the remaining Members of the Co-op.
- [19] By letter dated October 11, 2001, the Co-op delivered to Ms. Williamson a notice that the Board had determined to terminate her lease if she did not pay the outstanding arrears within 10 days of receipt of the notice. The letter made reference to Articles 4(a), 4(g) and 5 of the lease.

[20] Ms. Williamson did not pay the arrears. Accordingly, by letter dated October 25, 2001, the Board gave her notice that her lease would terminate at noon November 30, 2001 and gave her a notice to quit as of noon on that date.

[21] By letter dated January 30, 2002 mailed February 11, 2002, the Co-op advised Ms. Williamson that the lease had been terminated, that she remained in the unit illegally. The letter then stated:

Pursuant to Rule 17 of the Co-op's Rules, this is your 30 day notice that the Co-op intends to redeem all of your shares in the Co-op to satisfy your indebtedness to the Co-op within 30 days of your receipt of this letter. If you do not address your arrears in full within the 30 days, the Co-op will redeem your shares and apply the value of your shares to your outstanding indebtedness.

[22] The subsequent calculations of arrears delivered to Ms. Williamson do not, however, reflect a deduction of the value ascribed to the shares.

[23] Ms. Williamson neither quit nor paid her arrears which amounted to \$10,266.00 as of December 1, 2002. As a result, the Co-op commenced this action.

ANALYSIS

Lease Termination

[24] In this case it was submitted the Co-op has terminated Ms. Williamson's lease. In such situations, sections 18 to 21 of the Commercial Tenancy Act apply, see *Paloma Housing Co-operative v. Osmundson* Oral reasons for Judgment Madam Justice MacKenzie October 25, 2002 Vancouver Registry, doc. L011850; *Sherwood Forest Housing Co-Operative v. Green*, [1991] B.C.J. No. 3163 (S.C.).

[25] Sections 18 to 21 of the Commercial Tenancy Act provide:

Landlord may apply to Supreme Court

18(1) In case a tenant, after the lease or right of occupation, whether created in writing or verbally, has expired, or been determined, either by the landlord or by the tenant, by a notice to quit or notice under the lease or agreement, or has been determined by any other act whereby a tenancy or right of occupancy may be determined or put an end to, wrongfully refuses, on written demand, to go out of possession of the leased land, or the land that the tenant has been permitted to occupy, the landlord may apply to the Supreme Court

- (a) setting out in an affidavit the terms of the lease or right of occupation, if verbal:
- (b) annexing a copy of the instrument creating or containing the lease or right of occupation, if in writing:

- (c) if a copy cannot be annexed by reason of it being mislaid, lost or destroyed, or of being in possession of the tenant, or from any other cause, then annexing a statement setting forth the terms of the lease or occupation, and the reason why a copy cannot be annexed;
 - (d) annexing a copy of the demand made for delivery possession, stating the refusal of the tenant to go out of possession, and the reasons given for the refusal, if any; and
 - (e) any explanation in regard to the refusal.
- (2) This section extends and shall be construed to apply to tenancies from week to week, from month to month, from year to year, and tenancies at will, as well as to all other terms, tenancies, holdings or occupations.
- (3) An application under subsection (1) shall be commenced at a registry of the Supreme Court located in the judicial district where the land is situated.

Court to appoint time and place of inquiry, etc.

19 If after reading the affidavit it appears to the court that the tenant wrongfully holds and that the landlord is entitled to possession, the court shall appoint a time and place to inquire and determine whether the person complained of was a tenant of the complainant for a term or period which has expired, or has been determined by a notice to quit or otherwise, whether the tenant holds possession against the right of the landlord and whether the tenant has wrongfully refused to out of possession, having no right to continue in possession.

Notice in writing of inquiry

20(1) Notice in writing of the time and place appointed under section 19 shall be served by the landlord on the tenant or let at the tenant's residence or place of business at least 5 days before the day appointed, if not more than 32 km from the tenant's residence or place of business and one day in addition for every 32 km above the first 32, reckoning any broken number above the first 32 as 32 km.

- (2) A copy of the affidavit on which the appointment was obtained, and of the papers attached to it shall be annexed to the notice.

Court to issue writ of possession

21(1) If at the time and place appointed under section 19 the tenant, having been notified as provided, fails to appear, the court, if it appears to it that the tenant wrongfully holds, may order a writ to issue to the sheriff, commanding him or her to place the landlord in possession of the premises in question.

- (2) If the tenant appears at the time and place, the court shall, in a summary manner, hear the parties, examine the matter, administer an oath or affirmation to the witnesses adduced by either party, and examine them.

- (3) If after the hearing and examination it appears to the court that the case is clearly one coming under the true intent and meaning of section 18, and that the tenant wrongfully holds against the right of the landlord, then it shall order the issue of the writ under subsection (1) which may be in the words or to the effect of the form in the Schedule; otherwise it shall dismiss the case, and the proceedings shall form part of the records of the Supreme Court.
- [26] Ms. Williamson raises two procedural objections to the purported cancellation. The first is that a summary proceeding under Rule 18A is not available with respect to proceedings under those provisions of the Commercial Tenancy Act. The second is that the Co-op has not satisfied the necessary pre-conditions for relief under those sections.
- [27] The first issue is Ms. Williamson's objection to proceeding by way of Rule 18A. Counsel submits that the procedure to be followed in such a circumstance is set out in Commercial Tenancy Act and must be followed. That procedure does not contemplate a proceeding in the nature of an application for summary trial pursuant to Rule 18A. In response, the Co-op relies upon the decision of Mackenzie J. in Paloma Housing Co-op, *supra*. It appears from those reasons and counsel's submission, that the propriety of proceeding under Rule 18A was an issue in that proceeding. Madam Justice Mackenzie states that the procedure was appropriate. Accordingly, I find, on the basis of Paloma Housing, that the procedure is not defective by virtue of having been brought pursuant to Rule 18A.
- [28] The next objection raised is that the procedure adopted by the Co-op is fatally flawed because a valid demand for possession cannot be made at the same time and in the same document as notice is given of termination of the lease. Counsel relies upon *Re Anderson and Anderson* (1966), 57 D.L.R. (2d) 561 (B.C. Co. Ct.) in which Washington J. held that full compliance by the landlord with the provisions of the Commercial Tenancy Act is a pre-requisite to the jurisdiction of the Court. He held further that a notice to quit and a demand for possession cannot be embodied in one document in light of the language of the section requiring service of a demand for possession separate from and subsequent to the Notice to Quit. *Anderson, supra*, was followed in *2733 - 4th Avenue Developments v. Xavier*, [1981] B.C.J. No. 104 (B.C. Co. Ct.) and in *Foreshore Projects Ltd. v. Warner Shelter Corp.* (1983), 49 B.C.L.R. 26 (B.C. Co. Ct.).
- [29] In the present case, it appears to me that these requirements have not been met as the notice that the lease would terminate and demand for possession were found in one document, that document delivered prior to the termination of the lease.
- [30] As Wong J. observed in *Foreshore Projects, supra*, strict compliance with the Act is required:

Summary dispositions of conflicting claims between landlord and tenant are provided by two separate procedures outlined in ss. 18 and 28 of the Commercial Tenancy Act. Both sections are to be construed strictly: see *Gulf Oil Can. Ltd. v. Persall* (1977), 75 D.L.R. (3d) 471 (B.C. Co. Ct.), and cases cited therein at p. 473. In addition, forfeitures are regarded with disfavour by the Courts and their upholding will be avoided even for trifling reasons: *Big Valley Collieries v. MacKinnon* (1915), 9 W.W.R. 4, 23 D.L.R. 62 (Alta. T.D.).

[Paragraph 7]

[31] Accordingly, the Co-op is not entitled to relief pursuant to section 21 of the Commercial Tenancy Act.

Redemption of Shares

[32] The Co-op submits that by the letter dated January 30, 2002, it gave notice to Ms. Williamson that her shares would be redeemed within 30 days pursuant to the Rules of the Co-op. Under the notice provisions of the Co-op Rules, she is deemed to have received the letter on February 14, 2002. Accordingly, it submits her shares were redeemed and without shares she is not a member of the Co-op and has not been since March 15, 2002.

[33] Cessation of membership is grounds upon which the Board of Directors may terminate a lease pursuant to Article 4(c) of the lease. The Co-op submits that it exercised its lien pursuant to Rule 17. Rule 17 provides:

LIEN ON SHARES

17. 17.1 The Co-operative shall have a lien on a member's shares for a debt due to it by the member and the lien shall extend to the proceeds of any redemption or sale of the shares.

17.2 Upon 30 days notice in writing to a member the Directors may cause the Co-operative to sell or redeem all or a sufficient number of the shares of the member to satisfy the indebtedness of a member to the Co-operative.

17.3 Upon any sale or redemption the Directors shall apply the proceeds of the sale or redemption in satisfaction of the indebtedness of the member to the Co-operative and any surplus or excess from the proceeds of any sale or redemption after satisfaction of the indebtedness shall be paid to the member or in the case of redemption pursuant to Rule 3.3 to the person entitled to the shares.

[34] The Co-op submits that this caused Ms. Williamson to no longer be a member. It submits further that there is no requirement within Rule 17 that the Directors pass a resolution. Accordingly, the Co-op submits Ms. Williamson's ownership of her shares has been terminated and, relying upon the authority of *Sherwood Forest Housing Co-operative v. Green*, *supra*, the Co-op is entitled to the relief it seeks.

[35] Ms. Williamson submits that the evidence before the Court is insufficient to establish that the Co-op has redeemed Ms. Williamson's shares. The letter relied upon does not state that the shares have been redeemed only that the shares will be redeemed. No evidence was provided that such a redemption in fact occurred. In addition, the fact that the subsequent arrears statement produced by the Co-op does not credit Ms. Williamson's account with the value of the shares is evidence that the redemption did not occur.

[36] Ms. Williamson disputes the contention that no resolution is required for a redemption pursuant to Rule 17, relying upon the provision in Rule 17.2 that "the Directors may cause the Co-operative to sell or redeem all of the shares of a member....". Counsel submits that there is no other way for the Directors to cause the Co-op to act than through a resolution. Counsel notes:

Rules 1 states that "Directors" means the Directors Acting as a Board." Rule 55.1 provides: "Questions arising at any meeting of the Directors shall be decided by a majority of votes. In case of an equality of votes the chairperson shall have the deciding vote." That is the only provision in the Rules for the Directors to make decisions except for Rule 55.2 which provides that "a resolution signed by all directors shall have the same force and effect as if passed at a duly constituted meeting of Directors."

[37] Counsel submits further:

Rule 17 must be read in the context of these provisions and the rest of the Rules, which consistently refer to the Directors' or Membership's powers without specifying that they must be exercised by resolution (except in cases where an extraordinary or special resolution is necessary.) To suggest that no resolution is necessary because the Rules do not specify how the Directors should cause the Co-op to redeem the shares would be to interpret the Rules to authorize the directors to do almost every thing without resolutions. A coherent interpretation, and one that accords with the basic principles of democratic associations is that the Rules empower the Directors to do certain things by resolution. Rule 17 should be interpreted to required that the Directors pass a resolution that the shares be redeemed.

[38] Finally, counsel submits that in the Sherwood Forest case, *supra*, there was evidence that the ownership of the member's shares had been properly terminated by the resolution of the directors.

[39] I find that the Co-op has failed to prove that Ms. Williamson is no longer the owner of her shares. I agree that while the Co-op has given notice of an intention to act, it has proffered no evidence that the redemption actually occurred. Indeed the evidence of the subsequent arrears report is inconsistent with a redemption having occurred.

Cessation of Membership

[40] The Co-op submits that possession of the residential premises pursuant to the lease is dependent upon membership in the Co-op. It submits that the Co-op became Ms. Williamson's agent upon termination of the lease and redeemed the shares. The effect of redeeming the shares is, as in the Paloma Housing Co-operative case, *supra*, that Ms. Williamson can no longer be a member of the Co-op. Accordingly, it is submitted, sections 171 and 172 of the Cooperative Association Act can apply to the case at bar.

[41] Section 171 and 172 of the Cooperative Association Act provide:

Right to possession terminated

171 Any right of a member to possession or occupancy of residential premises that is dependent on his or her membership in a housing cooperative is terminated on the termination or other cessation of the membership.

Court order of possession - application by housing cooperative

172 (1) After termination under section 171 of a person's right to possession or occupancy of residential premises, the housing cooperative in which the person was a member may apply to the court for an order of possession of the residential premises.

- (2) On an application under subsection (1), if an appeal has not been commenced under section 37 and the application relates to a termination under section 35, the court must first determine, on evidence the court considers relevant, whether the person's membership was terminated in accordance with the principles of natural justice.
- (3) If the court determines under subsection (2) that the person's membership was terminated in accordance with the principles of natural justice, the court must make an order of possession in favour of the housing cooperative.

[42] Pursuant to section 171, the pre-requisite to the termination of the right to occupancy is the termination of membership. The question, therefore, is whether Ms. Williamson's membership has been terminated.

[43] Termination of membership is provided for in Rule 5. Rule 5 provides

5. 5.1 Where:

(i) a member has failed to pay housing charges, occupancy charges, or other money due by the member in respect of the residential premises; or

(ii) in the opinion of the Directors, a member has breached a material condition of an agreement between the member and the Co-operative relating to:

(A) possession or occupancy of the residential premises, or

(B) use of the property of which those premises form part,

and has failed to rectify the breach within a reasonable time after receiving written notice to do so from the Co-operative,

the membership of that member may be terminated by a resolution of the Directors, requiring a majority of three-quarters of all Directors, and passed at a meeting of the Directors called to consider the resolution.

5.2 The member whose membership is proposed to be terminated by a resolution of the Directors is entitled to at least seven (7) days' notice of the meeting at which the resolution is to be considered, together with a statement of the grounds upon which the member's membership is proposed to be terminated, and may appear, either personally or by or with an agent or counsel, to make submissions at the meeting.

5.3 Within seven (7) days after the date on which the resolution referred to in Rule 5.1 is passed by the requisite majority, the Co-operative shall, in writing, notify the person whose membership is terminated of the resolution.

5.4 A person whose membership is terminated under Rule 5.1 may appeal the decision of the Directors at the next meeting of the Co-operative by delivering a notice of appeal to the Co-operative within seven (7) days after the date when notice was given to the member under Rule 5.3.

5.5 A person who, pursuant to and within the time limit in Rule 5.4, appeals the termination of membership shall, notwithstanding the resolution of the Directors terminating membership, continue to be a member of the Co-operative, unless the members at the general meeting to which the appeal is brought confirm the termination of membership of that person by a resolution requiring a simple majority of the members present.

5.6 Material conditions shall be those so defined, designated or referenced in the agreement between the member and the Co-operative relating to possession or occupancy of residential premises.

[44] Rule 6 provides that the right of a member to possession or occupancy of residential premises is terminated upon "...termination of membership in the Co-operative".

[45] There is no evidence in this case that Ms. Williamson's membership was terminated pursuant to Rule 5. I have already found that the Co-operative has failed to establish that Ms. Williamson's shares were redeemed. The lien provisions found in Article 10 of the lease do not operate to terminate her membership. In the circumstances, I find that the Co-operative has failed to prove that Ms. Williamson's membership has been terminated.

[46] In the result, the Co-operative has not established that Ms. Williamson's shares were redeemed or that her membership was terminated. Accordingly, the Co-operative cannot bring itself within the provisions of Article 4(c) of the lease. It follows that the Co-operative is not entitled to relief pursuant s. 172 of the Cooperative Association Act.

CONCLUSION

[47] The Co-operative is not entitled to relief pursuant to the Commercial Tenancy Act because the requirements of section 18(1) have not been met. The Co-operative has not established its entitlement to relief pursuant to the Cooperative Association Act because it has failed to establish that Ms. Williamson's shares were redeemed and that she is no longer a member. In the result, the application is dismissed.

"C. Ross, J."

The Honourable Madam Justice C. Ross

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