CITATION: Smith v. Brockton (Municipality), 2016 ONSC 6781
COURT FILE NO.: 00-CV-192173CP
DATE: 20161102

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
JAMIE SMITH, ALANA DALTON, JAMIE McDONALD, and IRENE SALES INC., operating as THE HARTLEY HOUSE	*Milena Protich* for Plan Counsel
Plaintiffs	*Stephen A. Osborne* for Claimant, Kevin Doyle
– and –	
THE CORPORATION OF THE MUNICIPALITY OF BROCKTON, THE BRUCE-GREY-OWEN SOUND HEALTH UNIT, STAN KOEBEL, THE WALKERTON PUBLIC UTILITIES COMMISSION, and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO	
Defendants	
– and –	
IAN D. WILSON ASSOCIATES LIMITED, DAVIDSON WELL DRILLING LIMITED, EARTH TECH (CANADA) INC., CONESTOGA-ROVERS & ASSOCIATES LIMITED, B.M. ROSS AND ASSOCIATES LIMITED, GAP ENVIROMICROBIAL SERVICES INC., A & L CANADA LABORATORIES EAST, INC., DAVID BIESENTHAL and CAROL BIESENTHAL	
Third Parties	
Proceeding under the *Class Proceedings Act, 1992*	**HEARD**: October 24, 2016

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] This motion arises from the administration of a settlement agreement in what is known as the Walkerton Class Action. The action arose in 2000 as a result of the bacterial contamination of the Walkerton water supply.

[2] Pursuant to the Walkerton Compensation Plan, the Administrator seeks an order that Frank Gomberg be appointed to complete the arbitration of Kevin Doyle's claim for compensation. Unfortunately and regrettably, the arbitration could not be completed because of the death of the arbitrator, Martin Teplitsky, Q.C.

[3] Since the evidence has closed and the arbitration is at the argument stage, the Administrator seeks an order that the arbitration be completed based on the transcript of the evidence heard by Mr. Teplitsky, subject to Mr. Gomberg's discretion to recall witnesses. The Administrator asks that the costs of the arbitration be reserved to the Arbitrator.

[4] Mr. Doyle resists the motion. He opposes the appointment of Mr. Gomberg because Mr. Gomberg was Mr. Teplitsky's law partner with whom the late Mr. Teplitsky might have discussed the case. Mr. Doyle seeks the appointment of a different arbitrator, and he seeks an order that the arbitration be recommenced *de novo* with the parties being prohibited from using the transcripts from the original hearing.

[5] Further, Mr. Doyle seeks an order for payment of interim legal fees and disbursements and an order directing the new arbitrator to review all other costs that remain outstanding from the original hearing, including the fees of expert witnesses.

[6] For the reasons that follow, I appoint Mr. Gomberg to complete the arbitration based on a review of the transcripts. I order that Mr. Doyle immediately receive $15,000 from the Plan Fund, as interim fees; i.e., a credit and prepayment of his inevitable award of costs and disbursements for the hearing and rehearing.

B. FACTUAL BACKGROUND

[7] On May 15, 2000, the Walkerton Public Utilities Commission ("PUC") conducted a routine sample of the town water supply, and on May 17, 2000, it received a fax from the testing lab confirming E. coli bacteria contamination in the water sample. Incorrectly, the PUC did not notify public health officials of the contamination, and within days, the region's hospitals and clinics were inundated with patients with bloody diarrhea, vomiting, cramps, and fever. One of them was Mr. Doyle, who lived near Walkerton.

[8] In 2000, Mr. Doyle was an employee of Bruce Power and he owned and operated a cattle farm. He says that his health deteriorated as a result of his illness arising from the contamination of the water supply. He remained ill for some time. He felt compelled to take early retirement, and he says that he became unable to manage and operate his farming operation, which became unprofitable.

[9] A class action was brought on behalf of the victims of the Walkerton tragedy, and in March 2001, Chief Justice LeSage approved a settlement in that class action. Under the settlement, the Province of Ontario agreed to fund all costs associated with a Compensation Plan,

which provided compensation for the Class Members. The Plan set out the process for determining compensation.

[10] Under the Compensation Plan, Class Members submit claims and when the Administrator and the Claimant are unable to reach an agreement with regard to compensation, the Plan provides that the Claimant may seek arbitration of their claim. The costs of the arbitration may not be awarded against a Claimant. The Plan provides for the Claimant to recover his or her reasonable legal costs associated with the arbitration of the claim.

[11] Section 3.3.2 of the Plan provides that where a matter proceeds to arbitration, the arbitration will take place in accordance with the rules set by the court. The Administrative Judge under the Settlement Agreement may appoint arbitrators from time to time, as may be necessary for the proper administration and operation of the Plan.

[12] Section 4 of the Plan provides that a Claimant may be represented by a lawyer for the purpose of seeking compensation under the Plan and that the Plan will pay "reasonable legal costs" for the Claimant.

[13] On May 27, 2001, pursuant to the Settlement Agreement, Mr. Doyle submitted a Stage I Application for compensation under the Plan. He indicated that he had been ill as a result of the water contamination for the period of May 27-28, 2000 to July 30, 2000 and had been unable to work as a result.

[14] Several years passed, and on January 31, 2005, Mr. Doyle submitted his Stage II Application. Mr. Doyle made a claim of loss of income from self-employment for his farming business. He claimed in excess of $1.0 million and alleged that he had not been able to return to his farming business from May 27, 2000 up to the time of filing his Application.

[15] At the time when he submitted his Stage II Application, Mr. Doyle was represented by lawyer, Patrick Kelly.

[16] Many years passed, and in June 2014, Mr. Doyle's claim for illness was settled for $12,000 damages, plus pre-judgement interest. Mr. Doyle's claim for loss of income was not settled, and so an arbitration was scheduled for October 2014.

[17] At the arbitration, there were two main issues. One issue was whether Mr. Doyle had suffered an economic loss. The second issue was whether the losses had been suffered as a result of Mr. Doyle's illness.

[18] Mr. Teplitsky was the arbitrator assigned to preside at the arbitration. Before the commencement of the hearing, Mr. Doyle advised Mr. Teplitsky that his personal accountant had refused to come to the arbitration to give evidence. Mr. Teplitsky postponed the hearing, and appointed a neutral evaluator, Paul Ross of KPMG, to provide an opinion about Mr. Doyle's economic losses.

[19] Subsequently, the arbitration began; however, Mr. Ross advised that he could not express an opinion about Mr. Doyle's economic losses because there were insufficient and inadequate business records. Mr. Doyle requested, and was granted, another adjournment of the arbitration.

[20] In June 2015, Mr. Doyle retained his current counsel, Stephen Osborne, then of the Merchant Law Group, and now a sole practitioner.

[21] In December 2015, the hearing was again adjourned to complete the production of

documents.

[22] The arbitration resumed in June 2016 and proceeded on June 2, 3, 7, 8, 9, 21, 29 and 30, 2016. Before the commencement of the hearing, Mr. Teplitsky ordered that the evidence-in-chief was to be given in writing, subject to oral cross-examinations and re-examination.

[23] At the arbitration hearing, the Administrator's position was that Mr. Doyle had not proven on the balance of probabilities that he had suffered an economic loss and that if he could prove an economic loss, it was not causally connected with the consumption of contaminated Walkerton water.

[24] At the arbitration hearing, Mr. Teplitsky was provided with a voluminous document brief that included clinical notes and records of Mr. Doyle's treating physicians, his employment records, and his educational records from the University of Toronto, where notwithstanding his declining health, Mr. Doyle had completed a doctoral program.

[25] Mr. Doyle testified at the hearing. The evidence of two lay witnesses, Jeffery Lawson and Brenda Dolson (via telephone), was given by affidavit, and they were cross-examined. Mr. Doyle called an accountant, David Webb, a gastroenterologist, Dr. John Howard, and a nephrologist, Dr. William Clark, in support of his case. In opposition to Mr. Doyle's claim, the Administrator called: Mr. Ross of KPMG; Dr. Lisa Hall, an epidemiologist; Dr. Gabor Kandel, a gastroenterologist; and Dr. David Mendelssohn, a nephrologist.

[26] The evidence given at the arbitration was transcribed by a court reporter. The transcripts were provided to Mr. Teplitsky.

[27] Save for written argument, which was to be delivered by mid-August, 2016, the arbitration was completed on June 30, 2016.

[28] Regrettably, Mr. Teplitsky died on July 14, 2016, bringing to an end a distinguished and exemplary career as an academic, leader at the bar, mediator, and arbitrator.

[29] Subsequently, Mr. Gomberg was appointed to the roster of arbitrators to replace Mr. Teplitsky.

C. DISCUSSION AND ANALYSIS

1. The Appointment of an Arbitrator

[30] Mr. Gomberg has been appointed an arbitrator for the Walkerton Compensation Plan, but Mr. Doyle, who agrees that a new arbitrator must be appointed, opposes the appointment of Mr. Gomberg, because Mr. Gomberg was Mr. Teplitsky's law partner and friend and may have discussed the case with him. Put into legal terms, Mr. Doyle's objection is that Mr. Gomberg should be recused because of a reasonable apprehension of bias.

[31] The test for a reasonable apprehension of bias was set out by Justice de Grandpré in his dissenting judgment in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, and the test was approved and adopted by the Supreme Court of Canada in *R. v. Valente,* [1985] 2 S.C.R. 673 and in *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484. The test is whether an informed person, viewing the matter realistically and practically and having thought the matter through, would think that it is more likely than not that the decision-maker consciously or unconsciously would not decide the matter fairly. The information of this hypothetical observer

would include knowledge of the traditions of integrity and impartiality of the judiciary. The same test is applied for administrative tribunals and adjudicators: *Terceira v. Labourers International Union of North America*, 2014 ONCA 839.

[32] The test for a reasonable apprehension of bias has two elements of objectivity: (1) the measure is that of the reasonable and informed person; and (2) his or her apprehension of bias must be reasonable. It is to be noted that the test is not whether a party to the proceeding would reasonably apprehend bias but whether a hypothetical member of the public would apprehend impartiality. The determination of whether there is a reasonable apprehension of bias is an objective, fact-specific inquiry in relation to the facts and circumstances of a particular matter: *Chippewas of Mnjikaning First Nation v. Ontario (Minister of Native Affairs),* 2010 ONCA 47 at para. 230, leave to appeal refused [2010] S.C.C.A. No. 91.

[33] An allegation of a reasonable apprehension of bias is a serious allegation that calls into question the personal integrity of the adjudicator and the integrity of the administration of justice: *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham* (2000), 51 (3d) O.R. 97 (C.A.) at para. 131, leave to appeal refused [2001] S.C.C.A. No. 66. The party alleging bias has the onus of proving it and the threshold of proof is a high one: *Lloyd v. Bush*, 2012 ONCA 349 at para. 23; *Clayson-Martin v. Martin*, 2015 ONCA 596 at paras. 70-71.

[34] In my opinion, a reasonably informed person, viewing the matter realistically and practically and having thought the matter through, would not think that it is more likely than not that Mr. Gomberg would consciously or unconsciously not decide the matter fairly.

[35] Regardless of whether Mr. Gomberg was Mr. Teplitsky's law partner and friend and regardless of whether Mr. Teplitsky discussed the matter with Mr. Gomberg, which is just speculation, there is no reason to think that Mr. Gomberg would not independently and impartially decide the matter of Mr. Doyle's claim.

2. The Mode of the Arbitration Rehearing

[36] The Walkerton Compensation Plan did not envision the circumstances of an arbitrator passing away before completing the arbitration. The parties, however, did not dispute that this court in its oversight role with respect to the Walkerton Compensation Plan has the jurisdiction to resolve the matter and appoint a new arbitrator and to decide the manner or mode of the rehearing.

[37] In deciding the mode of the rehearing, the Administrator submitted that the court ought to apply, by analogy, subsections 123 (4) and (7) of the *Courts of Justice Act,* R.S.O. 1990, c. C.43, which state:

> *Inability to give decision; sitting alone*
>
> 123. (4) Where a judge has commenced hearing a matter sitting alone and,
>
> (a) dies without giving a decision;
>
> (b) is for any reason unable to make a decision; or
>
> (c) does not give a decision under subsection (2),

a party may make a motion to the chief judge for an order that the matter be reheard.

...

Rehearing

(7) Where an order is made under subsection (3), (4) or (6) for the rehearing of a matter, the chief judge may,

(a) dispose of the costs of the original hearing or refer the question of those costs to the judge or judges presiding at the rehearing;

(b) direct that the rehearing be conducted on the transcript of evidence taken at the original hearing, subject to the discretion of the court at the rehearing to recall a witness or require further evidence; and

(c) give such other directions as are considered just.

[38] For his part, Mr. Doyle submitted that the court ought to apply by analogy subsections 669.2 (1) and (3) of the *Criminal Code,* R.S.C. 1985, c. 27 (1st Supp.), which state:

Continuation of proceedings

669.2 (1) Subject to this section, where an accused or a defendant is being tried by

(a) a judge or provincial court judge,

(b) a justice or other person who is, or is a member of, a summary conviction court, or

(c) a court composed of a judge and jury,

as the case may be, and the judge, provincial court judge, justice or other person dies or is for any reason unable to continue, the proceedings may be continued before another judge, provincial court judge, justice or other person, as the case may be, who has jurisdiction to try the accused or defendant.

....

If no adjudication made

(3) ... if the trial was commenced but no adjudication was made or verdict rendered, the judge, provincial court judge, justice or other person before whom the proceedings are continued shall, without further election by an accused, commence the trial again as if no evidence on the merits had been taken.

[39] An arbitration and the Walkerton Compensation Plan are civil, not criminal, matters and Mr. Doyle is an applicant not an accused. I do not find the analogy of criminal proceedings helpful. As I view the matter, the proper analogy is subsections 123 (4) and (7) of the *Courts of Justice Act,* and thus the appropriate approach is to order a rehearing before Mr. Gomberg conducted

on the transcript of evidence taken at the original hearing, subject to his discretion at the rehearing to recall a witness or require further evidence.

[40] In making this direction it is worth noting that the Walkerton Compensation Plan is a part of a class action settlement and adjudicative hearings in the context of a class proceeding can take a variety of forms. Indeed in some class actions, the administration or adjudication of claims is done in writing without *viva voce* evidence.

[41] If, pursuant to subsections 123 (4) and (7) of the *Courts of Justice Act,* it is appropriate in the more formal and less flexible civil procedure to direct that a rehearing be conducted on the transcript of evidence taken at the original hearing, then it must *a fortiori* be appropriate to proceed in that fashion for the administration of a class action compensation plan.

[42] In any event, the fundamental question is whether there is any unfairness to Mr. Doyle in ordering that the arbitration be completed based on Mr. Gomberg's review of the transcripts of the completed hearing. In this regard, it is worth noting that both parties will have the opportunity to make their arguments to Mr. Gomberg with the assistance of having the transcripts from the original hearing, which is an advantage over even a typical civil trial, where transcripts are typically only prepared for an appeal.

[43] Relying on criminal law cases, Mr. Doyle submits that a rehearing based on the existing transcripts would be unfair because there are credibility issues and the arbitrator would be unable to fairly decide the matter without the opportunity of viewing the witnesses as they testify. However, I am not persuaded that there are genuine issues of credibility and certainly none of the type where a witness's demeanor would reveal fabricated evidence.

[44] Moreover, to the extent that there might be genuine issues of credibility, these appear to be matters that are amenable to being resolved by a review of the transcripts and the voluminous documentary record; visualize, the controversies are of the type that could have been adjudicated by way of a summary judgment motion, which is another example of a hearing based on affidavits, transcripts, and argument.

[45] I see no unfairness in a rehearing based on the transcripts and rather see fairness, proportionality, and common sense in not wasting the eight days of hearings that were completed before Mr. Teplitsky's death. In contrast, I regard it as unfair and a waste of due process to treat the original hearing as never having occurred, especially when the rehearing would involve the same lay and expert witnesses.

[46] The case at bar is similar to *922592 Ontario Inc. v. Lipman Zenner Waxman LLP*, [2012] O.J. No. 6085 (S.C.J.), where after a three-day hearing, an assessment officer reserved his decision, but unfortunately he died and no decision was released. The client sought a full rehearing, but the lawyer whose account was being assessed sought a rehearing based on the transcripts of the first hearing subject to the discretion of the new assessment officer to require further evidence. Justice Stevenson ordered a rehearing based on the transcripts. At para. 21, she stated:

> 21. Counsel for the Applicant contends that costs savings ought not to be the only consideration in this situation but rather a just result must be a primary consideration. I am mindful of this but I am also confident that an experienced assessment officer who conducts assessments regularly will certainly be able to make a just determination whether based solely on the evidence in the transcripts

> or based on *viva voce* evidence as he or she requires and will be able to assess credibility.

[47] See also *Parmar v. Bayley*, 2001 BCSC 1394, where a rehearing based on transcripts was ordered and the presiding judge at the rehearing noted that it is often possible to resolve matters of credibility upon a transcript especially where there has been extensive cross-examination. See also *D'Amico v. Wiemken*, 2010 ABQB 785 where *Parmar v. Bayley* was adopted.

[48] In *922592 Ontario Inc. v. Lipman Zenner Waxman LLP, supra,* Justice Stevenson also expressed concern that the client was being somewhat disingenuous in seeking a complete rehearing because there was no genuine reason to doubt the fairness of a rehearing using transcripts and it rather appeared that the client was trying to bolster his chances for success by redoing his evidence, this time assisted by a lawyer.

[49] I have similar concerns in the immediate case. There is nothing in the evidentiary record to indicate that the first hearing was not fair, and there is nothing to indicate that treating it as a closed dress rehearsal would be more fair or more just than a rehearing based on the transcripts. And it patently would be unfair and unjust to order that on a rehearing the parties would be precluded from referring to the transcripts of the first hearing to cross-examine any witness who gave a prior inconsistent statement.

[50] I conclude, therefore, that the arbitration be completed based on the transcript of the evidence heard by Mr. Teplitsky, subject to Mr. Gomberg's discretion to recall witnesses.

3. The Request for Interim Costs

[51] In *Smith v. Brockton (Municipality),* [2003] O.J. No. 959 (S.C.J.), Justice Winkler, as he then was, held that under the Walkerton Compensation Plan, interim legal fees may be paid in rare, exceptional cases. In that decision, he also held that claimants are entitled to an indemnity for their reasonable legal costs even if they fail to establish that damages are payable. What is reasonable is a matter that must be determined in the circumstances of the particular case and typically will require an assessment after the completion of the arbitration. The outcome of the arbitration will be a factor in the determination of the reasonableness of a fee.

[52] Justice Winkler described a claimant's entitlement to reasonable legal fees at paras. 22, 23, 24, 26, 27, and 30 of his decision as follows:

> 22. Ensuring that the purpose of the Plan is met on an ongoing basis requires that the term "reasonable legal costs" be interpreted in the context of the other provisions of the Plan. The word "reasonable" is a modifier, or limitation, that must be viewed in a specific case, not only in terms of quantum of the fee sought, but also the proportionality between the fee and the compensation payment and the fees paid in respect of other similar claims. Consideration must also be given to the fact that the Plan has eliminated any issues relating to fault or one-time only settlements. Taking these factors into account is the best method for combating abuses of the Plan or a diversion of its true purpose, that of providing compensation to eligible claimants, to one of providing ongoing retainers to counsel to the detriment of claimants expecting, and entitled to, an "efficient and timely" determination of their claims.

23. Some expansion on the foregoing is warranted. The term reasonable as it applies to fees of claimants counsel imports that the proportionality of the fee to the result must be considered. Also, whether the fees incurred are "reasonable" will depend, among other things, on the issues involved and the manner in which the claim was advanced. Examples of factors to be taken into account could include whether it was reasonable to commence an unsuccessful claim to begin with; whether an offer was made by the administrator in respect of a claim so that an arbitration was necessary; or whether a reasonable offer was made but rejected by the claimant. In addition, steps taken which prolong the proceeding rather than advance the matter to a resolution are a relevant consideration. The obligation to have the claims resolved in a "timely and efficient" manner does not rest only with the Administrator, or Ontario where it is involved in place of the Administrator. It is shared by counsel for the claimants as well and counsel cannot seek to increase legal fees through a failure to meet this obligation.

24. Similar claims also provide a useful guide for determining the reasonableness of the legal fees incurred. ...

....

26. .... Although the preamble to the Plan describes its purpose as ensuring that Class Members receive "full and complete compensation", that term is modified by the additional clause in the preamble that states that individuals will have access to "fair compensation through an efficient, timely and impartial process." These terms, particularly the emphasis on fairness and efficiency, when considered in the context of the scheme as a whole and along with the obligation to pay "reasonable legal costs", leads to the conclusion that the Plan does not contemplate the expenditure of disproportionate legal fees to achieve minimal gains. ...

27. The assessment of the reasonableness of legal fees should also be guided by the terms of the Plan relating to fault and future claims. As stated above, there are no issues of fault to be determined. Further, under s. 2.3, Class Members are entitled to seek additional compensation, despite having settled a claim, if they suffer "damages occurring or materializing after, or not reasonably discovered before, the date of the latest prior application, for which compensation has not previously been assessed or paid."

....

30. .... Although the Plan refers to "reasonable legal costs", it clearly means fees reasonably incurred by the Class Members in advancing their claims, rather than "costs" as that term is used in ordinary litigation. The principles upon which costs awards are made to indemnify the successful party in normal adversarial litigation, have no application in determining the amounts that Class Members are entitled to be paid for the legal fees and expenses incurred in seeking compensation. Subject only to the qualification that the term reasonable imparts to the analysis of their legal expenses, and the exercise of discretion in determining

> the reasonable fee in the total context of the claim, the Class Members are entitled to indemnification for their legal expenses.

[53] Applying Justice Winkler's decision in *Smith v. Brockton (Municipality), supra*, to the circumstances of the immediate case, it is inevitable that Mr. Doyle will be indemnified for his reasonable legal costs, and while the outcome of the arbitration will be taken into account in assessing what is a reasonable fee, Mr. Doyle will be entitled to be indemnified for his legal expenses in advancing his claim for compensation. The inevitability of indemnification explains, in part, why an award of interim fees; i.e., an advance payment will be extraordinary and rare; however, in my opinion, the circumstances of the immediate case fall into this rare category and the circumstances justify a pre-payment that will elevate any burden on Mr. Doyle to finance the costs of the arbitration until its completion.

[54] The regrettable death of Mr. Teplitsky in this profoundly slow moving arbitration is an extraordinary circumstance that justifies the payment of interim fees.

[55] In my opinion, an interim fee of $15,000 is sufficient to ensure that Mr. Doyle has legal representation to complete the rehearing based on the transcript evidence and any *viva voce* evidence required by Mr. Gomberg.

D. CONCLUSION

[56] For the above reasons, I appoint Mr. Gomberg to complete the arbitration of Mr. Doyle's claim. The rehearing shall be based on a review of the transcripts. I order that Mr. Doyle immediately receive $15,000 from the Plan Fund as payment of an interim fee.

Perell, J.

Released: November 2, 2016

CITATION: Smith v. Brockton (Municipality), 2016 ONSC 6781
COURT FILE NO.: 00-CV-192173CP
DATE: 20161102

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

JAMIE SMITH, ALANA DALTON, JAMIE McDONALD, and IRENE SALES INC., operating as THE HARTLEY HOUSE

Plaintiffs

– and –

THE CORPORATION OF THE MUNICIPALITY OF BROCKTON, THE BRUCE-GREY-OWEN SOUND HEALTH UNIT, STAN KOEBEL, THE WALKERTON PUBLIC UTILITIES COMMISSION, and HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendants

– and –

IAN D. WILSON ASSOCIATES LIMITED, DAVIDSON WELL DRILLING LIMITED, EARTH TECH (CANADA) INC., CONESTOGA-ROVERS & ASSOCIATES LIMITED, B.M. ROSS AND ASSOCIATES LIMITED, GAP ENVIROMICROBIAL SERVICES INC., A & L CANADA LABORATORIES EAST, INC., DAVID BIESENTHAL and CAROL BIESENTHAL

Third Parties

REASONS FOR DECISION

PERELL J.

Released: November 2, 2016