

## [Davies v. Clarington \(Municipality\), \[2011\] O.J. No. 5020](#)

Ontario Judgments

Ontario Superior Court of Justice

P. Lauwers J.

Heard: November 7, 2011.

Judgment: November 10, 2011.

Court File No. CV-00-1075-00CP

[2011] O.J. No. 5020 | 2011 ONSC 6669

Between Bonnie Davies, Plaintiff, and The Corporation of the Municipality of Clarington, VIA Rail Canada Inc., Canadian National Railway Company, Timothy Garnham, The BLM Group Inc., Apache Specialized Equipment Inc., Apache Transportation Services Inc., Blue Circle Canada Inc., Ontario Hydro Services Company, Defendants

(36 paras.)

### **Case Summary**

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**Civil litigation — Civil procedure — Production and inspection of documents — Objections and compelling production — Orders for production — Remedies for failure to produce — Application by one of the defendants for an order that plaintiff did not comply with certain undertakings allowed — Plaintiff was generally required to comply with the undertakings and to provide the documentation — Regarding documents that he claimed were unavailable he was to provide written explanation regarding his efforts to obtain such documents.**

Application by the defendant Apache Transportation Services for an order that the plaintiff Zuber did not comply with certain undertakings and with provisions of certain orders. At his discovery in August 2006 Zuber undertook to produce the updated clinical notes and records of all treating doctors or medical providers. He then provided authorizations to the defendants in September 2010. Some of the practitioners would not respond to the request without Zuber's active participation. Zuber was then required to execute any further authorizations required by the defendants for certain providers. A consent order was made in November 2010 that required Zuber to provide specific medical imaging documents to the defendants. Zuber claimed he provided such documents and that nothing further was available. The consent order also obliged Zuber to identify and produce all documents relied upon an October 2007 report. The order further required Zuber to produce all documents that pertained to his income since the accident from his teaching. Zuber also had to produce copies of court records that pertained to his divorce. He claimed that he complied with this undertaking. Zuber had to also provide the documentation used to create his income tax returns from 1999 to the present. He claimed that only the returns were available.

HELD: Application allowed.

Zuber was to provide a written explanation regarding his efforts to obtain the specific images referred to in the November 2010 order. He was to identify the 29 transactions that formed the basis of a particular report. He was also to comply with the provisions of the consent order by identifying which of the documents were teaching contracts and he was produce copies of all bank account statements regarding his Swiss accounts from 1999 to the present. Zuber was to explain in writing what was done to obtain certain banking records that were not produced to the defendants. Zuber was to also explain in writing what was done to answer the undertaking about

the divorce documents. He was to provide documentation for the special damages that he claimed before the pre-trial conference. Zuber used his best efforts to obtain the tax information and he was complying with this continuing obligation.

## Statutes, Regulations and Rules Cited:

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Ontario Rules of Civil Procedure, Rule 30.08(1), Rule 30.08(2)

## Counsel

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J. Strype, for Christopher Zuber, Class Member.

D. Merner, for the Defendant, VIA Rail Canada Inc. and Canadian National Railway.

S. Gray-Schleihauf, for the Defendant, The BLM Group Inc.

A. Sciacca, for the Defendants, Apache Specialized Equipment Inc., Apache Transportations Services Inc.

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## REASONS FOR DECISION

### **P. LAUWERS J.**

**1** The defendant Apache Transportation Services ("Apache") seeks an order finding that the plaintiff Zuber has not complied with certain undertakings and provisions of certain orders. Mr. Sciacca was clear that he was not seeking an order under rule 30.08(1) or (2) of the *Rules of Civil Procedure* today. If there is continued non-compliance, then he may seek an order on another day before or at trial. His position is supported by the other defendants who sent counsel to the motion.

**2** I begin with three observations. First, I noted in paragraph 13 of my decision in the undertakings motion, found at [\[2010\] O.J. No. 4900](#) that, as McLachlin J. observed in *R. v. O'Connor*, [\[1995\] 4 S.C.R. 411](#) at paragraph 193, the court aims for not necessarily the fairest of all possible trials, but rather a trial which is fundamentally fair. She noted, "What the law demands is not perfect justice, but fundamentally fair justice." In my view this orientation is necessary in this motion.

**3** I also observe that since the size of the amended claim has gone from \$10 million to \$50 million pursuant to my decision in the amendment motion, found at [\[2010\] O.J. No. 3703](#), the concept of proportionality is accordingly to be adjusted to require rather more rigorous compliance than might normally be the case where that would be unduly expensive and therefore disproportionate to the benefit.

**4** Finally, in the decision in the undertakings motion, I made the following observation, which continues to be relevant:

41 As noted above, many of the documents being sought by the defendants may no longer exist. The plaintiff's effort to comply with the order may demonstrate the problem. I find, however, that Mr. Strype's offer to authorize the defendants to search for more documents not to be sufficient compliance with the undertakings in the circumstances. I am not satisfied that any person in Poland or in any other country who receives a request for documentation from the defendants would feel obligated to assist if Mr. Zuber is not the one making the request. Mr. Zuber will make renewed efforts to produce the documents; he will provide the appropriate authorizations to the defendants including waivers of confidentiality and releases. The defendants may also make use of the Court's formal order to pursue such document production as they see fit.

### **Discovery undertakings**

5 At his discovery on August 11, 2006 Mr. Zuber undertook to produce the updated clinical notes and records of all treating doctors or medical providers. He then provided authorizations to the defendants in September, 2010. It soon became clear that a number of practitioners would not respond to the request without Mr. Zuber's active participation, and perhaps not even then. I require Mr. Zuber to execute any further authorizations required by the defendants in relation to the medical practitioners listed at paragraph 17 of Mr. Deans' Affidavit sworn September 27, 2011. Mr. Strype stated candidly that experience shows that the "authorizations are worthless and won't work" and that "Zuber will have to do it himself" and I so require.

6 Mr. Sciacca was able to find an outfit called Arthromed on the internet although apparently it is now out of business. I require Mr. Zuber to make honest efforts to determine whether the Arthromed records relating to his treatment can be found and produced.

7 The defendants have worked hard to encourage a number of persons to provide documents pursuant to the authorizations but have generally not been successful. That said, a number of institutions in Poland and Switzerland including banks and government offices may not be amenable to further production without letters rogatory. Accordingly, I suggest to the parties that they should prepare the appropriate letters rogatory which I would be quite willing to sign.

### **Consent order dated November 2, 2010**

8 The order required Mr. Zuber to "request and produce to the defendants, the x-rays, MRIs, CAT scans, EMGs, and other medical imaging documents identified in Schedule "A".

9 Mr. Strype asserts that: "We have produced to the defendants all the x-rays, MRIs, CAT scans, EMGs that the plaintiff was able to obtain. No further images are available from the doctors, clinics or hospital." He also notes that a considerable amount of material has been produced consisting of original images for Mr. Zuber from 2000 all the way through to 2006, and promises additional material when it becomes available. Mr. Strype also points out that he has produced the reports related to the various images in translated form. He asserts that more than enough medical information in this form has been produced and that the defendants' approach is overkill.

10 While I tend to agree with Mr. Strype, Mr. Sciacca requests that Mr. Strype provide a written explanation of the efforts made by Mr. Zuber to obtain the specific images referred to in the order. This is a reasonable request and I so order.

11 Mr. Sciacca seeks the "complete raw test data" related to Dr. Pilowsky's testing of Mr. Zuber. Mr. Strype asserts that the test scores of Mr. Zuber have been provided and that nothing else is required. Mr. Sciacca has put before me no evidence indicating what more is required or even what the practice is in this area. I therefore decline to make an order on this request without prejudice to Mr. Sciacca's ability to pursue another motion with appropriate evidence.

**The loss of income issue**

**12** The loss of income issue is clearly the most important one in this case.

**13** In the consent order obliged Mr. Zuber to "identify and produce all documents, including confidential documents, reviewed, referred to or relied upon by Mr. Joe Smoczynski" in the Baker Tilly Smoczynski I Partnerzy report dated October 11, 2007, and to attach those documents to his report. A similar requirement is found in paragraph 5(a) of the order that I settled and signed today arising from the undertakings motion. The Affidavit of Judi Denesi, a law clerk in Mr. Strype's law firm deposes that "all business documents referred to by Mr. Smoczynski have been provided to the defendants at tabs 1-299(a). Mr. Smoczynski does not have the original Excel spreadsheet relating to his October 2007 report as his Excel spreadsheet was constantly updated with new financial documents."

**14** I require Mr. Strype to identify the 29 transactions that form the basis of the first Baker Tilly Smoczynski report and also to identify by document number the documents produced by Mr. Zuber that relate specifically to this paragraph in the order.

**15** Mr. Strype advises that supplementary Baker Tilly reports dated April 20, 2011 and August 1, 2011 have been produced. Mr. Strype notes that there are now 34 transactions in the updated reports. The evidence of Mr. Zuber is that he was obliged to destroy a number of the underlying contracts. Mr. Strype notes that Mr. Zuber has been able to cooper together drafts of the contracts that witnesses identify as being the same as the executed contracts. Mr. Strype admits that the original documents have been destroyed and recognizes that the destruction of the documents could well make it difficult for Mr. Zuber to prove his loss.

**16** The consent order required Mr. Zuber to "request and produce to the defendants all documents, records, and contracts pertaining to the plaintiff's income since the accident from his teaching." The response of Ms. Denesi is that "all teaching contracts, if any, are contained in Volume I, Tabs 1-299(a). The teaching income has been reported in his income tax returns located in Volume I at Tabs 178-183". In oral argument, Mr. Strype advised that a number of the teaching contracts were not in writing but were engagements for which Mr. Zuber was paid a stipend that was reported on his income tax. I require Mr. Strype to identify by document number which are teaching contracts.

**17** The consent order obliged Mr. Zuber to "request and produce to the defendants copies of all bank account statements with respect to his Swiss accounts from 1999 to the present." The same general requirement is set out in paragraph 5(d) of the order signed today.

**18** Mr. Zuber's Affidavit of Documents contains some invoices identifying bank accounts. Ms. Denesi's Affidavit notes: "All bank statements in Mr. Zuber's possession have been produced with respect to any invoices rendered by the Bastion Group. At present the PKO Bank is refusing to produce any further documentation, as the accounts were closed in or about 2003". She adds: "All statements from Coutts Bank have been requested and denied by the bank. We are making further representations to the bank for production (through Polish representatives)". Mr. Sciacca points out that a number of other banks are identified in the invoices about which no explanation has been provided.

**19** I require Mr. Strype to explain in writing what has been done in the effort to obtain these documents. I pointed out in oral argument that letters rogatory may be necessary to encourage the financial institutions to provide the appropriate information. The same approach should be taken to the order to "request and produce to the defendants copies of all statements with respect to [Mr. Zuber's] credit cards denominated in Euros".

**20** The consent order obliged Mr. Zuber to "request and produce to the defendants copies of all court records with respect to the plaintiff's divorce, including but not limited to any medical and psychiatric reports and any court-ordered assessments, pertaining to the plaintiff Zuber only." The Affidavit of Documents purports to enclose the

divorce file. Ms. Denesi swears that "we have produced all documents referable to both the divorce and custody issues involving Mr. Zuber and his daughter".

**21** Mr. Sciacca points out that the divorce documents itself refers to exhibit lists and enclosures that are not part of the material produced. Mr. Strype notes that what has been produced is the Polish court file and the attachments are not included. The amount at issue on this particular head being rather modest, there is no point in pursuing it further.

**22** I require Mr. Strype to explain in writing what has been done to answer this undertaking.

**23** The consent order requires Mr. Zuber to "request and produce to the defendants the Polish state social security file pertaining to the plaintiff". Mr. Zuber has produced an application for state social insurance and the Affidavit of Ms. Denesi states: "Signed direction/authorizations were forwarded to Mr. Regan, as requested. More recently we provided any up-to-date address for the state security office by correspondence dated October 26, 2011 to defence counsel. It should be noted that letters to a Polish government office must be in Polish".

**24** Mr. Zuber has the obligation to pursue this information personally and he has not done so thus far.

#### **Endorsement dated November 15, 2010**

**25** Under paragraph 4(a) Mr. Zuber was directed to provide the date of a certain document. Mr. Strype points out, however, that the accident was on November 23, 1999, and the document was translated in Poland on February 13, 2001. This should sufficiently narrow the date. Dr. Granowski has apparently been located by the defendants and Mr. Zuber is obliged to pursue the inquiry.

**26** Mr. Strype will provide documentation for the special damages being claimed before the pre-trial conference.

**27** I am satisfied by Mr. Strype's explanation that there is no point in requiring Mr. Zuber to pursue the production of the records of Dr. Gary Shapero or Dr. Sherwood Appleton. Although Mr. Zuber was referred to these doctors by Dr. Ko, he did not attend.

**28** The order obliged Mr. Zuber "to provide the documentation used to create his income tax returns from 1999 to the present". Ms. Denesi explains:

We have been unable to locate Teresa Dobrowolska. We have produced the income tax returns from 1999 to 2009. The tax returns are the only documents in Mr. Zuber's possession. He has no further supporting documentation.

Anna Kowalczyk does not have any supporting documentation for the returns she helped to prepare. We have never been able to identify a bookkeeper who worked on Mr. Zuber's personal tax returns in the years 2003 to 2007. We suspect it was Teresa Dobrowolska, however, we have not been able to locate her.

**29** In my view, this is a continuing obligation but the plaintiff appears to have used best efforts thus far to obtain this information.

**30** Mr. Zuber was obligated "to produce the underlying invoices with respect to the spreadsheets produced by Mr. Zuber and enclosed at tab "AA" of Apache's motion material." Ms. Denesi explains that "there are no invoices available with respect to the spreadsheets. The spreadsheet was created by Mr. Smoczynski from documents available to him at the time of the creation of the report. We are checking with Mr. Smoczynski to locate and produce the underlying invoices".

**31** Mr. Sciacca referred to tab 166 of Volume I in Exhibit "D" to Mr. Deans' Affidavit as a spreadsheet. Mr. Strype

points out that there are no invoice numbers on the spreadsheet which appears to be a currency calculation. The document should be translated nonetheless.

**32** Paragraph 7 of the order requires Mr. Zuber to produce the English translations of certain documents. Translations must be provided to the documents in Volume I found at tabs 24, 40, 42 and 44. I also require proper translations to be provided for tab 15, the last page of tab 106 in Exhibit "D", and tab 172.

### **Costs**

**33** Mr. Sciacca proffers a Costs Outline in the total amount of \$6,080.97. This reflects more than 40 hours of his time in reviewing Mr. Zuber's production and in putting together the material for the motion. He is claiming a partial indemnity rate of \$110.00 which seems completely appropriate. I agree with Mr. Sciacca that the unsatisfactory state of the material necessitated the motion and that, given its complexity and the amount at issue, the time is not unreasonable.

**34** Mr. Strype submits that the costs should be in the cause. That would be inconsistent with the court's practice and I see no reason to delay a costs award. I therefore fix costs at the amount requested by Mr. Sciacca in the amount of \$6,080.97 all-inclusive and require it to be paid within 30 days.

**35** Mr. Merner did make a couple of helpful interventions during the argument and is not seeking any costs. Mr. Gray-Schlehauf requests costs in a nominal amount of \$500.00. He made no submissions of substance. In the circumstances, I award no costs in respect of the attendance of Mr. Merner and Mr. Gray-Schlehauf.

**36** Order accordingly.

P. LAUWERS J.