

COURT OF APPEAL FOR ONTARIO

OSBORNE A.C.J.O.

B E T W E E N :)
) Lyndon Barnes
RONALD McINTYRE by his estate) **for the moving party,**
representative MAUREEN McINTYRE) **Imperial Tobacco Canada**
) **Limited**
) **Applicant/Respondent**)
) **in Appeal**)
)
- and -) **Douglas Lennox**
) **for the respondent,**
ATTORNEY GENERAL FOR) **Maureen McIntyre**
ONTARIO)
)
) **Respondent/Appellant**) **Janet Minor and**
) **in Appeal**) **Sean Hanley**
) **for the respondent,**
) **Attorney General for Ontario**
)
)
) **Heard: June 26, 2001**
)

OSBORNE A.C.J.O.:

[1] This is a motion by Imperial Tobacco Canada Limited (ITCL) for leave to intervene as an added party in an appeal by the Attorney General for Ontario from the order of Wilson J. dated March 1, 2001 and reported as *McIntyre Estate v. Ontario (Attorney-General)* (2001), 198 D.L.R. (4th) 165. In that order, Wilson J. concluded that the proposed contingent fee arrangement between the plaintiff and her counsel in an action against ITCL did not violate the provisions of *An Act Respecting Champerty*, R.S.O. 1897, c. 327 (the *Champerty Act*). In her statement of claim in that action the plaintiff, Maureen McIntyre, alleges that her late husband, Ronald McIntyre, died of lung cancer as a direct result of smoking ITCL products to which he had become addicted. The claim, although issued, has not been served.

[2] The plaintiff's income and assets are not sufficient to fund what she contends will be relatively costly litigation. Accordingly, plaintiff's counsel took the position that they would only act for her on a contingent fee basis. The particulars of the proposed arrangement are fully set out in Wilson J.'s reasons.

[3] Rather than simply proceeding with the action on a contingent fee basis, the plaintiff applied for a declaration that the particular contingent fee arrangement with her counsel did not violate the *Champerty Act*, the *Solicitors Act*, R.S.O. 1990, c. S.15, or the common law. In the alternative, if the contingent fee arrangement did violate the *Champerty Act*, the plaintiff sought a declaration that the *Champerty Act* violated her s. 2(b) and s. 7 Charter rights. Because the applications judge found that the proposed contingent fee arrangement did not breach the relevant provisions of the *Champerty Act*, she did not address the constitutionality of the *Champerty Act*.

[4] The application for a declaration that the arrangement did not violate the *Champerty Act* was brought in the plaintiff's name. The Attorney General of Ontario was the named respondent. ITCL was not a party to the application, or served with notice of it.

[5] When the province appealed Wilson J.'s order, ITCL, which learned of Wilson J.'s order from a newspaper report, sought leave to be added as a intervener party pursuant to Rules 13.01 and 13.03(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which provide:

13.01 – A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,

(a) an interest in the subject matter of the proceeding;

(b) that the person may be adversely affected by a judgment in the proceeding;

or

(c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

13.03(2) – Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be

granted by a panel of the court, the Chief Justice of Ontario or the Associate Chief Justice of Ontario.

[6] Thus, under Rule 13.01, the court may grant a non-party leave to intervene in an appeal where the party can show an interest in the subject matter of the proceedings; evidence that it may be adversely affected by a judgment in the proceedings; or a question of fact or law in common with one or more of the questions in issue in the proceedings.

[7] ITCL contends that it has an interest in the subject matter of the appeal and that it may be adversely affected by a judgment issued on the appeal.

[8] Before moving to the crux of ITCL's motion for leave to intervene in the appeal, it is important to briefly summarize the issue on the appeal. The Attorney General has framed the issue as whether the proposed contingency arrangement between the plaintiff and her counsel is prohibited by the *Champerty Act*. The Attorney General's notice of appeal supports this characterization of the issue on the appeal and I accept this characterization as valid. The issue on the appeal does not concern ITCL's liability to the plaintiff in any respect.

[9] ITCL, as an essential part of its motion for leave to intervene, seeks to expand the record which was before the applications judge. The evidence ITCL seeks to introduce is set out in the comprehensive affidavit of Deborah Glendinning. In general, ITCL wants to put evidence before this court to establish:

- that the record below was incomplete and inaccurate in certain respects as it related to the history of tobacco litigation in Canada;
- the accurate particulars of conduct of the tobacco industry and that of ITCL, in Canada;
- the state of regulation of the tobacco industry in Canada; and,
- the cost of tobacco litigation. In this regard, ITCL contends that tobacco litigation is no more costly than any other personal injury litigation.

[10] The evidence in question is evidence suggesting that the evidence that was before the applications judge was not complete and, indeed, was inaccurate in certain respects. The evidence ITCL seeks to add to the record was available

when the application was heard. However, it was not adduced because ITCL was not given notice of the plaintiff's application by either the plaintiff or the Attorney General, the respondent on the application.

[11] An intervener will rarely be permitted to expand the evidentiary record on an appeal. Expanding the record creates obvious problems, in that in reviewing the order appealed from, this court will necessarily have to consider the correctness of the order on the basis of a different evidentiary record than the one that was before the court below.

[12] For the reasons that follow, ITCL's motion for leave to intervene is dismissed. In my opinion, ITCL should not be permitted to expand the evidentiary record. Further, on the record that is before me I am not persuaded that ITCL has anything to say about the issues on the appeal that will not be said by the Attorney General. I will deal with the evidentiary issue first since it is so much part of the fabric of ITCL's position on this motion.

[13] As I have said, ITCL was not served with notice of the plaintiff's application. Thus, it did not appear on the application. In these circumstances it was open to ITCL, once it learned of the result of the application before Wilson J., to move to vary or set aside her order under Rule 37.14(1)(a). This rule provides that a person "who is affected by an order obtained on motion without notice" may move to set aside or vary the order. Rule 37.14(2) provides that the court may set aside or vary the order in question "on such terms as are just." Rule 37.14(4) provides that a motion to set aside or vary an order without notice to the moving party may be made "to the judge who made it ... or to any other judge." Finally, Rule 39.01(6) provides that where a motion is made without notice, "the moving party or applicant shall make full and fair disclosure of all material facts." Under this rule, a failure to disclose "is in itself sufficient ground for setting aside any order obtained on the motion or application." ITCL contends that the plaintiff did not make full and fair disclosure to the applications judge on her motion before Wilson J.

[14] Instead of proceeding under either or both of Rules 37.14 and 39.01, once ITCL determined that the Attorney General had appealed Wilson J.'s order, ITCL sought leave to intervene and leave to expand the record. Yet, the advantage of proceeding under rules 37.14 or 39.01 is that, however such a motion is decided, the evidence that ITCL now seeks to admit if it is granted intervener status will have been considered by the court below. It will not have to be considered afresh in this court, as will be the case if ITCL were to be granted leave to intervene and to expand the evidentiary record.

[15] It appears to me that the factual issues and problems which ITCL raises, particularly with respect to the history of tobacco litigation in Canada, were entirely peripheral to Wilson J.'s decision. The issue before Wilson J. was whether the proposed fee arrangement between the plaintiff and her counsel offended the *Champerty Act*, the *Solicitor's Act* or the common law. In my opinion, the additional evidence proposed by ITCL is not material to either the relief sought on the application before Wilson J., or to her order. Therefore, had the evidence that ITCL seeks to adduce been before the motions judge, it is unlikely that her order would have been any different. See *Girsberger v. Kresz* (1998), 19 C.P.C. (4th) 57 (Ont. Gen. Div.), leave to appeal refused, [1998] O.J. No. 2392; *931473 Ontario Ltd. v. Coldwell Banker Canada Inc.* (1991), 5 C.P.C. (3d) 238 (Ont. Gen. Div.); *Pazner v. Ontario* (1990), 74 O.R. (2d) 138 (H.C.J.).

[16] I accept that there may be cases where failure to disclose or inaccurate disclosure, though not material to the decision in question or the relief sought on the motion, may be so egregious as to bring the administration of justice into disrepute. In those cases, the order issued ought to be set aside. However, this is manifestly not one of those cases.

[17] In order to be granted leave to intervene, ITCL must show a sufficient interest in the subject matter of the proceeding. ITCL argues that, as the main defendant in the plaintiff's action, it has a financial interest in the proceeding. I accept that ITCL does have a financial interest in the main proceeding, that is, in the action in which it is a defendant. However, it is important to recognize that the relevant proceeding for purposes of ITCL's motion for leave to intervene is the appeal related to the contingent fee arrangement between the plaintiff and her counsel. In my view, ITCL cannot show a sufficient interest in the subject matter of *that* proceeding to warrant being granted leave to intervene.

[18] ITCL does not have an interest the Attorney General's appeal from the order permitting the contingent fee arrangement that was put generally before Wilson J. While ITCL may be interested in trying to prevent or discourage potential litigation against it, it does not have an interest in whether or not the plaintiff can retain counsel to bring such an action. As counsel for the plaintiff aptly put it in his factum:

Put simply, the ability of the respondent [the plaintiff] to hire a lawyer is none of Imperial Tobacco's business.

[19] Even if ITCL does have a financial interest in the appeal, I accept the plaintiff's submissions that that interest is not sufficient to justify the order sought. ITCL's interest in the outcome of the appeal must be genuine and direct.

As stated, the precise issue that will be before this court – whether a contingent fee arrangement, necessary to promote the plaintiff’s access to justice, breaches the *Champerty Act* – is not an issue in which ITCL has a direct interest. See *Halpern v. Toronto* (2000), 51 O.R. (3d) 742 (Div. Ct.); *Peixeiro v. Haberman* (1994), 20 O.R. (3d) 666 (Gen. Div.). In *Peixeiro*, LPIC was refused leave to intervene in a private negligence matter which was based on the potential implications of limitation periods set out in the *Highway Traffic Act*, R.S.O. 1990, c. H.8, and the *Insurance Act*, R.S.O. 1990, c. I.8. LPIC argued that the decision could have significant repercussions on negligence claims against lawyers. MacPherson J. held that the result would not affect any of the lawyers involved in the action, that those lawyers could adequately argue the issue, that LPIC was not financially exposed in the particular litigation, and that its interest was not impartial or altruistic.

[20] One can easily distinguish the interest of ITCL in this case from that of LPIC in *Peixeiro* on the ground that, unlike LPIC, ITCL is a named defendant in the plaintiff’s action. However, it seems to me that *Peixeiro* stands for the principle that intervener status should not be granted simply because the proceeding opens the party seeking to intervene to future litigation. This concern was clearly part of LPIC’s position in *Peixeiro*. Following *Peixeiro*, the prospect of ITCL or other tobacco companies being exposed to future litigation undertaken on a contingency fee arrangement is not sufficient to establish the kind of genuine and direct interest required to permit ITCL to be granted intervener status.

[21] Furthermore, ITCL must show an adverse impact in respect of the appeal “in a greater way than any member of the general public”. See *John Doe v. Ontario (Information and Privacy Commissioner)* (1991), 87 D.L.R. (4th) (Ont. Div. Ct.). Superficially, ITCL can show an adverse impact in a greater way than any member of the general public, as it is a defendant in the plaintiff’s main action. However, it seems to me that the fact that ITCL is a defendant in the plaintiff’s action is incidental to, and distinctly separate from the subject matter of the relevant proceeding – the appeal related to the contingent fee arrangement. Specifically, it is incidental to the plaintiff’s common law and constitutional arguments attacking the application and validity of the *Champerty Act* to the fee arrangements between her and her counsel.

[22] ITCL also invokes the common law tort of “barratry” to justify its interest in the Attorney General’s appeal. I include myself among those who had never heard of the tort of barratry until I read the material on this motion. Nonetheless, this submission requires some comment because of the position ITCL takes with respect to it. ITCL claims that the tort of barratry permits a defendant who is exposed to costs as a result of a champertous proceeding to sue the lawyer through

whose “efficacious intermeddling” or improper motive the champertous action was brought in the first place.

[23] Barratry is related to, but clearly different from, champerty and maintenance. Barratry is defined in *Black’s Law Dictionary*, 7th ed. (St. Paul: West Publishing, 1999) as “[t]he offence of frequently exciting and stirring up quarrels and suits, either at law or otherwise”. According to *Black’s*, barratry is also “a crime in most jurisdictions”.

[24] By contrast, champerty refers to a bargain between a stranger and a party to a lawsuit by which the stranger pursues the party’s claim in consideration of receiving part of any judgment proceeds. The difference between champerty and barratry appears to be that while champerty is purely self-interested, barratry requires the additional intent to harm the third person: “... if the design was not to recover his own right, but only to ruin and oppress his neighbour, that is barratry”. See *Words and Phrases Judicially Defined*, Vol. I (London: Butterworth & Co., 1943).

[25] Maintenance is further distinguished from barratry and champerty on the basis that it appears to be motivated by altruism. That is, it requires a person to “lay out money on behalf of another in suits at law to recover a just right, and this may be done in respect of the poverty of the party; but if he lends money to promote and stir up suits, then he is a barrator”. *Words and Phrases, supra*.

[26] In Canada, the common law criminal offences of champerty, maintenance and barratry (as well as refusing to serve in office and being a “common scold”) were abolished after the 1950 *Report of the Royal Commission on the Revision of the Criminal Code*. There is no reference to a tort of barratry in torts texts such as *Canadian Tort Law*, Lewis Klar, (Toronto: Butterworths, 1999), *Remedies in Tort*, Lewis Klar et al., (Toronto: Carswell, Looseleaf ed.) or *The Law of Torts*, 9th ed., John Fleming (N.S.W.: The Law Book Company, 1998). Nonetheless, for the purpose of this motion I will assume, but not decide, that there is such a thing as the tort of barratry.

[27] The offence of barratry was considered (along with champerty and maintenance) by the Supreme Court of the United States in *NAACP v. Button* (1963), 371 U.S. 415. In that case, the Supreme Court held that legislation passed by the State of Virginia aimed at restricting the activities of the National Association for the Advancement of Colored People, which supported litigation involving alleged civil rights abuses, was unconstitutional. Justice Brennan wrote the majority opinion:

However valid may be Virginia's interest in regulating the traditionally illegal practices of barratry, maintenance and champerty, that interest does not justify the prohibition of the NAACP activities disclosed by this record. Malicious intent was of the essence of the common law offences of fomenting or stirring up litigation. And whatever may be or may have been true of suits against the government in other countries, the exercise in our own, as in this case, of First Amendment rights to enforce constitutional rights through litigation, as a matter of law, cannot be deemed malicious.

[28] The *NAACP v. Button* case was cited with approval by the British Columbia Court of Appeal in *Young v. Young*, [1990] 29 R.F.L. (3d) 113. The Court of Appeal's judgment in *Young* was varied on other grounds by the Supreme Court of Canada, [1993] 4 S.C.R. 3.

[29] Assuming that the common law tort of barratry lives on, the issue remains whether it could have any application in this case. According to its characterization by ITCL, its application assumes the presence of a champertous action. If the retainer in question is champertous in law, the question then becomes whether ITCL's costs interest is a sufficient basis upon which to grant an application for intervener status. For reasons I have already canvassed, ITCL's costs interest is not a sufficient basis. If the retainer is not champertous, there is no foundation in the obscure tort of barratry and ITCL cannot rely on it to support its interest in the appeal. In that regard, there is absolutely no evidence of a malicious intent on the part of the plaintiff's counsel directed toward ITCL.

[30] In my opinion, the real issue on the Attorney General's appeal is whether, because of the proposed fee arrangements between the plaintiff and her counsel, this is a champertous action. As I have already stated, ITCL has nothing to add to the Attorney General's submissions on that question.

[31] In my view, ITCL's position is analogous to the position of targeted defendants in motions under s. 246 of the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16, where leave to commence a derivative action is required. In *Lederer v. 372116 Ontario Ltd.* (2001), 141 (O.A.C.) 338 (C.A.), this court held that the issue whether leave should be granted to commence a derivative action does not require service upon the targeted defendants so as to give those defendants a right to participate in the leave motion. Of course, the defendant in such circumstances, and Imperial Tobacco here, has the right to challenge any

claim on the basis that the claim discloses no reasonable cause of action, or is frivolous or vexatious.

[32] Finally, I want to address two further issues, both relevant to ITCL's position on this motion. First, I accept that under Rule 13.01(2), if ITCL were granted leave to intervene without being granted the right to significantly expand the record, ITCL's participation as an intervener will not "unduly delay or prejudice" the determination of the rights of the plaintiff and the Attorney General on the appeal. However, if ITCL is permitted to intervene and expand the record, its intervention would, in my view, unduly delay the determination of the issues on the appeal.

[33] Second, in its proposed additional evidence, ITCL suggests that tobacco litigation is not unduly expensive when compared to other forms of personal injury litigation. I find this suggestion somewhat disingenuous. In fact, virtually all personal injury litigation is beyond the reach of even middle class Ontario residents. This explains why almost all such litigation in Ontario is undertaken on some agreed contingency fee arrangement. See *Bergel & Edson v. Wolf* (2000), 50 O.R. (3d) 777 (Sup. Ct.). Moreover, I would not be surprised if, consistent with recent American experience, some defence work in Ontario is conducted on contingent fee arrangements. As Carthy J.A. recently said in *Finlayson v. Roberts* (2000), 136 O.A.C. 271 (C.A.), at para. 24: "For some years, the contingency-like fees approach has been condoned by the courts, particularly in negligence claims".

[34] For these reasons ITCL's motion for leave to intervene is dismissed with costs to the plaintiff, payable by ITCL fixed at \$750. These costs will be accounted for through the judicial supervision of the final fee arrangements contemplated by the applications judge.

RELEASED: "Jul 26 2001"

"C.A. Osborne A.C.J.O."