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Provincial Court Small Claims Appeals: When is an appeal by way of trial de novo appropriate?

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Cases Considered:

Rezources Inc. v. Gift Lake Development Corp., 2008 ABQB 254

Section 51 of the *Provincial Court Act*, R.S.A. 2000 Ch. P-31, provides that an appeal of a Provincial Court decision is to be heard as an appeal on the record unless a party applies and the Court of Queen's Bench orders that the appeal to be heard as a trial *de novo*. The default position is therefore an appeal on the record that was created at trial, usually a transcript of what was said and any exhibits that were entered.

The *Provincial Court Act* says nothing about how the Court of Queen's Bench is to decide whether to hear an appeal as a trial *de novo*. Instead, the decision is left to the discretion of each Court of Queen's Bench judge in each particular case in order to accommodate the multitude of fact situations that might arise. While the exercise of this discretion cannot be restricted, judicially established guidelines can reduce uncertainty and inconsistency.

There appear to be only two reported Queen's Bench decisions setting out the factors a judge should consider in deciding whether to exercise his or her discretion in favour of an appeal by way of trial *de novo*. The leading decision on the issue is the decision of Madam Justice Veit in *Toralta Construction (1988) Ltd. v. Hankewich Homes Ltd*. (1992), 4 Alta. L.R. (3d) 90. It was the first case in which an attempt was made to set out in a comprehensive fashion the factors that should be considered by a Court of Queen's Bench judge on the exercise of discretion under section 51 of the *Provincial Court Act*. The second is the recent judgment of Mr. Justice Graesser in the case of *Rezources Inc. v. Gift Lake Development Corp*., 2008 ABQB 254. Mr. Justice Graesser does not attempt to be comprehensive in his discussion of the relevant factors, but his decision is a reasoned approach to an issue more usually approached as entirely fact specific. I will discuss the *Rezources* case itself and the guidelines enunciated by Mr. Justice Graesser shortly, but first I will review the guidelines in the *Toralta Construction* case and those cases that followed it.

Until 1989, appeals from the Provincial Court were always heard by way of a trial *de novo*. The *Provincial Court Amendment Act, 1989*, S.A. 1989, c. 18, s. 54, changed the law to what it is now, providing that "[a]n appeal is to be heard as an appeal on the record unless, on application by a party, the Court of Queen's Bench orders the appeal to be heard as a trial de novo." Reflecting on this change in the 1992 case of *Toralta Construction*, Madam Justice Veit

characterized the change in policy as "a recognition of full acceptance of the Provincial Court as a court of record." In *Merchant Retail Services Ltd. v. Baloun* (1996), 188 A.R. 63 at para. 40, Madam Justice Veit outlined a number of reasons why an appeal from Provincial Court is not a default trial *de novo*: "…[It] re-enforces the status of the Provincial Court as a court of record; it promotes a full and fair hearing in the Provincial Court instead of reducing the Provincial Court merely to a forum for a practice trial, a dry run, an expensive discovery; it promotes reasonable efficiency in the court system because it establishes one trial, not two, as the normal process for any single cause of action."

In developing guidelines in *Toralta Construction*, Madam Justice Veit first drew an analogy to a similar 1976 change in the *Criminal Code* provisions governing summary conviction appeals: *Criminal Code*, R.S.C. 1985, c. C-46, s. 822(4). Prior to 1976, the default method for summary conviction appeals was also trial *de novo*. After 1976, s. 822(4) provided: "… where an appeal is taken under section 813 and where, because of the condition of the record of the trial in the summary conviction court or for any other reason, the appeal court, …. is of the opinion that the interests of justice would be better served by hearing and determining the appeal by holding a trial de novo, the appeal court may order that the appeal shall be heard by way of trial de novo . . . ." Courts had interpreted the new s. 822(4) to emphasize two things. First, it had become exceptional to grant an appeal by way of a new trial. Second, the main factor in granting an appeal by way of a trial *de novo* was the state of the record. Madam Justice Veit found (at 94) that these were also the two main principles applicable to interpreting the change in mode of appeal in the *Provincial Court Amendment Act, 1989*. First, an appeal is normally on the record. Second, the state of the record is a major factor in determining the type of appeal.

There are a number of later cases which apply the "state of the record" factor. The most straightforward example can be found in *Liu v. West Edmonton Mall Property Inc*. (2000), 279 A.R. 305. The appeal in that case was from an order made as a result of a pre-trial conference. There was no transcript of the proceedings and therefore no record on which the appeal could be heard. Another case which illustrates a successful application for an appeal by way of trial *de novo* based on the state of the record is *Deyell v. Siroccos Hair Co. Ltd.* (1998) 245 A.R. 294 (Q.B.). Mr. Justice Mason allowed the new trial on the basis that the Provincial Court Judge had erred in allowing the Plaintiff's two medical reports to be submitted in affidavit form even though he acknowledged the Defendants' right to cross-examine the doctors who wrote those reports. The Defendants had been adamant during the trial that they wanted to cross-examine but the doctors were not produced as witnesses. The Defendants' argument was that the record included the affidavit evidence but no cross-examination and that an appeal on that record was therefore inappropriate and Mr. Justice Mason agreed. A third example, which includes a thorough discussion of the "state of the record" factor, is Mr. Justice Wilson's decision in *Gill v. Sandhu*, 1999 ABQB 209.

In addition to the two main principles identified in *Toralta Construction*, Madam Justice Veit added three additional factors to be considered in determining the mode of Provincial Court appeals, factors that were based on the case law on the *Criminal Code* provisions.

The third factor she noted was that the time and cost involved in an appeal is much greater in a new trial than in an appeal on the record. She elaborated on this factor in *Boyko v. Strong*, [1996]

A.J. No. 783 (Q.B.), noting (at 94) that convenience and time savings were factors that favoured appeals on the record: "The judge who hears an appeal on the record can read that record in advance of the hearing and thus be prepared to go straight to all appeal issues."

Her fourth factor was specific to the nature of the cases being appealed (at 94):

> [I]t is not offensive to have a streamlined type of trial for civil claims of relatively low value. . . . It does not make sense that small claims should be tried with all the formality and all the process appropriate for larger, more complex claims. The award of a new trial in this court as a method of appeal would subject the respondent to a form of process which the Legislature has deemed unnecessary.

Madam Justice Veit's enunciation of this fourth factor was relied on by Madam Justice Acton in *Hinton v. Alberta Heirloom House Ltd*., 1999 ABQB 519.

New evidence was the focus of Madam Justice Veit's fifth factor. She held (at 95) that "it is appropriate, when considering the possibility of granting an appeal by way of a new trial, to consider that a new trial will have the effect of granting to the applicant the right to lead fresh evidence in circumstances where that evidence may not be allowed according to the usual tests for the introduction of such evidence." In other words, she was concerned that an application for a trial *de novo* mode of appeal not be used instead of an application to admit new evidence. Madam Justice Veit dealt with this fifth factor at greater length in *Yakiwczuk v. Chmilar*, [1997] A.J. No. 1203, 27 C.P.C. (4th) 267 (Q.B.). The application for an appeal by way of trial *de novo* in that case was based on the existence of new evidence. She held that when new evidence was the reason being advanced by one of the parties, "the court should adopt the 'fresh' evidence rule, i.e., was the 'fresh' evidence not discoverable and will the 'fresh' evidence be significant, and on a significant issue, and is it in the interests of justice that it be heard" (at para. 5). If the new evidence met the fresh evidence rule, then an appeal should be heard by way of trial *de novo*. If it did not, the appeal should be on the record: see also *R. v. Leung*, [1998] 2 W.W.R. 178 and Roger P. Kerans, *Standards of Review Employed by Appellate Courts* (Juriliber, 1994) at 206.

In the *Boyko v. Strong* case, Madam Justice Veit added a sixth factor to be considered in the exercise of the court's discretion. She held (at para. 8) that the main reason that appeals were normally on the record was the need for finality:

> The reason is that there should be finality to litigation, especially in situations where the real issue is credibility, that is whether a witness should be believed. There should not be judge shopping, that is looking for what a litigant perceives to be a more favourable judge. Parties should not be allowed, other than in exceptional circumstances, to re-litigate their case.

This insistence on the finality of the Provincial Court judge's decision in normal circumstances was a significant factor in the decision of Madam Justice Acton in *Hinton v. Alberta Heirloom House Ltd.* and the decision of Mr. Justice Wilson in *Gill v. Sandhu*, 1999 ABQB 209. In the latter case, Mr. Justice Wilson noted (at para. 10), that "[i]n a true *de novo* hearing, the reviewing

tribunal makes its own decision on the issues with no regard to the proceeding before the first tribunal. This is a complete absence of deference." As a complete absence of deference, it undermines what Madam Justice Veit noted in *Toralta Construction* was the legislature's acknowledgment that "[t]he Provincial Court is a court of record; its judges are professionals." See also Madam Justice Ross' reliance on this point in *Redwater River Ranch Ltd v. de Weerd*, 2004 ABQB 553.

This brief canvas of the judicial interpretation of section 51 of the *Provincial Court Act* indicates that the guidelines that Madam Justice Veit developed in the *Toralta Construction* case have been relied upon by a number of Queen's Bench judges. *Toralta Construction* was relied upon in the *Rezources* case as well. However, Mr. Justice Graesser also took the opportunity to set out a few guidelines himself.

Rezources Inc. v. Gift Lake Development Corp. was a judgment on applications by Gift Lake for appeals from five different Small Claims Court decisions to be heard as new trials. Rezources had instituted five actions, each based on a different invoice for services and equipment rentals. The five trials had proceeded concurrently in Provincial Court, all without lawyers involved. One witness testified for each party. Doug Anderson, the person alleged by Gift Lake to be the key witness, did not appear. Anderson was the major shareholder in Rezources, Gift Lake's contact at Rezources, and the person who Gift Lake's witness testified agreed to invoice changes and credits. Rezources' witness basically testified that Doug Anderson's actions were in breach of a management agreement between him and Rezources. At the conclusion of the trial, the Provincial Court Judge stated that the evidence about invoice changes and credits was hearsay in the absence of Mr. Anderson and his testimony. He therefore granted judgment to Rezources.

Mr. Justice Graesser considered four reasons put forward by Gift Lake as to why an appeal by way of trial *de novo* was appropriate. Three of them were specific to the particular facts of this case and, according to Mr. Justice Graesser, did not require a new trial. The fourth reason was the non-attendance of Doug Anderson. Mr. Justice Graesser stated that it was clear that the trial turned on the authority or lack of authority Rezources had given Doug Anderson and that his role, and therefore his evidence, was the key. He was of the opinion that the trial should have been adjourned so that Gift Lake could attempt to secure Anderson's attendance when it became clear that Anderson's role was pivotal. The only way to determine the issue of his authority was to hear the evidence of Doug Anderson. As a result, Mr. Justice Graesser ordered that the appeal be heard by way of trial *de novo*.

Although not stated, this ground for ordering a new trial could be categorized as an example of the "state of the record" reason, with the record lacking in the key testimony of Doug Anderson. This seems to be the way Mr. Justice Graesser saw it as he indicated that a record that was incomplete on a key issue was a reason to order a trial *de novo* (at para. 34).

However, the facts might better fit the "new evidence" factor. Although Mr. Justice Graesser discussed a different point from the *Toralta Construction* case, he did not note Madam Justice Veit's warning that one factor that should be considered is whether or not a new trial will have the effect of granting the applicant the right to lead fresh evidence in circumstances where that evidence would not be allowed according to the usual tests for the introduction of such evidence.

Mr. Justice Graesser did not explicitly consider whether Doug Anderson's evidence would meet the fresh evidence rule. He did, however, consider the facts that went to establishing whether his testimony was discoverable or not, whether it would be significant and on a significant issue, and whether it was in the interests of justice that it be heard ? i.e., the elements of the fresh evidence rule. The difficult part of the rule's application in this case was the first element, and the question of whether or not this evidence could have been produced with the proper use of a notice to attend served upon Doug Anderson. However, the parties were not represented, Gift Lake had requested an adjournment even if not because of Anderson's absence, and Gift Lake had spoken to Anderson twice before the trial and Anderson had assured them he would attend. In the informal context of a Small Claims Court and unrepresented parties, this might have been enough.

Although he decided that a trial *de novo* was required in order to hear new evidence that should have been heard in the Provincial Court trial, Mr. Justice Graesser went on to acknowledge that an order for an appeal by way of trial *de novo* should only be granted in the most compelling circumstances. He noted several reasons for adhering to the default position of an appeal on the record (at para. 34). The first was deference to the Provincial Court's skilled and experienced judges, a point that Madam Justice Veit in *Toralta Construction* had indicated was the purpose behind the 1989 change in the legislation. His second reason was the cost involved in a new trial, echoing Madam Justice Veit's third factor. A third factor he noted was the need for finality in litigation, a factor Madam Justice Veit had added in *Boyko v. Strong.* Mr. Justice Graesser also noted two reasons for departing from the default position and instead ordering an appeal by way of trial de novo. His fourth factor was, as already indicated, a record that is incomplete on the key issues, a factor indicating a trial *de novo* would be warranted. This appears to be similar to Madam Justice Veit's second factor, the state of the record. Finally, he indicated that where the applicant could demonstrate that a trial was conducted in an unsatisfactory manner a trial *de novo* should be ordered. This appears to be a new point. Mr. Justice Graesser says nothing further about his last factor, but perhaps the trial judge's failure to order an adjournment in the *Rezources* case is the sort of situation he had in mind.

The factors set out by Mr. Justice Graesser this year and those enumerated by Madam Justice Veit sixteen years earlier go some way towards reducing uncertainty and inconsistency in determining the mode of appeal from Provincial Court. So long as the guidelines remain at the level of fairly general principles that have weight, or factors to be taken into account, they are appropriate in the context of the broad discretion granted in section 51 of the *Provincial Court Act*.