

A Judge's Duty is to Judge

Legal Research | Litigation | Litigation & Dispute Resolution | Rules of Civil Procedure

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A judge plays many roles, but one of the most important is to render a decision between conflicting parties. In rendering a decision, a judge must be impartial and unbiased. He or she must carefully consider the evidence, weigh the credibility of parties and witnesses and apply the law. A judge must stay above the battle and resist being drawn into the dispute to such an extent that the judge must conduct their own legal research and make a judgment utilizing facts and legal theories that neither party raised before the court.

The role of a judge, accordingly, places a corresponding duty on the parties and their lawyers to fully raise the issues that are relevant to a dispute and to explain those issues in their written materials and oral arguments. Failure to do so will result in a case being delayed and the court strongly rebuking the work of the lawyer.

In *McPherson v. McPherson*, 2021 ONSC 4066 (CanLII), Justice Chown recently was required to delay hearing a matter because the parties on both sides of a family law dispute failed to properly advance their positions.

The case dealt with the enforcement of a settlement that the parties had negotiated. While both sides agreed that the matter was settled under “Final Minutes of Settlement” dated 7 January 2020, the parties disagreed on the meaning of the terms contained therein.

Yet in bringing the matter to court, Justice Chown felt that the parties had failed to fully address the issues. He wrote:

I have spent a great deal of time reviewing the notices of motion, the affidavits and the factums filed in this matter, as well as doing my own legal research. The parties have not addressed several important issues. I need to hear further from the parties before making a decision on the motions.

Even though the parties both agreed that a settlement had been reached, neither party provided Justice Chown with any authorities showing how courts approached similar cases or set out arguments on how any test should be applied.

Procedurally, neither party framed the issues to be dealt with by the court under a rule. Under the *Family Law Rules* that applied to this case, [rule 18\(13\)](#) dealt with motions to enforce a settlement while [rule 16](#) dealt with summary judgment. However, these were the only rules that might be applicable to the circumstances of the case.

With respect to the use of summary judgment to enforce an accepted offer, Justice Chown explained that, as referenced in MacLeod's Ontario Family Law Rules Annotated 2020-2021, the decision in *West v. Oreskovich*, 2009 CarswellOnt 1957 (this case is subject to a publication ban) stood for the proposition that “The issue of whether or not parties have reached an agreement is properly addressed in the context of a motion for summary judgment.”

He then noted that cases under [rule 49.09 of the Rules of Civil Procedure](#) also utilized the approach under summary judgment to enforce an accepted offer and that in family law the test for summary judgment had also been used to enforce settlements.

The parties also failed to explain why their respective interpretations of the agreement should be accepted as either being fair or rational in the context of the case where the parties had also entered into an agreement in 2016. Justice Chown noted that “I would benefit from receiving the parties' submissions on why their interpretation of the agreement is consistent with equalization and support rules.”

The case also raised a controversial issue about an interim order that required the respondent to pay over \$63,000 for matrimonial expenses. While the parties made submissions on how this amount was to be treated in the calculations that needed to be made by the court, neither party addressed the issue of whether the prior order was a final order or an interim order or how this could impact the outcome of the matters before the court. Justice Chown noted that there was a

significant body of law on the issue of whether interim rulings were binding or not on a trial judge.

Lastly, the respondent denied that he owed any child support. However, he did not address why he should not be obliged to pay \$1,000 per month as agreed upon in the minutes of settlement. The agreements that had been signed by the parties did not say when the \$1,000 per month payments were to start, but, again, neither party specifically addressed the implications of this fact.

This case is significant because it serves as a reminder to all lawyers that they cannot cut corners or approach issues in a case lazily. As best as possible, all legal issues and the procedures that permit those issues to be before the court, should be fully canvassed in the materials and arguments advanced before a judge. Failure to do so can have many negative implications, including, as seen here, a delay in the parties having their matter finally adjudicated. While Justice Chown's reasons do not indicate why the parties failed to address significant and important issues to help him render a decision, it is clear that parties simply cannot rely on a judge to take the raw materials presented by the parties in a matter hoping that a judge who retires to his or her chambers will magically produce a result. A PDF version is available to download [here](#).

If you require any litigation assistance, our **Dispute Resolution Group** lawyers are available to assist you. Please contact [Stephen Thiele](#) at 416.865.6651.

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