

Ineffective Assistance of Counsel in the Civil Context: The case of SMTCL Canada Inc. v. Master Tech Inc., 2017 ONCA 291

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Wajeb Assaf, former lawyer for the defendant, represented Master Tech in the unsuccessful defence of a summary judgement motion which resulted in a \$65,000 judgement against his client. Unsatisfied with the result, Master Tech launched an appeal on the grounds of ineffective assistance of counsel.

Master Tech alleged that had it not been for the negligence of Assaf in failing to put forth a complete evidentiary record on the motion, it would have been successful.

While Master Tech sought to adduce “fresh evidence” on the appeal and indicated that it intended to sue Assaf, Assaf sought intervener status in the appeal under Rules 13.01 and 13.03 of the *Rules of Civil Procedure*. Assaf’s motion to intervene was granted to ensure that he would be bound by an eventual appellate court decision and in the interests of justice. Indeed, Assaf’s participation was viewed as more efficient and would permit a robust assessment of complete evidentiary record issue.

Although appeals based on ineffective assistance of counsel are evident in the criminal and family law contexts, in the words of Strathy, C.J.O, such an appellate ground is “unusual in civil cases and rarely available.” Thus, this case brings to the forefront the availability of such a ground of appeal and the threshold that must be met in order to succeed.

Catzman J.A. in *W. (D.) v. White*, (2004), 189 O.A.C. 256 (C.A.), leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 486, limited the availability of ineffective assistance of counsel as a ground for appeal to the “rarest of cases”:

I would not be prepared to close the door to the viability of ineffective assistance of counsel as a ground for a new trial in a civil action. But, also like Grange J.A., I would limit the availability of that ground of appeal to the rarest of cases, such as (and these are by way of example only) cases involving some overriding public interest or cases engaging the interests of vulnerable persons like children or persons under mental disability or cases in which one party to the litigation is somehow complicit in the failure of counsel opposite to attain a reasonable standard of representation.

Although on the motion to intervene the Court of Appeal allowed Master Tech’s appeal to proceed on the ground of ineffective assistance of counsel, it appears that the success of such an appeal in the civil context, absent egregious circumstances (i.e. failure of counsel to appear at trial), is exceptional and may not succeed. Indeed, there appear to be no reported civil cases in Ontario where an appeal on the grounds of ineffective assistance of counsel has been successful.

So while the Court in *SMTCL Canada Inc. v. Master Tech Inc.*, appears to have left the door open to a successful appeal on the grounds of ineffective counsel, I predict that there will be little room for Master Tech to succeed because presently, it appears that an appeal based on ineffective assistance of counsel, would be... ineffective.

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

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