

# KEEPING CURRENT

November 5, 2021

## Lawyer who was not provided the opportunity to be heard about breach of duty to the court was denied procedural fairness

By James R.G. Cook

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Professional reputations which take years to build can be damaged by negative comments in judicial reasons, which are publically available on CanLII and other web services.

In *Blake v. Blake*, [2021 ONSC 7189 \(CanLII\)](#), the Divisional Court of Ontario reinforced the fundamental principle of procedural fairness requiring that a lawyer receive notice and an opportunity to be heard before such comments are the foundation of a court's written decision.

The case involved a lawyer who acted for a responding party in an estates dispute. The lawyer brought a motion for summary judgment to have the application dismissed against his client on the basis of an expired limitation period. The motion judge dismissed the motion and invited written submissions on costs.

In July 2019, a decision on costs was released in which the motion judge expressly considered the lawyer's conduct as counsel and the resulting implications to the lawyer's client. In particular, the motion judge found that the lawyer

breached his duty to the court by failing to bring a leading authority to the court's attention, and because of this breach, found that it was a proper case for an award of substantial indemnity costs against his client of more than \$91,000.

The estates application was subsequently settled between the parties. However, the lawyer sought and obtained leave to appeal the decision on costs.

At issue were specific comments in the costs decision about the conduct of the lawyer, which the motion judge said gave rise to "some very serious concerns regarding counsel's understanding and recognition of his duty as an officer of the court and his duty of candour with counsel opposite."

The motion judge was specifically concerned that counsel had not brought a leading case to the court's attention regarding the limitation period issue, and which was in the process of being appealed. The appeal decision, *Wall v. Shaw*, [2018 ONCA 929](#), was released while the motion judge's decision was under reserve.

The motion judge held that the *Wall* decision was determinative of the limitation period issue that was the subject of the summary judgment motion brought by the lawyer's client. In his decision on the motion, the motion judge referred to the lawyer's omission of the *Wall* decision as "both unfortunate and troubling" as the decision clearly put to rest any controversy or doubt as to the limitation period argument relied upon by the lawyer's client.

The motion judge's costs decision stated that the failure to bring the *Wall* case to the court's attention was intentional on the part of the lawyer:

I have also reached the very troubling conclusion that counsel for the respondents purposely did not bring the decision in *Wall v Shaw* to the attention of the court during the submissions on the motion or while my decision was under reserve. The decision was directly on point with the issue at stake on the summary judgement motion and the decision was adverse to the interests of the respondents.

On appeal, the lawyer argued that he had been denied procedural fairness and the opportunity to have notice and address the motion judge's concerns about his conduct.

In the Divisional Court's [Reasons for Decision](#), the appellate court stated that the key issue was whether it was open to the motion judge to base his costs decision on his own legal research and internet searches without giving the parties an opportunity to make submissions.

The appellate court noted that trial judges are expected to dispose of matters before them

solely on the basis of the evidence presented by counsel. However, it *is* open to judges to consider all relevant authorities, whether cited by the parties or not: *McCunn Estate v. Canadian Imperial Bank of Commerce* (2001), [2001 CanLII 24162 \(C.A.\)](#), at paras. 42.

In some cases, when judges consider authorities not cited by the parties, the issue of whether counsel should be invited to make further submissions arises. While the lawyer's appeal was not concerned with the substance of the motion judge's decision (since the application had been settled), the appellate court noted that it would have been preferable for the motion judge to give the parties an opportunity to make submissions on *Wall* before releasing the decision on the merits.

It was in any event a fundamental breach of procedural fairness for the motion judge to base the costs decision on the lawyer's failure to bring the *Wall* decision to the court's attention, without giving counsel an opportunity to address the issue.

The Divisional Court noted that it was evident from the decision that the motion judge undertook his own review of the law and as a result of that review discovered the *Wall* decision. Having discovered *Wall*, the motion judge concluded that it was determinative of the summary judgment motion. The motion judge was obviously frustrated by counsel not having brought to the court's attention a decision that was directly on point and determinative of the motion.

Unfortunately, the lawyer was not provided with notice of the motion judge's concerns and the opportunity to respond before the costs decision was released.



The Divisional Court noted that in appropriate circumstances, the courts may sanction the conduct of a lawyer, for example by ordering costs personally against the lawyer under Rule 57.07(1) of the *Rules of Civil Procedure*, or finding a lawyer in contempt of court.

Another way the court can sanction a lawyer, as happened in this case, is through the reasons of the court that become part of the public record.

In the Divisional Court's view, regardless of how the court imposes a sanction, it is a fundamental principle of procedural fairness that the court provide notice to the lawyer of the court's intention to sanction the lawyer and provide an opportunity for the lawyer to be heard prior to sanctioning the lawyer's conduct. To sanction the conduct of a lawyer without notice and without an opportunity to make submissions puts the court in the position of making findings that could have a significant impact on a lawyer's reputation.

The Divisional Court reasoned that a public finding by the court that a lawyer has breached his or her duty to the court is a finding that can have a long-lasting impact on that lawyer's reputation. In those circumstances, it was a requirement that a lawyer facing such a sanction must be given notice and an opportunity to be heard prior to the court making such a public finding.

Here, while the motion judge did not award costs against the lawyer personally, costs were ordered payable by his client on an elevated scale due to the lawyer's "clear breach of duty" and without giving the lawyer any opportunity to address the motion judge's concerns.

In allowing the lawyer's appeal, the Divisional Court affirmed the following rule of procedural fairness:

Where a motion judge or trial judge intends to call into question the integrity of a lawyer with a finding that the lawyer has breached his or her duty to the court, there is a corresponding obligation on the court to provide that lawyer with notice and an opportunity to be heard. This is a rule of fairness. A lawyer's reputation is something built on years of hard work. A lawyer's reputation can be lost in mere seconds when someone reads a judge's reasons that call into question that lawyer's integrity.

While allowing the appeal, the Divisional Court acknowledged the "crushing workload" the judiciary has to address on a daily basis and that judges are human and can fall into error. However, as the error in this case had a negative impact on the lawyer's professional reputation, the appeal was allowed on the basis that the lawyer ought to have had the opportunity to be heard and to respond to the adverse comments made against him before the costs decision was released.

### **Contact us**

If you have a litigation matter and are in need of legal advice, please contact [James Cook](mailto:jcook@grllp.com), at 416.865.6628 or [jcook@grllp.com](mailto:jcook@grllp.com).

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