

# THE GR COURT DOCKET

March 29, 2018

## In the Cold Light of an Unfavourable Result, Blaming Your Lawyer Will Not Brighten Your Prospects

By Stephen Thiele

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes two of Canada's largest banks, several medium to large-sized municipalities, agencies, boards and commissions and other government entities, high tech and software companies, real estate developers, lenders and investors.

A number of our lawyers have enjoyed in-house corporate positions and been appointed as board members of tribunals or as judges.

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In our justice system, there are winners and losers. While winners are often elated with a result, losers are sometimes bitter and seek to blame those around them for their loss. They appeal their unfavourable result and, among other grounds, allege that the loss was the result of ineffective counsel.

The allegation of ineffective counsel is most frequently seen in criminal law cases. However, this ground of appeal is also used in civil cases, particularly child protection cases.

Recently, Gardiner Roberts LLP was retained to defend a lawyer against an allegation of ineffective counsel in a child protection case.

### **The Case**

Due to a publication ban, specific details of the facts of this case cannot be discussed. However, generally, unsuccessful litigants at trial appealed a decision of a trial judge in connection with the welfare of children.

Among other grounds of appeal, the litigants argued that the trial judge's decision would have been different if their lawyer had provided them with effective counsel.

The litigants contended that their lawyer made a group of errors which included a failure to call key witnesses and to challenge certain facts. Furthermore, the litigants argued that their lawyer was incompetent due to a lack of experience in the area of law that formed the subject matter of the dispute.

The lawyer disagreed and relied on the transcript of an examination obtained during the appeal process in which one of the litigants confirmed that the lawyer had done a good job at the trial and that the litigants' challenge to the lawyer's competence arose at a later time rather than immediately after receiving the unfavourable decision.

### **The Law**

In assessing whether the litigants

should succeed on the grounds of ineffective assistance of counsel, the judge noted that the Supreme Court of Canada had acknowledged the importance of the litigants' representation in child protection proceedings and that the test for ineffective assistance of counsel in such cases had been established by drawing on principles set out by the Ontario Court of Appeal in *R. v. Archer*.

The test is as follows:

1. First, where the claim is based on contested facts, the Appellant must establish the material facts on the balance of probabilities.
2. Second, the Appellant must demonstrate that counsel's acts or omissions amounted to incompetence, and
3. Third, the Appellant must demonstrate that counsel's ineffective representation caused a miscarriage of justice. A miscarriage of justice occurs if the appellate court is satisfied that counsel's ineffective representation undermined the appearance of the fairness of the trial, or the reliability of the verdict. A verdict is rendered unreliable where the Appellant demonstrates that had counsel performed in a competent fashion, there is a reasonable possibility that the verdict could have been different.

However, the Ontario Court of Appeal had recently clarified that in child protection cases there was no need to consider an allegation of ineffective assistance of counsel if the trial judge had not made an error.

The issue would be moot.

## **The Court's Decision**

In assessing whether the trial judge had made an error, the court found none. Thus, a finding as to whether the litigants' lawyer had provided ineffective assistance at the trial was moot.

In any event, the court held that the lawyer had not provided ineffective assistance.

The lawyer had not prevented the litigants from testifying and did not fail to call relevant witnesses.

A decision made by the lawyer to not call a particular expert witness was within the realm of decisions for the lawyer to make. There was no incompetence on the lawyer's part, and, regardless, the testimony of the expert would not have made a difference to the trial judge's decision.

With respect to the alleged inexperience of the lawyer, while the material facts showed that the lawyer had only been called to the bar a year before the trial started and that the lawyer's practice was mostly in another area of law, the lawyer was appropriately aware of the case the litigants had to meet at trial.

Further, challenges made by the litigants about the lawyer's file management and record keeping was irrelevant to the ineffective counsel analysis. As determined by the Ontario Court of Appeal in another case, a consideration of ineffective counsel was not to be used as a "springboard from which an appellate court engages in a retrospective analysis of every single aspect of a lawyer's conduct."



### **Representation by Gardiner Roberts LLP**

The lawyer was represented by litigation partner James Cook and litigation associate Chris Junior.

Mr. Cook and Mr. Junior were assisted in the preparation of written legal argument by the firm's Director of Legal Research and partner, Stephen Thiele.

### **About the Author**

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