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CIVIL LITIGATION UPDATE

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December 2018

Westeel Fabrication Ltd. v. Envoy Construction Services Ltd., 2018 BCSC 2176

It ain't over till it's over – *Westeel Fabrication Ltd. v. Envoy Construction Services Ltd.*, 2018 BCSC 2176, provides guidance on issues arising on applications to settle orders.

Following a trial management conference where a trial was adjourned, the parties were unable to agree on the form of order. The plaintiff disagreed with the defendant's draft form of order and raised various objections to settlement of that draft form of order. In reasons following a hearing to settle the order, where the defendant's draft form of order was accepted, the Court provided guidance on a number of issues arising in respect of settlement of that order.

New Matters of Fact

Counsel for the plaintiff sought to raise new facts that were not before the judge at the trial management conference. The Court held this was inappropriate. An application to settle an order is not a further opportunity to raise new facts that were not before the Court when the order was made.

The Court stated:

[6] It is not appropriate, when involved in the process of settling the contents of an order, to introduce matters which were not heard before the court which made that order. Settling an order is based on the record before the court. Settling an order does not represent a second opportunity to advance new factual submissions, and I decline to consider any such submissions here.

Court Settling its Own Order

Counsel for the plaintiff challenged the jurisdiction of the Court to settle its own order.

The Court confirmed a judge of the Supreme Court has jurisdiction to settle orders, as part of the power to manage and control their own proceedings. In this regard, a judge is not confined to accepting draft orders submitted by either party.

The Court stated:

[7] A judge of this court has the authority to manage and control their own proceedings, including the settling of orders: *J.P. v. British Columbia (Children and Family Development)*, 2016 BCSC 57 at para. 4 citing *Director of Civil Forfeiture v. Lloydsmith*, 2014 BCCA 72. Judges are not confined to accepting drafts submitted by either party if the drafts are not in accordance with the reasons for judgment and the applicable authorities: *J.P.* at para. 4; see also *Birch v. Brenner*, 2015 BCSC 974.

On this point, the Court referred to *J.P. v. British Columbia (Children and Family Development)*, 2016 BCSC 57, for a summary of applicable principles:

[4] I respectfully disagree with the Province's position that I am confined to adopting one or the other of the two final draft versions presented. The form of order must accurately set out the orders arising from the Reasons in a manner that is in accord with the case law. For example, the order must not, as the Province quite rightly points out, contain recitals from the Reasons or the parties' various arguments, which the plaintiffs' first draft did: see *A.L.B. v. Park*, 2015 BCSC 38 at paras, 11-12; *Bauer v. Insurance Corp. of British Columbia* (1989), 38 B.C.L.R. (2d) 232 at 239-241. An order should clearly express what was intended by the decision and be capable of being understood on its face without recourse to extrinsic materials: *Yanke v. Salmon Arm (City)*, 2011 BCCA 309. Trial judges have the authority to manage and control their own proceedings, including the settling of orders: *British Columbia (Director of Civil Forfeiture) v. Lloydsmith*, 2014 BCCA 72. They are not confined to accepting drafts submitted by either party if they are not in accordance with the reasons for judgment and the applicable authorities. [Emphasis added.]

Clerk's Notes

Counsel for the plaintiff took the position the clerk's notes are authoritative as to the terms of the order.

The Court confirmed that, while a court clerk's notes can be helpful in settling an order, the court clerk's notes are not the court's order, and in settling an order it is preferable to refer to the recording or a transcript of the proceedings.

The Court stated:

[8] The notes of a court clerk are helpful in settling an order. However, "[c]lerk's notes are not the court's order": *Mayall v. Kebarle*, 2018 BCSC 170 at para. 47. In settling the terms of an order, it is preferable to examine a recording or a transcript of the proceedings: see e.g. *Inter-coastal BKR Development Group v. Cadillac Care Inc.*, [1995] B.C.J. No. 2275 at paras. 11-16; *Haight-Smith v. Neden et al*, 2002 BCCA 329 at para. 5. In this case, it is clear from what was recorded on the digital automatic recording system and actually said by the court at the TMC that the draft order submitted by the defendant is accurate. [Emphasis added.]

On this point, the Court referred to *Haight-Smith v. Neden et al*, 2002 BCCA 329, where the Court of Appeal stated:

[5] The clerk in chambers at the time recorded the costs as being disbursements only, but that is not what governs. What governs is what the learned chambers judge said at the time. … It might be that the clerk's notes were the product of an exchange between Madam Justice Proudfoot and counsel after the transcribed portion that I have already quoted. I do not have any evidence of that before me, and I am told that the tape of whatever exchanged took place is no longer available. On that basis, I think that what should have governed the Registrar in settling the order was the transcript that was available and not the clerk's notes. The transcript clearly contemplates the ordering of all costs not just disbursements. [Emphasis added.]

Westeel is a useful authority to have at-hand if issues arise in respect of settlement of an order.

We hope you found this update useful.

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