

CITATION: Stajic v. Langille, 2024 ONSC 6120
COURT FILE NO.: CV-22-00687490-00CP
DATE: 20241204

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MARKO STAJIC, Plaintiff

– and –

SCOTT LANGILLE, GERHARD MULLER, PAUL PATHAK, ERIC SILVER,
MICHAEL STEIN, and JOHN DOES 1-3, Defendants

BEFORE: Justice E.M. Morgan

COUNSEL: *Albert Pelletier* and *Vincent DeMarco*, counsel for the Plaintiff

Linda Rothstein and *Sonia Patel*, for the Defendants

Dana Peebles, for the litigation guardian for Wayland Group Corp.

Marcus Knapp, for Guarantee Company of North America

HEARD: December 3, 2024

ENDORSEMENT

[1] The Plaintiff seeks to remove Osler, Hoskin & Harcourt LLP (“Osler”) as counsel of record for the Defendants in this proposed investors’ class action. The Defendants are former directors and officers of Wayland Group Corp. (“Wayland”), a now insolvent cannabis corporation that is itself subject of another proposed investors’ class action, CV-21-00665194-00CP (the “Main Action”).

[2] Osler has a long history with this matter. The firm has over time been counsel for Wayland in the Main Action, Wayland in its CCAA application, the special committee of board of directors of Wayland during an Ontario Securities Commission investigation, and for the Defendants when they were the directors and officers of Wayland. A partner of the Osler firm was appointed CEO of Wayland, while another partner of Osler was appointed General Counsel of Wayland. The

Plaintiff contends, *inter alia*, that some of these roles conflict with each other and that, in any case, Osler has become indistinguishable from the client it purports to represent.

[3] This motion was scheduled at a case conference held June 26, 2024. At that conference, counsel raised the prospect that there might be objections by Osler to some of the evidence contained in the moving party's motion record.

[4] I indicated at the time that any such objection may be made in the context of the response to the motion. At that case conference 6 months ago, I did not have the motion materials before me and so did not know the nature of the objections and their significance.

[5] The Plaintiff's motion record contains a supporting affidavit of one of his lawyers, Andrew Morganti. In that affidavit, Mr. Morganti sets out the procedural history surrounding Wayland and the Defendants, and provides support for the relief sought in the motion. The Defendants, through counsel retained for this disqualification motion, have responded to that affidavit with an affidavit of one of the Defendants as well as an affidavit of an Osler partner who served as a corporate solicitor for Wayland.

[6] The Plaintiff then issued a Reply record, with a supplementary affidavit by Mr. Morganti replying to the responding record and affidavits therein. In his supplementary affidavit, Mr. Morganti set out a number of allegations of professional misconduct by members of the Osler firm. More specifically, he deposed that Osler has made intentional misrepresentations on behalf of Wayland amounting to 'conduct unbecoming a lawyer'. While these accusations were foreshadowed by the Plaintiff's Notice of Motion, they were absent from Mr. Morganti's first affidavit and the original motion record.

[7] It turns out that Defendants' counsel strenuously objects not only to the admissibility of certain evidence put forward and statements made by Mr. Morganti in his supplementary affidavit, but to the timing of the production of that evidence – i.e. in a Reply Record, leaving insufficient time for any new responding affidavit and/or cross-examination. Counsel for the Defendants submits that the allegations against Osler are extremely serious, and cannot be permitted to go unanswered. She insists that the matter be adjourned so that this late-filed evidence can be appropriately responded to.

[8] The Defendants also submit that some of the materials referenced by Mr. Morganti in his supplementary affidavit are privileged. This material was apparently acquired by the Plaintiff during the course of CCAA proceedings in respect of Wayland. Plaintiff's counsel says that a large database of documents was sent to them by counsel for Wayland's insurers, who had in turn received it from Osler in its capacity as former counsel to Wayland and custodian of all of Wayland's documents.

[9] The supplementary affidavit provided by Mr. Morganti is more expansive than is usual for an affidavit sworn by counsel of record. It not only identifies and appends certain documents – which would be the usual limit of a lawyer's affidavit – but it expounds on the affiant's view of

those documents. Importantly, in paragraphs 10 and 11, it references, but does not particularize or fully identify, correspondence between lawyers at Osler and their client, Wayland, as then represented by the Defendants in their capacity at the time of directors and officers of Wayland. In doing so, Mr. Morganti has made it necessary for opposing counsel to seek an order identifying those documents: *Celanese v. Murray Demolition*, [2006] 2 SCR 189, at paras. 62-63.

[10] At the hearing, Plaintiff's counsel explained that he has been advised by counsel for Wayland's insurers that they forwarded to him the database of documents of which Osler is custodian pursuant to an Order of Justice Penny dated March 2, 2022 in the Wayland CCAA proceedings, less those identified by the insurer's counsel as "presumptively privileged documents". That subset of the Wayland database was apparently sorted out from the rest by using search terms and applying those terms to the many thousands of Wayland documents. It is therefore not a subset of documents that has actually been reviewed to determine whether or not they are actually privileged. It would appear that the "presumptively privileged documents" that have been withheld from production to Plaintiff's counsel may be either over-inclusive or under-inclusive of all of the actually privileged documents in the Wayland database.

[11] Accordingly, the documents that Plaintiffs' counsel have received, which number in the hundreds of thousands, likely do include some privileged materials. Indeed, Mr. Morganti's paragraphs 10 and 11 confirm that this is so. I understand that these were received inadvertently by Plaintiff's counsel, but nevertheless the privilege issue must be dealt with.

[12] Paragraph 4 of Justice Penny's order indicates that those documents were only provided to various parties for use in the main action to which the present action is a companion. The Order makes no mention of the present action since it was issued prior to the present Statement of Claim. Any use of documents delivered pursuant to that Order will have to be specifically authorized by the court.

[13] As indicated above, the privileged documents in the hands of Plaintiff's counsel will have to be identified and described by them. As the Supreme Court set out in *Celanese*, at paras. 49-50, 65, this is to be done in affidavit form. In present circumstances, that presumably requires a further supplementary affidavit of Mr. Morganti's, along with an opportunity to cross-examine on that evidence.

[14] At the hearing, Plaintiff's counsel indicated that there is some confusion as to whom the disclosure and identification of privileged documents is to be made. He accurately pointed out that the privilege belongs to Wayland, which is now insolvent and is not a party to this case. That said, Justice Penny's Order specifically says that any party having come into the possession of Wayland's privileged documents is to advise Wayland's former directors and officers – i.e. the present Defendants. That direction by Justice Penny provides a full answer to Plaintiff's counsel's question. The notification is to go to the Defendants via their counsel here.

[15] This Osler disqualification motion must now be adjourned. Plaintiff's counsel must have time to prepare the relevant affidavit listing privileged documents, and the Defendants and counsel

must have an opportunity to review those documents. The Defendants are permitted to file their supplementary affidavit materials responding to the statements in Mr. Morganti's supplementary affidavit. And cross-examinations must be permitted to take place.

[16] Counsel for the Plaintiff argues that all of this will take considerable time and expense, and that it is not really necessary for the present motion. That may or may not turn out to be the case, but it is necessary in the greater scheme of this litigation to get the privileged documents identified and the privilege issue dispensed with one way or another. While I do understand and would ordinarily support the Plaintiff's desire to expedite matters and proceed as economically as possible, there are larger considerations of law and policy at stake in the privilege issue.

[17] Once Mr. Morganti has served his new affidavit, counsel will be in a position to work out a revised timetable. They may be in touch with my assistant in order to obtain a new, mutually convenient motion date.

[18] Defendants' counsel has asked for permission to make submissions on costs of the adjournment. They may do so in writing. I would ask Defendants' counsel to email my assistant with brief submissions within two weeks of today. I would also ask Plaintiffs' counsel to email my assistant equally brief submissions. They may do so within three weeks after the Defendants' submissions are received, since they will be bumping up against the Christmas/New Year holiday.

Date: December 4, 2024

Morgan J.