Federal Court		Cour fédérale

Date: 20100513

Docket: T-788-09

Citation: 2010 FC 529

Ottawa, Ontario, May 13, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

ISABELLE ARCAND

Applicant

and

ABIWYN CO-OPERATIVE INC.

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This application comes before the Court pursuant to sections 14 and 16 of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, P-8.6 (the Act), in respect of reports of the Office of the Privacy Commissioner of Canada (the Commission) issued on March 31, 2009 and May 5, 2009 respectively, both flowing from a complaint made to the Commission by the applicant.

[2] The applicant requests:

1. An order requiring the respondent to correct its practices and comply with principle 4 and sections 5 to 10 of the Act;

2. An order requiring the respondent to publish a notice of any of the action taken or proposed to be taken to correct its practices to comply with the Act;

3. An order requiring that the respondent pay the applicant damages in the amount of $30,000, including damages for psychological suffering and humiliation;

4. The applicant's costs of this application; and

5. Such further and other relief as this Honourable Court deems just.

Background

[3] The parties to this application have a past with complaints, disputes and litigation stemming from incidents which occurred in 2005 and prior. In late 2006, the parties entered into a settlement as part of which the applicant agreed to give up any further claims. What falls to be determined by this Court is whether the respondent can enforce that release to bar any further award of damages in this application.

[4] The respondent is a non-profit housing co-operative located in Ottawa, Ontario and organized under the laws of Ontario pursuant to the *Co-operative Corporations Act,* R.S.O. 1990, c. C.35 (the Co-op Act). The applicant was a resident of the co-op from 1993 to 2007.

[5] A dispute arose between the parties causing the respondent's board of directors to initiate eviction proceedings against the applicant in accordance with procedures set out in the Co-op Act. On April 21, 2005, the respondent provided the applicant with a notice to appear before the board on May 3, 2005.

[6] At around this time, the applicant retained a lawyer to provide her with legal advice and to represent her interests in connection with the eviction proceedings. On or about May 2, 2005, the lawyer wrote to the respondent requesting an adjournment of the May 3, 2005 board meeting for medical reasons. Two notes from the applicant's physician were appended to the letter.

[7] The board declined to grant the adjournment and on May 3, 2005, voted to evict the applicant. The applicant appealed the board's decision to the members of the respondent drawing attention to the doctors' notes. The respondent advised the applicant and her counsel that a general members meeting would be held on May 26, 2005 to decide her appeal. On May 16, 2005, the respondent distributed a notice of special members meeting to approximately 100 members. The package contained copies of the two notes from the applicant's physician. The applicant was upset that her sensitive medical information had been widely distributed. Neither the applicant nor her counsel attended the May 26, 2005 meeting at which her eviction was upheld.

[8] The applicant maintained the position that her eviction was improper given the circumstances and refused to vacate the premises. The respondent later commenced an action at the Ontario Superior Court to enforce the eviction. On December 16, 2005, the applicant filed a statement of

defence and counterclaim claiming that the respondent had harassed the applicant, refused to accommodate her disability and had damaged her personal belongings throughout her 13 year tenancy. The statement discussed specific incidents of harassment and mismanagement by board members and staff of the respondent and also specifically addressed the incident involving the medical notes. In a paragraph concluding her defence, the applicant stated:

> [39.] Ms. Arcand pleads and relies on the *Ontario Human Rights Code*, R.S.O. 1990, c. H-19 as amended, the *Co-operative Corporations Act*, R.S.O. 1990, c. C.35 as amended, and the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 as amended.

[9] In her counterclaim, the applicant sought damages for injury and disrepair to her belongings and apartment, general damages for mental anguish and distress caused by harassment and discrimination by the respondent's board and employees and punitive damages for years of what was described as outrageous misconduct.

[10] In a filed reply and defence to counterclaim, the respondent denied all allegations made by the applicant including a denial of any liability for mental anguish and distress.

[11] On October 7, 2005, the applicant initiated a complaint concerning the breach of her privacy to the Commission (the privacy complaint). The Commission sent letters to both the applicant and the respondent on January 16, 2006 advising them that an investigation had begun. The respondent's then counsel responded with a letter of submissions to the Commission on

February 13, 2006. The respondent's position was that it had simply followed its internal policies which were in compliance with the Co-op Act.

[12] On October 30, 2006, the applicant and respondent entered into a settlement agreement (the settlement) whereby *inter alia*, the applicant received monetary compensation and in return would vacate the co-op premises and sign a full and final release (the release).

[13] The parties disagree with regard to the effect of the release. The applicant alleges that she was asked during negotiations to drop her privacy complaint and specifically refused. She also alleges that she was under the impression that the settlement and the release had been drafted in such a way as to allow her to continue her privacy complaint. The respondent disagrees.

[14] On March 31, 2009, the Commission released a report of findings. The report found that a breach of the applicant's privacy had occurred and a recommendation was made that the respondent amend its by-laws and privacy policy to clearly indicate that it will seek a member's express consent before disclosing sensitive personal information. In the Commission's view, this would bring those documents into compliance with principles 4.3, 4.3.4, and 4.3.6 of the Act.

[15] The respondent amended its by-laws accordingly and informed the Commission of the change on April 17, 2009. On May 5, 2009, the Commission responded that it was "satisfied with the actions taken with respect to [the] recommendations".

[16] On April 29, 2009, the applicant, through her new counsel, sent the respondent a letter demanding compensation in relation to the report and alluded to the potential for this application. The respondent refused to pay and thereafter the applicant commenced this application.

Issues

[17] The issues are as follows:

1. Is the applicant estopped from bringing this application by virtue of the settlement agreement and release signed by the parties?

2. If not, what damages, if any, is the applicant entitled to?

Applicant's Written Submissions

[18] The applicant submits that settlement did not encompass the respondent's breach of the Act. The settlement was only in regards to the respondent's eviction proceedings. There is no mention of the privacy complaint anywhere in the settlement, despite the respondent's knowledge that it had been initiated. Nor did the applicant's pleadings discuss any specific cause of action in relation to the breach of the Act.

[19] The applicant submits that she was careful to not give up her right to continue the privacy complaint and demonstrated her understanding of the settlement and release by continuing with the privacy complaint. Indeed, the respondent took part in the privacy complaint and did not attempt to

enforce the settlement. This indicates that the respondent also viewed the privacy complaint as being separate from the litigation. At best, there was no meeting of the minds on this issue.

[20] In the alternative, the applicant asks this Court to exercise its residual discretion to refuse to apply the estoppel since the settlement and did not adequately compensate the applicant for her humiliation and thus, results in unfairness.

[21] The respondent's breach of the Act was a serious one. The respondent's actions were also in violation of the *Co-operative Corporations Act* and the *Human Rights Code* of Ontario. The applicant has suffered considerable and continuing mental distress as a result of the respondent's breach which allowed other co-op members to make assumptions about the applicant and to stereotype or otherwise malign her. The applicant feels that her reputation is damaged forever and also fears that some of the material distributed by the respondent may still be in circulation, since the package was sent to 100 members and was never entirely recovered. The applicant is fairly entitled to compensation.

Respondent's Written Submissions

[22] The respondent submits that the present application is an abuse of process, is vexatious and must be dismissed. These proceedings violate the community's sense of fair play and decency.

[23] The release signed by the applicant encompassed the relief she now seeks. It was a complete bar to any other "claim, demand or complaint". Similarly structured releases have not been confined strictly to the claims advanced in that action alone. The words, "the Defendant withdraws any and all complaints and actions arising out of her membership…" in the release clearly precluded the applicant from continuing her privacy complaint and any subsequent attempts to enforce a decision based on that complaint.

[24] In regards to the intention of the parties, the test is objective. There is nothing to substantiate the applicant's claim that she instructed her lawyer to draft the release to omit the privacy complaint or any objective evidence of her intention. If she really did so instruct her lawyer, she would have had a potential cause of action against him. After the settlement and release, there was no reason for the respondent to take any action until the applicant attempted to seek compensation by the demand letter of April 29, 2009, upon which the respondent immediately enforced the release. Lastly, by asserting that the settlement was improvident, the applicant is implicitly acknowledging that the initial settlement was for the same damages.

[25] The respondent submits that the applicant has not put forward any acceptable evidence in support of her claim for compensation. The report from the Commission does not result in any *prima facie* entitlement to any award of damages.

Analysis and Decision

[26] **Issue 1**

Is the applicant estopped from bringing this application by virtue of the settlement agreement and release signed by the parties?

Before determining the merits of the respondent's argument that the applicant is estopped from proceeding, it is useful to elaborate on the type of application at hand. Subsection 14(1) and section 16 of the Act read as follows:

14.(1) A complainant may, after receiving the Commissioner's report, apply to the Court for a hearing in respect of any matter in respect of which the complaint was made, or that is referred to in the Commissioner's report, and that is referred to in clause 4.1.3, 4.2, 4.3.3, 4.4, 4.6, 4.7 or 4.8 of Schedule 1, in clause 4.3, 4.5 or 4.9 of that Schedule as modified or clarified by Division 1, in subsection 5(3) or 8(6) or (7) or in section 10.	14.(1) Après avoir reçu le rapport du commissaire, le plaignant peut demander que la Cour entende toute question qui a fait l'objet de la plainte — ou qui est mentionnée dans le rapport — et qui est visée aux articles 4.1.3, 4.2, 4.3.3, 4.4, 4.6, 4.7 ou 4.8 de l'annexe 1, aux articles 4.3, 4.5 ou 4.9 de cette annexe tels que modifiés ou clarifiés par la section 1, aux paragraphes 5(3) ou 8(6) ou (7) ou à l'article 10.
. . .	. . .
16. The Court may, in addition to any other remedies it may give,	16. La Cour peut, en sus de toute autre réparation qu'elle accorde :
(a) order an organization to correct its practices in order to comply with sections 5 to 10;	a) ordonner à l'organisation de revoir ses pratiques de façon à se conformer aux articles 5 à 10;

(b) order an organization to publish a notice of any action taken or proposed to be taken to correct its practices, whether or not ordered to correct them under paragraph (a); and	b) lui ordonner de publier un avis énonçant les mesures prises ou envisagées pour corriger ses pratiques, que ces dernières aient ou non fait l'objet d'une ordonnance visée à l'alinéa a);
(c) award damages to the complainant, including damages for any humiliation that the complainant has suffered.	c) accorder au plaignant des dommages-intérêts, notamment en réparation de l'humiliation subie.

[27] A hearing under section 14 is not a judicial review of the Commission's report but provides for *de novo* review in Court of "any matter in respect of which the complaint was made," (see *Waxer v. McCarthy*, 2009 FC 169, [2009] F.C.J. No. 252 (QL) at paragraph 25 and 26)).

[28] Section 14 gives an applicant a right to apply to this Court for a hearing if certain preconditions are met. Here, the applicant has met those preconditions. The disclosure of the applicant's sensitive medical information and resulting humiliation were the subject matter of the Commission's report. Further, in dealing with the privacy complaint, the Commission applied Principle 4.3 regarding consent and found that there had in fact been a breach of the applicant's privacy by the respondent.

[29] This application for a hearing under section 14 is not an abuse of process. There has been no previous section 14 hearing on this matter and as such, it is the first opportunity for a court to examine, and if necessary, enforce the findings of the Commission.

[30] The applicant also invites this Court to apply section 16 by making orders under susbsections 16(a) and (b) and to award monetary damages under subsection 16(c).

[31] Section 16 enables courts to make a broad range of remedies and specifically contemplates in subsection 16(c), that monetary damages can be awarded for humiliation. The Act does not further clarify damage awards leaving common law concepts to fill the void. In substance, the subsection creates a statutory cause of action - humiliation - and allows for monetary damages calculated under common law and tort concepts to flow to applicants provided they first bring a privacy complaint and otherwise qualify for a hearing under section 14 and provided the Commissioner's report can confirm those facts necessary to establish the humiliation claimed. As a threshold, Parliament has left it to courts to determine when some degree of humiliation based on a breach of the Act described in a Commissioner's report, warrants this type of relief.

[32] I find it unnecessary in the present case to decide whether humiliation, that warrants the granting of damages under section 16(c) of the Act, must rise to the level where it can be considered a personal injury as is required of other psychological injuries in tort law (see *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 S.C.R. 114, 55 C.C.L.T. (3d) 36, [2008] S.C.J. No. 27 (QL) at paragraphs 8 to 10).

[33] However, given the openness of subsection 16(c) and its implicit evoking of the common law notion of damages, it is appropriate for courts to consider common law doctrines such as estoppel and abuse of process which, if established, would preclude any award of damages.

[34] On the other hand, subsections 16(a) and (b) are much more tied to the specific scheme and language of the Act. In this case, the applicant's claim for relief under these subsections is not so much prohibited by the release she signed as it is prohibited by the fact that requesting such relief would be pointless and in my view, vexatious.

[35] The Commission recommended that the respondent amend its by-laws and privacy policy "…to clearly indicate that it will seek a member's express consent before disclosing sensitive personal information…". I am satisfied that the respondent took this recommendation seriously, was forthright with the Commission and moved quickly to amend it policies. Less than one month later, after receiving correspondence from the respondent, the Commission wrote:

> You have advised that Abiwin Co-operative has already adopted a policy of requesting express consent with respect to the distribution of sensitive personal information during proceedings that may lead to the termination of membership and occupancy rights. You also note that at the Co-operative's annual general meeting in November 2009 a formal adoption of the proposed by-law changes will be considered.
>
> As such, our Office is satisfied with the actions taken with respect to my recommendations. However, I would appreciate you reporting back to me on the Board's decision on the proposed by-law amendment.

[36] Indeed, the applicant admits in her memorandum of argument at paragraph 42, "… [the respondent] accepted the outcome of the Privacy Commissioner's report, and implemented that office's recommendations." Further, in taking away from the need to intervene is the fact that the applicant no longer resides at the Co-op.

[37] There is no need for this Court to make an order pursuant to subsections 16(a) or (b).

[38] I now turn to the claim for relief under subsection 16(c).

[39] In my view, it is unnecessary to establish that the applicant is estopped from collecting damages. It is enough that the release signed by the applicant in 2006 is enforceable and bars the applicant's request for an award of damages under subsection 16(c) of the Act. With the release, the respondent attempted to, and in my view did, purchase contractual immunity from the present claim made against it.

[40] A release is a contractual clause which often limits or precludes a party from commencing an action in the future. It is simply one type of promise which can be reduced to writing and to which the general rules of contract law apply. A release has also been described as follows:

> Black's Law Dictionary Fifth Edition defines 'release' as "the relinquishment, concession, or giving up of a right, claim, or privilege, by the person in whom it exists or to whom it accrues, to the person against whom it might have been demanded or enforced." Releases are generally enforced in accordance with their terms. If a party wants to reserve or exclude a particular claim or right, that party must expressly exclude it from the terms of a general release…
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> *Keats v. Arditti*, [2000] N.B.J. No. 498 (QL) at paragraph 104

[41] At issue in the present case is the meaning of the words of the release. Words in a contract take their meaning from the context in which they are used and the intent of the parties. As the

Supreme Court of Canada remarked in *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, [1998] S.C.J. No. 59 at paragraph 54:

> …The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time….

[42] However, it has been ruled that the scope of a release clause will be more narrowly limited to those things which were in contemplation of the parties at the time when the release was given (see *Hill v. Nova Scotia (Attorney General),* [1997] 1 S.C.R. 69, [1997] S.C.J. No. 7 (QL) at paragraph 20). It is perhaps fitting that release clauses are owed a slightly more narrow interpretation than other contractual clauses given the broad language they typical employ. Regardless, the words of the release themselves are a good indicator of what was in the contemplation of the parties (see *Ysselstein v. Tallon*, [1992] O.J. No. 881, 18 C.P.C. (3d) 110 (Gen. Div.) at paragraphs 59 to 61). This applies a *fortiori* where the party signing the release was represented by counsel.

[43] In considering what was in the contemplation of the parties, a court may also consider the context, including the circumstances surrounding the execution of the document and evidence of the intention of parties (see *Taske Technology Inc. v. PrairieFyre Software Inc.*, [2004] O.J. No. 6019, 3 B.L.R. (4th) 244 (Ont. S.C. (Master)) at paragraph 25). Courts are limited to considering only objective evidence of intent. The parties cannot rely solely on their own direct evidence of what their intention was. The test is the intention a reasonable person would have had if placed in the situation of the parties. This principle was stated by Whitten J. in *Abundance Marketing Inc. v. Integrity Marketing Inc.*, 2002 Carswell Ont. 3273, [2002] O.T.C. 731 (Ont. S.C.):

> 16 This contextual analysis, in so far as it touches upon the intentions and expectations of the parties, must be an objective one. Lord Wilberforce in *Reardon Smith Lime Ltd. v. Hansen-Tangen* (1976) 3 All E.R. 570 (H.L.) at page 574 stated:
>
> > When one speaks of the intentions of parties to the contract, one is speaking objectively - the parties cannot themselves give direct evidence of what their intention was and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly when one is speaking of aim or object, or commercial purpose, one is speaking objectively of what a reasonable person would have in mind in the situation of the parties." (as quoted by Wilkinson J. in *Cinabar Enterprises Ltd. v. Bertelson*, Ibid. para. 51).

[44] In my view, a reasonable person in the applicant's situation would have understood that the present application and request for damages would entirely contravene the words and the intent of the release she signed. The fact that the privacy complaint continued to proceed with the Commission does not change this nor does the fact that more than three years have passed.

[45] Here, I would give considerable weight to the words of the release, not only because both parties were fully represented by counsel, but also because the parties had approximately equal bargaining power and co-drafted the document.

[46] To begin, the release in the present case was titled FULL AND FINAL RELEASE. Such a title will militate toward a more broad interpretation of the release (see *Taberner v. World Wide Treasure Adventures Inc.*, [1994] B.C.J. No. 1154, 45 B.C.A.C. 129 (QL) at paragraphs 7 and 8).

However, even given their plain meaning, the words of the release in the present case, in two separate places, encompass the type of application brought here.

[47] First, in the first paragraph, the release provides that the applicant releases the respondent from “any and all actions, causes of action, claims […] demands for damages, indemnity costs, interest and loss of injury of every nature kind howsoever arising which the Releasor may now have or may hereafter have arising out of Court Action file #05-CV-0314466”.

[48] The first paragraph of the release bars the present application because this application arises out of facts that had already occurred and were the subject of that previous litigation between the parties. In that action, the applicant’s pleadings described in detail the disclosure of the medical notes which are the subject of this application and even reproduced them. In those same pleadings, the applicant also claimed that the board had “knowingly given personal and sometimes false or misleading information about Ms. Arcand to Co-op members”. In those same pleadings, the applicant also counterclaimed for “General damages in the amount of $25,000 for mental anguish and distress caused by harassment…”. As noted above, the applicant had also claimed she was relying on the provisions of the Act.

[49] Applicant’s counsel argued forcefully before me that while the applicant’s pleadings in the previous action did contain those ingredients, the precise nature of the present application was not pled, nor was any particular section of the Act. The applicant therefore claims that the present application was not caught by the release. I disagree. It is true that the applicant did not specify

precisely which incident or incidents formed the basis of her claim for mental anguish and did not specify which sections of the Act she relied on but the applicant cannot draw an advantage from that vagueness now. Even if neither party contemplated the precise nature of the present application, it would still fall under the broad words of the first paragraph of the release, because the wrong that was described in the previous action is the same wrong the applicant now attempts to claim damages for.

[50] Second, I find that the present application for damages is barred by the third paragraph of the release which stated:

> IF THE RELEASOR commences any proceeding involving any claim, complaint or demand against the Releasees for any cause, matter or thing relating to the matters dealt with in this Release, this Release may be raised as a complete bar to any such claim, demand or complaint in the proceeding.

[51] The applicant's request for damages under subsection 16(c) for her humiliation resulting from the respondent's actions is clearly a "claim or demand" for a "cause or matter" relating to the matters dealt with in the release.

[52] Looking beyond the words of the release, a closer examination of the circumstances surrounding the signing of the release provides no assistance to the applicant. She was fully represented by counsel throughout and thus, cannot make any claim of *non est factum*. Nor can she claim that the release should be set aside due to unequal bargaining power. Both with counsel, the applicant and the non-profit co-op were essentially on a level playing field.

[53] A review of the minutes of settlement which was agreed to and signed by the parties on the same day as the release, is informative. Paragraph 9 reads:

> The Defendant, Isabelle Arcand agrees to execute full and final releases for all counterclaims in the action and, in particular, the Defendant withdraws any and all complaints and actions arising out of her membership and occupancy in the Plaintiff, Abiwin Co-operative Inc., and further not to file any future complaints or actions arising out of such membership and occupancy.
>
> (My emphasis)

[54] In my view, this is further evidence that the release they would later sign was meant to be just as it was titled, a full and final release from all claims arising out of her membership and occupancy.

[55] It seems the applicant's only evidence of her contrary intention that the privacy complaint and this ensuing application would not be barred is her evidence that she was asked by the respondent prior to the release to drop her privacy complaint and she refused. She also claims that she instructed her lawyer, in drafting the settlement and release, to leave this avenue open to her.

[56] The problem is that there is no objective evidence of this belief. If parties A and B agree to enter into a settlement and a full and final release in regards to a long standing and multifaceted dispute and party A wishes to keep open the possibility of claiming damages in a different type of action but in relation to the same basic facts, he or she ought to specifically exclude that cause of action from the settlement and release. If party A chooses not to, party B is entitled to rest assured that the dispute has been resolved in full.

[57] Finally, the applicant cannot rely on the respondent's acquiescing to the Commission's complaint process as evidence that the respondent did not believe the release applied. On the contrary, the respondent's post-settlement conduct was entirely consistent with a belief that the release was enforceable.

[58] An application under section 14 of the Act is optional for those who receive a Commissioner's report in their favour. It is not simply an extension of the privacy complaint. It is a separate and subsequent step and is itself a new action. In this case, it related to matters dealt with in the release signed by the applicant and was barred by that release. The privacy complaint had already been initiated at the time the release was signed. When the applicant attempted to take this next step and apply for damages under subsection 16(c), the respondent immediately sought to enforce the release.

[59] For the reasons above, I have determined that a reasonable person in the applicant's situation ought to have understood that the full and final release would preclude this application.

[60] Finally, I would reject the applicant's claim that the release should be set aside because the settlement was improvident and did not fully compensate her. This final claim only affirms her acknowledgement that the initial settlement was for the same damages she is now attempting to claim damages for a second time.

[61] The respondent, the non-profit Co-op, paid valuable consideration for the settlement and release. At minimum, the release was the means through which it has purchased contractual immunity from such an action arising out of the very events which gave rise to the settlement. As such, I would allow enforcement of the document and say that it prevents the applicant from any claim of damages under subsection 16(c).

[62] The release also imposed on the applicant an obligation to withdraw her privacy complaint. She did not do so and the respondent did not take any positive action either. Instead, the Commission continued its work and produced a report with which the respondent complied. It is that report which allowed the applicant to proceed with this hearing and, as I stated above, I do not find this hearing itself to be an abuse of process.

[63] **Issue 2**

What damages, if any, is the applicant entitled to?

For the reasons set out above, I am of the view that while the applicant has a right to proceed with this hearing under section 14 of the Act, no categories of relief under section 16 are open to her. I have described above how making an order pursuant to subsections 16(a) or (b) in the present circumstances would be unnecessary and repetitive since the Commission has already succeeded here with the simple recommendation that the respondent change its by-laws and privacy policy. The respondent took heed of this recommendation and promptly complied. I have also concluded that the applicant is barred from claiming damages under subsection 16(c) as such a claim is contrary to the terms of the release signed by the applicant.

[64] The application is therefore dismissed with costs to the respondent.

JUDGMENT

[65] **IT IS ORDERED that** the application is dismissed with costs to the respondent.

"John A. O'Keefe"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-788-09
STYLE OF CAUSE:	ISABELLE ARCAND - and - ABIWYN CO-OPERATIVE INC.
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	November 25, 2009
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	May 13, 2010

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