

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20210921**

**Docket: A-59-21**

**Citation: 2021 FCA 188**

**Present: WEBB J.A.**

**BETWEEN:**

**MANIGEH SABOK SIR**

**Appellant**

**and**

**HER MAJESTY THE QUEEN, ATTORNEY GENERAL OF CANADA,  
JOE LOZINSKI, CHRIS CASE, DEAN VODDEN, OFFICER DARKO,  
OFFICER SIGUENZA, RYAN HOW, ROD ENS**

**Respondents**

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on September 21, 2021.

**REASONS FOR ORDER BY:**

**WEBB J.A.**

**Federal Court of Appeal**



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**Respondents**

**REASONS FOR ORDER**

**WEBB J.A.**

[1] The appellant has submitted two motions - one seeking an order that the appellant is not required to serve the respondents with any further documents in this appeal and the other requesting an order that the respondents' motion record, in which the respondents are seeking security for costs, be removed from the Court file. Although other remedies were sought in the motions, addressing these two main issues will render the other remedies sought moot.

I. Motion for an order that the respondents are not required to be served

[2] The notice of appeal in this matter was filed on March 1, 2021. On March 11, 2021, a notice of appearance and proof of service thereof were filed by the Attorney General of Canada. The motion brought by the appellant is based on the assertion of the appellant that the notice of appearance was not served on the appellant and therefore that the notice of appearance was not properly filed.

[3] The requirement to serve the notice of appearance before it is filed is set out in Rules 341 and 73 of the *Federal Courts Rules*, SOR/98-106:

**341 (1)** A respondent who intends to participate in an appeal shall, within 10 days after service of the notice of appeal, serve and file

(a) a notice of appearance in Form 341A; or

(b) where the respondent seeks a different disposition of the order appealed from, a notice of cross-appeal in Form 341B.

[...]

**73** No document required to be served, other than an originating document, shall be filed without proof that it has been served within the time and in the manner provided for by these Rules.

**341 (1)** L'intimé qui entend participer à l'appel signifie et dépose, dans les 10 jours suivant la signification de l'avis d'appel :

a) soit un avis de comparution établi selon la formule 341A;

b) soit, s'il entend demander la réformation de l'ordonnance portée en appel, un avis d'appel incident établi selon la formule 341B.

[...]

**73** À l'exception de l'acte introductif d'instance, aucun document qui doit être signifié ne peut être déposé à moins d'être accompagné de la preuve qu'il a été signifié dans le délai et de la manière prévus par les présentes règles.

[4] The solicitor for the Attorney General of Canada, in the responding record filed in relation to this motion, indicated that “[t]he Respondents genuinely believed they served the Notice of Appearance upon the Appellant prior to sending it for filing”. However, the respondents have not submitted any document to confirm that the notice of appearance was served by electronic mail prior to it being filed with the Court and only state that they “genuinely believed they served the Notice of Appearance”. As a result, the respondents failed to establish that they properly served the appellant with the notice of appearance prior to it being filed with the Court.

[5] The appellant submits that since the respondents are not able to confirm that the notice of appearance was properly served prior to it being filed, the appellant is not required to serve any further documents in this appeal on the respondents under Rule 145.

[6] Rule 145 provides:

**145** Subject to subsection 207(2) or **unless the Court orders otherwise**, a party who has been served with an originating document is not required to be served with any further documents in the proceeding prior to final judgment if

(a) the party has not filed a notice of appearance or a defence within the time set out in these Rules; or

(b) the party has no address for service and has not served and filed a

**145** Sous réserve du paragraphe 207(2) et **sauf ordonnance contraire de la Cour**, si la partie qui a reçu signification d’un acte introductif d’instance se trouve dans l’une des situations ci-après, il n’est pas nécessaire de lui signifier d’autres documents dans le cadre de l’instance avant le jugement final :

a) elle n’a pas déposé d’avis de comparution ni déposé de défense dans le délai prévu par les présentes règles;

b) elle n’a pas d’adresse aux fins de signification et n’a pas signifié et déposé d’avis de consentement à la

notice of consent to electronic service in Form 141A.

signification électronique établi selon la formule 141A.

[emphasis added]

[Non souligné dans l'original.]

[7] The rule that a party who has failed to file a notice of appearance is not required to be served with any further documents is subject to the discretion granted to the Court to order otherwise. The stipulation “unless the Court orders otherwise” gives a broad power to the Court to order that a party who has failed to file a notice of appearance may nonetheless still be entitled to be served documents in an appeal. This is a discretion granted to the Court and, therefore, the question is whether discretion should be exercised in this case.

[8] The appellant acknowledges that she received the notice of appearance from the respondents on March 23, 2021, which is 22 days after the notice of appeal had been filed. The appellant submits that she has suffered prejudice as a result of the respondents not serving her prior to the filing of the notice of appearance. She states that the basis for the dismissal of her claim in the Federal Court (which gave rise to the current appeal) is that she failed to comply with a particular deadline. She also submits that the non-compliance by the respondents with the Rules has led to a series of motions and has caused delays in this appeal.

[9] With respect to her claim of prejudice on the basis that her claim in the Federal Court was dismissed because she failed to comply with the deadline, the situation related to her non-compliance with the deadline and the failure of the respondents to properly serve the notice of appearance are not comparable. Although the appellant has not provided the full Order of the Federal Court that dismissed her claim, she has submitted an excerpt, which appears to set out

the basis for dismissing her claim. In the recitals to this Order there is a reference to a December Order of the Federal Court which provided as follows:

1. The Plaintiff shall pay into Court the amount of \$8,900.00 as security for the Defendants' costs by no later than February 14, 2020.
2. The Plaintiff shall, within seven (7) days of paying the \$8,900.00 into Court, submit a status report to the Case Management Judge and to the Defendants' counsel confirming that the amount of \$8,900.00 has been paid into Court in accordance with paragraph 1 of this Order.
3. The Plaintiff shall pay the outstanding costs award of \$1,200.00 to the Defendants by no later than February 14, 2020.
4. In the event that the Plaintiff fails to comply with the terms of this Order, the Defendants are granted leave to apply informally to dismiss the action without further notice to the Plaintiff.

[10] The deadline that the appellant indicates she missed appears to be the deadline to pay the security for costs and the previous costs award on or before February 14, 2020. Therefore, the appellant (who was the Plaintiff in the Federal Court matter) failed to comply with the December Order of the Federal Court. As well, the December Order itself notified the appellant that failing to comply with that Order would result in the defendants (now the respondents in this appeal) being entitled to apply informally to dismiss her action without further notice to her. This is not comparable to the respondents failing to serve a notice of appearance on the appellant in this matter.

[11] The notice of appearance is a procedural matter that the respondents remedied by subsequently sending a copy of this notice to the appellant. Rule 145 also provides a discretion to the Court to provide for service of documents even if a notice of appearance is not properly served or filed. On the other hand, payment of costs under the December Order of the Federal Court is a substantive right to receive a sum of money and this December Order clearly stated that failure to comply with the terms of that Order would result in the defendants having the right to request that the appellant's action be dismissed.

[12] I also do not accept that the motions and correspondence arising as a result of the failure of the respondents to serve notice of appearance prior to filing it has caused prejudice that should result in the respondents not being entitled to be served with any further documents.

[13] Rule 3 provides the general principles for the interpretation and application of the Rules:

**3** These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.

**3** Les présentes règles sont interprétées et appliquées de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible.

[14] In this case, in my view, the application of the Rules that would result in the just, most expeditious, and least expensive determination of this appeal on its merits would be to provide an order that the respondents are to be served with any further documents in this appeal. The appellant received a copy of the notice of appearance on March 23, 2021, and therefore has known since at least that date that the respondents intend to participate in this appeal. As a result, the motion for an order that the appellant is not required to serve the respondents will be

dismissed without costs and the order will provide that the respondents are to be served with any further documents in this appeal.

[15] The only solicitors involved in this appeal for the respondents are solicitors with the Department of Justice. The Order that is the subject of this appeal is the Order of the Federal Court dismissing the appellant's motion to appeal the Order of the Prothonotary which, *inter alia*, dismissed her claim as a result of her failure to pay the amount for the security for costs and the costs award. As a result, the respondents do not have separate interests in this appeal and it is a moot point whether the notice of appearance was intended to indicate that all of the respondents (in particular the named individuals) would be appearing, as the only counsel that will be appearing for the respondents will be counsel with the Department of Justice.

II. Motion for an order to remove the respondents' motion record from the Court files

[16] The basis for this motion by the appellant is her submission that she was not properly served with the motion record of the respondents in which the respondents are seeking security for costs. She again relies on Rule 73, referred to above. She also refers to Rule 74:

**74 (1)** Subject to subsection (2), the Court may, at any time, order that a document that is not filed in accordance with these Rules or pursuant to an order of the Court or an Act of Parliament be removed from the Court file.

**74 (1)** Sous réserve du paragraphe (2), la Cour peut à tout moment ordonner que soient retirés du dossier de la Cour les documents qui n'ont pas été déposés en conformité avec les présentes règles, une ordonnance de la Cour ou une loi fédérale.

[17] In her submissions, she acknowledges that she has received a copy of the motion record but she maintains her position that she received this after it was filed with the Court and not before. She also submits that the motion record was served via electronic mail but that she had not consented to such service.

[18] The respondents submit that the motion record was properly served, as Rule 340 provides that the address for service of a party on appeal shall be the same as it was for the Federal Court proceeding. The respondents submit that the appellant had consented to electronic service at the Federal Court and had not withdrawn this consent by filing Form 141B (Rule 141(3)).

[19] It is not necessary in this case to resolve the issue of whether the appellant had withdrawn her consent to electronic service.

[20] Rule 147 provides:

**147** If a document has been served in a manner that is not authorized by these Rules or by an order of the Court, the Court may validate the service if it is satisfied that the document came to the notice of the person to be served or that it would have come to that person's notice except for the person's avoidance of service.

**147** Si un document a été signifié d'une manière non autorisée par les présentes règles ou une ordonnance de la Cour, celle-ci peut valider la signification si elle est convaincue que le destinataire a pris connaissance du document ou qu'il en aurait pris connaissance s'il ne s'était pas soustrait à la signification.

[21] Under this Rule, if a document has been served in a manner that is not authorized, the service can be validated if the Court is satisfied that the document came to the notice of the

person to be served. In this case, it is clear that the motion record came to the notice of the appellant. Even if the motion record was served in a manner that is not authorized by the Rules, it is appropriate in this case to validate the service of the respondents' motion record on the appellant as of the date that it was received by the appellant.

[22] With respect to the timing of the service of the motion record, the appellant states in paragraph 27 of her submissions that the respondents had served its motion record on April 1, 2021. This is the same date on which the motion record was filed with this Court. There is no merit to the appellant's argument with respect to Rule 73 and therefore no basis to remove the respondents' motion record under Rule 74.

[23] The appellant's motion to have the respondents' motion record, in which the respondents are seeking security for costs, removed from the Court files will be dismissed with costs fixed in the amount of \$750 payable in any event of the cause on or before October 20, 2021.

“Wyman W. Webb”

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:**

A-59-21

**STYLE OF CAUSE:**

MANIGEH SABOK SIR v.  
HER MAJESTY THE QUEEN et  
al.

**MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES**

**REASONS FOR ORDER BY:**

WEBB J.A.

**DATED:**

SEPTEMBER 21, 2021

**WRITTEN REPRESENTATIONS BY:**

Manigeh Sabok Sir

ON HER OWN BEHALF

Jennifer Lee

FOR THE RESPONDENTS

**SOLICITORS OF RECORD:**

A. François Daigle  
Deputy Attorney General of Canada

FOR THE RESPONDENTS