

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Phyllis Boyd (Applicant) v. Brian Dennis Fields (Respondent)

COUNSEL: *Deidre Anne Newman*

BEFORE: Justice Czutrin
For the Applicant

Geoffrey Wells
For the Respondent

Sandy Morris
For the non-party Arlene Sylver

HEARD: May 15, 2007

ENDORSEMENT

RE: USE OF EMAIL RECEIVED BY MISTAKE

[1] After the protest of respondent's and non-party, Arlene Sylver's, counsel concerning applicant's counsel's intention to use or to disclose to the court the contents of an email sent by Ms. Morris (counsel for the non-party) to Mr. Wells (counsel for the respondent), applicant's counsel sought leave to file the affidavit of Susanne Baldassarre that appended the email objected to by Ms. Morris and Mr. Wells.

[2] In considering the issue I read the email.

[3] The email sent by Ms. Morris to Mr. Wells purports to report to Mr. Wells the events and outcome of the appearance before me March 29, 2007. It was personal, informal and one might say “email-style stream of consciousness”, no doubt embarrassing to the author once disclosed to others who were clearly not the intended recipients.

[4] It contained Ms. Morris’ strategy, her assessment of how a motion went (Mr. Wells was not present) and how she decided to proceed based on that.

[5] Clearly this email was not meant for Ms. Newman or her client to see. It was not intended for this judge or any other judge to see.

[6] The email contained the usual warning paragraph that the email was intended to be received only by the named recipients.

[7] The email did not come to Ms. Newman directly from Ms. Morris, but inadvertently was part of a fax sent by Mr. Wells to Ms. Newman that included other material intended for Ms. Newman.

[8] Ms. Newman did not immediately advise Mr. Wells of this mistake, as she should have. However, she did seek the advice of the Law Society, although I am not sure at what point she did so. She decided at first to use the email and she gave no forewarning to either Mr. Wells or Ms. Morris. To be clear, at some point she did decide to seek leave to introduce before the court. While contacting the Law Society for advice was certainly prudent, I would not be

surprised that unless they had all the facts, and even if they had them, they might only have given her a qualified opinion. I had no evidence as to their opinion, nor would I be bound by it.

[9] All evidence to be admissible must be relevant.

[10] Evidence in a motion is governed by the Rules: See rule 14(17), 18, 19, (20), (21) and (22).

[11] All counsel relied on the Code of Professional Conduct of the Canadian Bar Association.

[12] I do not sit in a disciplinary capacity in these proceedings, but I do have responsibility to be a gatekeeper of evidence, to control the process so that cases are conducted in a civil manner and in compliance with the Rules and fairness to the parties.

[13] I accept that Ms. Newman believed that the use of the email was necessary to advance her client's position. The substantive issue of the motion where Ms. Newman wishes to use this email is the request by her to examine a non-party prior to trial.

[14] Ms. Newman believed that the email supported, advanced and was relevant to the merits of her motion. I respectfully disagree.

[15] The email was about strategy and a subjective assessment of events relating to an incomplete motion. I find that in balancing the objectives of the Rules, the rules of admissibility of evidence and the use of emails or documents that come into the hands of counsel by mistake, the court should discourage counsel from taking advantage of such mistake or embarrassing colleagues, unless the probative value significantly and materially outweighs the prejudice and the civility and avoidance of sharp practice that counsel owe to each other and the administration of justice. I do not propose to provide an exhaustive list of where I might consider allowing this type of material being admissible, but would consider situations where:

- a. the interests of justice requires admission because to do otherwise would result in miscarriage of justice; or
- b. not disclosing or admitting certain facts or information would hide a criminal act or endanger a person.

[16] I find that the email does not advance the case or meet any of these criteria and is not admissible.

It should be struck from the record.

[17] Costs will be addressed on the return of motion.

Czutrin J.