IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Mr. Justice William J. Burnett
Madam Justice Lori T. Spivak

B E T W E E N :

	)	***J. B. Harvie*** *and*
OLA CHARLENE BEAULIEU, ANDREW ALBERT BEAULIEU, KYRA ANDI BEAULIEU and KYUSS BEAULIEU	)	***D. C. Mazur***
	)	*for the Appellant*
	)	*(via videoconference)*
	)	
(Plaintiffs) Respondents	)	***R. I. Histed***
	)	*for the Respondents*
- and -	)	*(via videoconference)*
	)	
J. MACUMBER	)	***D. L. Carlson***
	)	*for the Intervener*
(Defendant) Appellant	)	*(via videoconference)*
	)	
- and -	)	***H. I. Schachter***
	)	*for the City of Winnipeg*
THE ATTORNEY GENERAL OF MANITOBA	)	*(via videoconference)*
	)	
	)	***R. L. Tapper, Q.C.***
Intervener	)	*on a watching brief for*
	)	*V. F. Y. Li*
- and -	)	*(via videoconference)*
	)	
THE CITY OF WINNIPEG	)	*Motion heard:*
	)	***June 5, 2020***
(Defendant)	)	
	)	*Judgment delivered:*
	)	***November 27, 2020***

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the Manitoba*, Court of Appeal Rules*, Man Reg 555/88R, this appeal was heard remotely by videoconference.

On appeal from *OCB et al v The City of Winnipeg*, 2019 MBQB 84; and 2019 MBQB 133

SPIVAK JA

Introduction

[1] This is a motion by the City of Winnipeg (the City) to strike the notice of appeal filed by the defendant, J. Macumber (Macumber). Macumber, a police officer, and the City were found jointly and severally liable to the plaintiffs for torts committed by members of the Winnipeg Police Service (WPS) in responding to a 911 call on December 26, 2014. The City filed a notice of appeal of the judgment in court file number AI19-30-09379 in which it intended to name both itself and Macumber as appellants. The current appeal filed by Macumber, through separate counsel, includes an allegation of ineffective assistance of counsel at trial, a ground which was not included in the appeal filed by the City and one which it does not wish to pursue.

[2] The principal issue in this motion is whether the provisions of *The Police Services Act*, CCSM c P94.5 (the *PSA*), give absolute carriage and control of this litigation to the City and preclude Macumber's independent appeal. Also at issue is whether Macumber's appeal should be struck as an abuse of process on the basis that an allegation of ineffective assistance of counsel is unsustainable in a civil appeal.

[3] For the reasons that follow, I have concluded that the *PSA* does not preclude Macumber's independent appeal and his appeal is not an abuse of process. I would therefore dismiss the City's motion.

Background

[4] The plaintiffs sued the City and Macumber for wrongs alleged to have been committed by members of the WPS in responding to a 911 call from the Clarion Hotel on December 26, 2014, regarding an intoxicated male causing a disturbance. Two WPS units with four officers, including Macumber, attended to the hotel. After speaking with the hotel staff, the police officers entered the hotel room occupied by the plaintiffs. Once inside, a number of physical altercations occurred between the plaintiffs and the officers, the nature of which was the subject of much dispute at trial. Several of the plaintiffs were arrested and charged with assaulting a police officer. The City's in-house legal counsel represented both the City and Macumber at trial.

[5] The trial judge found that the WPS lacked lawful grounds to enter the plaintiffs' hotel room and committed actionable wrongs once inside. The City and Macumber were held jointly and severally liable to the plaintiffs for *Charter* breaches (see the *Canadian Charter of Rights and Freedoms* (the *Charter*)), battery, malicious prosecution, false imprisonment and breaches of *The Privacy Act*, CCSM c P125. In his reasons for judgment, the trial judge made negative credibility findings against the police officers and Macumber. He determined that Macumber engaged in the improper use of his office and participated in creating a false narrative to justify the conduct of the officers. He also concluded that Macumber maliciously laid a charge against the plaintiff, Ola Beaulieu, to support that false narrative. The trial judge awarded general and punitive damages to the plaintiffs, as well as solicitor/client costs based on this behaviour.

[6] The City filed a notice of appeal of the judgment on December 4, 2019. That notice essentially alleges that the trial judge erred in fact and law in concluding that the defendants entered the hotel room unlawfully and committed torts or breached the plaintiffs' *Charter* rights while inside. On December 6, 2019, Macumber filed a notice of appeal in this proceeding claiming similar errors by the trial judge, but also asserting the additional ground of ineffective assistance of trial counsel. Following the filing of Macumber's notice of appeal, at the direction of the registrar, the City and Macumber each amended the styles of cause in their respective notices of appeal, identifying them as separate appellants in distinct appeals.

Issues and Positions of the Parties

[7] In my view, there are fundamentally two issues raised by the City's motion.

[8] The first issue is whether, pursuant to the *PSA*, the City alone controls this litigation and Macumber has no right to an independent appeal or whether the City is prevented from acting on his behalf because of a reasonable apprehension of a conflict of interest which would entitle him to a separate appeal.

[9] The second issue is whether, if Macumber's appeal is not precluded by the *PSA*, it should nonetheless be struck as an abuse of process on the basis that his claim of ineffective assistance of trial counsel is unavailable in a civil appeal.

[10] The relevant provisions of the *PSA* are contained in section 40. It provides that the City is jointly and severally liable for the torts of police

officers committed in the performance of their duties and is obliged to pay damages and costs awarded as a result. The City is entitled to defend actions brought in the name of and on behalf of the police officer and the police officer is required to cooperate in that defence. Those provisions read as follows:

> **Municipality liable for torts of officers**
> **40(1)** A municipality that operates a police service is jointly and severally liable for a tort committed by a police officer in the performance of his or her duties.
>
> **Municipality to indemnify officer**
> **40(2)** A municipality that operates a police service must pay the following:
>
> (a) any damages or costs awarded in an action or proceeding against one of its police officers as the result of a tort committed by the officer in the performance of his or her duties;
>
> (b) any costs incurred and not recovered by the officer in the action or proceeding;
>
> (c) any sum required to settle the action or proceeding against the officer.
>
> **Municipality may defend officer**
> **40(3)** A municipality that may be liable under this section has the right to defend — in the name and on behalf of the police officer — an action or proceeding that may be brought against the officer.
>
> **Duty to cooperate**
> **40(4)** A police officer whose conduct is the subject of an action or proceeding must cooperate with the municipality in the settlement or defence of the action or proceeding.

[11] The City argues that, pursuant to section 40(3) of the *PSA*, it has exercised its right to appeal on behalf of both defendants and Macumber is precluded from filing an independent appeal. The City's position is that the

scheme of the *PSA*, which indemnifies Macumber for any damages and costs awarded, assigns or vests Macumber's right to defend in the City and grants it carriage and absolute control of the litigation. It argues that Macumber has no interest in the litigation and is not entitled to advance the ground of ineffective assistance of counsel contrary to its wishes and his duty to cooperate. The City also contends that Macumber's appeal is an abuse of process as such a claim in a civil appeal is legally untenable.

[12] The plaintiffs support the City's position, but their primary concern is for the substantive appeal to be heard as soon as possible.

[13] Macumber argues that the *PSA* does not vest or assign his rights to the City and that insurance principles which limit an insurer's right to control litigation apply. He says that the City should be prevented from representing him because a conflict of interest exists since the City will not raise the ground of ineffective assistance of counsel. Macumber contends that, if the *PSA* allows the City to conduct his appeal notwithstanding the conflict of interest, section 40(3) infringes his right to liberty under section 7 of the *Charter*. Macumber acknowledges that the ground of ineffective assistance of trial counsel in a civil appeal is rare, but argues this is insufficient to dismiss his appeal at this stage.

[14] Counsel for the Attorney General of Manitoba (the Attorney General) submits that there is no need to respond to the constitutional issue if the City's representation pursuant to section 40(3) is constrained by a conflict of interest. Further, the Attorney General's position is that Macumber's liberty interest pursuant to section 7 of the *Charter* is not engaged.

Does Section 40 of the *PSA* Grant Control of the Litigation to the City and Preclude Macumber's Right to Independently Appeal?

[15] As earlier mentioned, it is the City's position that the scheme of section 40 of the *PSA* either grants the City an assignment of Macumber's right to defend or vests that right in the City. The City argues that, because it is ultimately liable for any damages or costs awarded against Macumber, he has no participatory rights in the litigation and the City's right to control his defence pursuant to section 40(3) is absolute. The determination of this issue involves an examination and interpretation of section 40.

[16] The modern approach to statutory interpretation requires the words of a statute "be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, quoting Elmer A Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87; and, more recently, *Bell Canada v Canada (Attorney General)*, 2019 SCC 66 at para 41). The "entire context" does not simply contemplate the statute itself, but also includes the wider literary context of "the statute book as a whole" and the wider legal context of the common law and related statute law (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at para 1.13).

[17] The Legislature is presumed to draft its provisions with regard to habits of expression, as well as the substantive law embodied in the existing legislation (see *Nova Scotia (Office of the Ombudsman) v Nova Scotia (Attorney General)*, 2019 NSCA 51 at para 120, quoting *65302 British Columbia Ltd v Canada*, [1999] 3 SCR 804 at para 7). "Parliament is

presumed to know the law and it is a reasonable inference that its failure to use familiar terms of art shows that some other meaning was intended" (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at para 45).

[18] Reviewing the language of section 40, it is significant that, unlike other provincial statutes, the provisions do not use any variation of the words "vesting" or "assignment". This can be compared to the clear language used, for example, in section 9(5) of *The Workers Compensation Act*, CCSM c W200 (the *WCA*), which specifically states that, upon compensation to the worker, the right of action "becomes vested" in the board. In *Kowalchuk v Adduri*, 2001 MBCA 7, this Court explained that the phrase "becomes vested" has a specific legal meaning: that the board owns the right of action absolutely (see para 24). Similarly, in contrast to section 40 of the *PSA*, section 9.1 of the *WCA* explicitly provides that a worker must "assign" the right of action in a jurisdiction other than Manitoba to the board.

[19] In my view, in light of the presumption that Parliament is presumed to know the law, if the legislators had intended section 40(3) of the *PSA* to vest a police officer's right to defend in the City or absolutely assign such right, they would have used some version of those words or plainly so indicated as was done in the *WCA*.

[20] Considering the entirety of section 40, it is apparent that the *PSA* sets up an indemnity scheme similar to that contained in liability insurance contracts. The municipality is jointly and severally liable for the tortious conduct of a police officer in the performance of his or her duties and is required to pay any damages or costs. In return for this obligation, the

municipality is given the right to defend such an action and the police officer is required to cooperate with the municipality in the settlement or defence of the action (see *Brockton (Municipality) v Frank Cowan Co*, 2002 CarswellOnt 25 at para 31 (CA)).

[21] In my view, the *PSA* should be interpreted in accordance with established common law insurance principles for the following reasons.

[22] "The common law forms an important and complex part of the context in which legislation is enacted and operates and in which it must be interpreted" (Sullivan at para 17.1). When used in legislation, common law terms and concepts will be presumed to retain their common law meaning unless the legislation states otherwise (see *Manitoba Public Insurance Corp v University of Waterloo et al*, 2007 MBCA 107 at para 34). This Court has previously drawn upon common law principles to interpret statutory provisions involving insurance issues (*ibid* at para 42).

[23] As earlier noted, the overall scheme and language of section 40 is similar to that found in the indemnity insurance context. It sets up a system where the municipality is given the right to control the defence of an action in relation to a police officer because of its potential obligation to indemnify. The use of the phrase "in the name of and on behalf of the [police officer]" is the same as a typical defence clause in liability insurance contracts (Gordon Hilliker, *Liability Insurance Law in Canada*, 4th ed (Markham: LexisNexis, 2006) at 84). There is nothing in section 40 of the *PSA* that overrides the presumption that insurance law indemnity concepts would be applicable when interpreting section 40(3).

[24] I now turn to those insurance law indemnity principles that deal with the duty to defend.

[25] While liability insurance policies generally provide that the insurer has the exclusive right to select and instruct counsel to "defend in the name of and on behalf of the Insured" (*ibid*), the right of the insurer to do so raises complex issues which "are inextricably bound with the ethical obligations placed upon lawyers both by their governing bodies and by the courts" (*ibid* at p 134).

[26] Case law is clear that, while an insurer has the prima facie right to direct and control the defence, that right is not absolute. In *Brockton*, the insurance contract provided that the right to control the defence and appoint counsel belonged to the insurer and the insured had a duty to cooperate. At the same time, Goudge JA, for the Court, noted that "the duty of counsel appointed by the insurer [is] to fairly ensure the defence of the insured and fully protect its interests" (at para 40).

[27] Additional cases confirm that a lawyer appointed by an insurer to defend its insured owes a duty of loyalty and good faith to the insured (see *Pembridge Insurance Company v Parlee*, 2005 NBCA 49 at paras 17-18; *Mallory v Werkmann Estate*, 2015 ONCA 71 at para 29; and *Hoang v Vicentini*, 2015 ONCA 780 at para 14). As explained by Deschênes JA in *Pembridge* (at paras 17-18):

> It is now beyond dispute that a lawyer appointed and paid for by an insurer to defend its insured in compliance with the insurer's contractual duty to defend owes a duty to fully represent and protect the interest of the insured. . . . [F]irst and foremost, once appointed, the lawyer must represent and act on behalf of the

> defendant insured with the utmost loyalty and only in the latter's best interest. . . .
>
> . . . is not expected to protect the interests of the insurer to the detriment of the . . . insured. . . .

[28] Importantly, as well, the duty "to defend also carries with it a duty to be free from conflicts – a duty not to 'steer' the defence in favour of the indemnifying party or to 'soft-peddle' defences that are available to the indemnified party" (*Whirlpool Canada Co v Chavila Holdings Limited*, 2017 ONCA 81 at para 76, Strathy CJO, dissenting but not on this point, quoting *Appin Realty Corp, Ltd v Economical Mutual Insurance Co*, 2008 ONCA 95 at para 14; and *Amato v Welsh*, 2013 ONCA 258 at para 60).

[29] The upshot of this jurisprudence is that, to remove the insurer's right to defend and control the defence of the litigation, there must be "a reasonable apprehension of conflict of interest on the part of counsel appointed by the [insurer]" (*Brockton* at para 45). Goudge JA stated (*ibid* at para 43):

> . . . The balance is between the insured's right to a full and fair defence of the civil action against it and the insurer's right to control that defence because of its potential ultimate obligation to indemnify. . . . The question is whether counsel's mandate from the insurer can reasonably be said to conflict with his mandate to defend the insured in the civil action. Until that point is reached, the insured's right to a defence and the insurer's right to control that defence can satisfactorily co-exist.

(Also see *Hoang* at para 14; *Whirlpool* at para 78; and *Markham (City) v AIG Insurance Company of Canada*, 2020 ONCA 239 at para 89.)

[30] The concurrent right of the City to fully represent and defend both its own interest and that of a police officer thus gives rise to the same

limitation identified in the case law which allows an indemnified party to have separate counsel where a reasonable apprehension of a conflict of interest exists.

[31] Finally, while the City relies on the police officer's obligation to cooperate as precluding Macumber's ability to instruct his own counsel and advance a separate appeal, this duty appears no different than what is required of an insured when an insurer invokes its right to defend. Whether an insured has breached the duty to cooperate is a pragmatic question to be determined in light of the circumstances with particular emphasis on the interaction between the insured and the insurer, including any duties expected to be fulfilled by the insurer (see *Ruddell v Gore Mutual Insurance Company*, 2019 ONCA 328 at para 24). I am of the view that the duty to cooperate in section 40(4) should not prevent Macumber from seeking control of his defence if a reasonable apprehension of a conflict arises.

[32] In light of my conclusion that the City's right to defend pursuant to section 40(3) is subject to conflict-of-interest concerns, there is no need to address the constitutional issue of whether that section violates Macumber's section 7 *Charter* rights.

Does Macumber Have the Right to Independent Counsel Because of a Reasonable Apprehension of a Conflict of Interest?

[33] Do the circumstances of this case raise a reasonable apprehension of a conflict of interest if counsel appointed by the City were to represent both the City and Macumber on the appeal?

[34] Not every potential conflict between the interests of an insurer and its insured requires the insurer to yield the right to control the defence. The issue is the degree of divergence that must exist before the insurer can be required to surrender control of the defence. The question is whether counsel's mandate from the insurer can reasonably be said to conflict with the mandate to defend the insured. If the insurer puts counsel in a position of having conflicting mandates, it must surrender control of the defence to an insured who wishes to retain their own counsel (see *Brockton* at paras 41, 43).

[35] Consideration of whether a reasonable apprehension of a conflict of interest exists also includes whether counsel is able to meet their legal and ethical obligations to fully represent and protect the interest of the insured; whether counsel is acting inconsistently with the duty of loyalty by taking a position contrary to the interest of the insured or protecting the interest of the insurer to the detriment of the insured; whether fair-minded and reasonably informed members of the public would conclude that the proper administration of justice compels removal of counsel; and whether counsel can be viewed as steering the defence in favour of the indemnifying party or downplaying defences that are available to the indemnified party (see *Mallory* at para 28; *Hoang* at para 17; *Whirlpool* at para 76; and *Markham* at para 91).

[36] The above-noted cases are consistent with the decision in *Canadian National Railway Co v McKercher LLP*, 2013 SCC 39. In that case, the Supreme Court of Canada emphasised that a lawyer's duty of loyalty to a client includes the obligation to avoid conflicting interests and a duty of commitment to the client's cause: "Together, these duties ensure 'that a divided loyalty does not cause the lawyer to "soft peddle" his or her [representation] of a client out of concern for another client"' (at para 43,

quoting *R v Neil*, 2002 SCC 70 at para 19). In a situation such as this, the inquiry "becomes whether the concurrent representation of clients creates a substantial risk that the lawyer's representation of the client would be materially and adversely affected" (*McKercher* at para 38) and "liable to create conflicting pressures on judgment" (*ibid*, quoting Donovan WM Waters, Mark R Gillen & Lionel D Smith, eds, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Carswell, 2012) at 968).

[37] The City argues that there is no reasonable apprehension of a conflict of interest because Macumber has no pecuniary interest in the outcome of the action since he is fully indemnified. However, apart from the judgment, Macumber has filed an affidavit indicating that he has suffered consequential loss of earning capacity and reputational harm. In my view, the fact that indemnity is assured does not necessarily address whether the representation of both parties by counsel for the City raises a reasonable apprehension of a conflict of interest.

[38] Further, I do not accept the City's assertion that the inclusion or exclusion of a ground of appeal of ineffective assistance of counsel is simply a matter of tactics which remains solely within its purview. While "[a] mere disagreement with respect to litigation strategy does not amount to a conflict of interest", the matter at hand is substantive and affects the interests of the litigants (*Kostic v Thom*, 2020 ABQB 324 at para 25).

[39] It is evident that a reasonable apprehension of a conflict of interest exists in this case. Appeal counsel's mandate from the City is to refrain from alleging ineffective assistance of trial counsel, while Macumber is intent on pursuing that ground of appeal. It is in Macumber's interest to have this issue

fully determined at the appeal while it is contrary to the City's interest for this to occur. It is difficult to see how this could not create conflicting pressures on counsel's judgment. Without impugning the integrity of counsel for the City, an apprehension of a conflict of interest arises because a reasonable bystander could question whether counsel is minimising a defence and favouring the interest of the City (or its in-house trial counsel) contrary to the duty of loyalty and good faith to pursue Macumber's best interest. The City's concurrent representation of Macumber creates a substantial risk that his interest would be materially and adversely affected.

[40] The City's right to control the defence and Macumber's right to a full and fair defence have reached the point where they can no longer co-exist. The test of a reasonable apprehension of conflict of interest is met. Macumber is entitled to advance an independent appeal by separate counsel.

Should Macumber's Appeal be Struck as an Abuse of Process?

[41] Even if Macumber's appeal is not precluded by the *PSA*, the City's position is that it is an abuse of process because the allegation of ineffective assistance of counsel does not constitute a legitimate ground of appeal in a civil matter.

[42] Section 31.3 of *The Court of Appeal Act*, CCSM c C240, recognises the Court's jurisdiction to stay or dismiss a proceeding as an abuse of process or on any other ground.

[43] Abuse of process has a wide ambit and engages the inherent power of the Court to control misuses of the judicial system. The primary focus of the doctrine is the integrity of courts' adjudicative functions (see *Northern*

Sunrise County v Virginia Hills Oil Corp, 2019 ABCA 61 at para 24). Abuse of process may be the basis for quashing a frivolous appeal on the ground of lack of merit. However, since a decision is called for before an appellant has had an opportunity to present its position, and because dismissal is an adjudication on the merits, this jurisdiction is to be exercised with caution. Furthermore, where such a motion involves consideration of material and extensive submissions, a motion to quash has been held to be inappropriate. Accordingly, the test for dismissing an appeal as futile has been expressed in terms of the appeal being "absolutely unsustainable," "manifestly entirely devoid of merit or substance," or "so devoid of merit that to countenance it would be an abuse of the court's process" (Donald JM Brown with the assistance of David Fairlie, *Civil Appeals* (Toronto: Thomson Reuters, 2019) vol 2 (loose-leaf updated 2020, release 3), ch 9 at para 9:3320; see also para 9:3310).

[44] In *Jardine v Hyggen*, 2018 SKCA 38, Richards CJS reviewed the case law and policy considerations governing the doctrine of abuse of process applicable to unmeritorious or futile appeals. While the motion to quash in *Jardine* was pursuant to r 46.1(1) of the Saskatchewan Court of Appeal rules, (which specifically allows for the dismissal of an appeal as being manifestly without merit), the approach outlined is helpful and relevant (see Saskatchewan, *Court of Appeal Rules*, online (pdf): <www.*sasklawcourts.ca/images/documents/Appeal/Rules/CA_Rules_-_English.pdf*> (date accessed 17 November 2020)). Richards CJS summarised the three key points emerging from the authorities as follows (at paras 19-21): (1) "the threshold for quashing an appeal as being manifestly without merit is high"; (2) "the authority to quash an appeal as being manifestly without merit should be

exercised only exceptionally"; and (3) "the Court must guard against being drawn into a practice where applications to quash become a substitute for hearing appeals on their merits" and "where the required assessment of its merits involves being drawn into . . . the evidence."

[45] Likewise, the Ontario Court of Appeal has said that "[a] court will seldom exercise its power to quash an appeal because it is manifestly devoid of merit, as this will usually require full argument on all grounds the appeal raised" (*Lee v McGhee*, 2017 ONCA 997 at para 4). Only a "minimal level of merit" is needed to defeat such a motion (*Schmidt v Toronto Dominion Bank*, 1995 CarswellOnt 154 at para 7 (CA); and *Children's Aid Society of London and Middlesex v CDB*, 2014 ONCA 692 at para 40).

[46] In the recent decision of *Martinez v Canada (Communications Security Establishment)*, 2019 FCA 282, Rennie JA confirmed the Federal Court of Appeal's similar approach to a motion to quash an appeal for lack of merit pursuant to the Court's inherent jurisdiction to prevent abuse of process. He quoted (at para 10) the standard set out in *Re Yukon Conservation Society and National Energy Bd* (1978), 95 DLR (3d) 655 at 659 (FCA), whereby LeDain JA stated (at p 659): "Courts of Appeal will exercise the power of quashing or summarily dismissing an appeal where there is such manifest lack of substance in the appeal as to bring it within the character of vexatious proceedings".

[47] Turning to the case at hand, "Although ineffective assistance of counsel can be argued as a ground of appeal in civil as well as criminal cases, it is granted more rarely in civil contexts" (*Richardson v Richardson*, 2019 ONCA 983 at para 41). In the oft-quoted case of *W (D) v White*, 2004

CarswellOnt 3379 (CA), Catzman JA stated that, while he was not prepared to close the door to the viability of this ground, he would limit its availability to the "rarest of cases"; for example, one involving some overriding public interest, the interests of vulnerable persons or where "one party to the litigation is somehow complicit in the failure of counsel opposite to attain a reasonable standard of representation" (at para 55). In *Mediatube Corp v Bell Canada*, 2018 FCA 127, Stratas JA noted that "[t]he cases show that in order to meet the 'rarest of cases' threshold in the civil context, an appellant must demonstrate some exceedingly special interest or truly extraordinary situation" (at para 42).

[48] To be sure, the jurisprudence illustrates the difficulty of successfully advancing the ground of ineffective assistance of counsel and the reasons for restricting the availability of such recourse in a civil context. But this Court has yet to consider the availability and scope of this ground in a civil proceeding and there is limited case law in this regard. Moreover, substantive matters have been raised in the context of this motion. Relying in part on policy grounds, the City urges the adoption of a restrictive test and process in relation to this issue. Macumber argues that he should be entitled to advance this ground as there is a public interest element to his appeal arising from his role as a police officer and participation in the administration of justice. He seeks to file, at the hearing of the appeal, a motion for fresh evidence to substantiate his position.

[49] As reflected in the cases cited above, the threshold for striking out an appeal on the basis of abuse of process is quite high and the power should only be exercised in the clearest of cases, where a detailed review of material is not required. The test is whether the appeal is manifestly devoid of merit.

[50] This is not such a case. Despite the exceptional nature of this ground, Macumber's appeal does not have the character of a proceeding that should be dismissed at this stage. Furthermore, it is apparent from the extensive nature of the written and oral submissions that an assessment of the motion's merits requires a detailed consideration of the law and material which courts have cautioned should be reserved for the substantive appeal. I add as well that this is a novel area of the law that has been evolving, the determination of which involves policy considerations. This also reinforces my conclusion that this is not a proper case to summarily dismiss Macumber's appeal as an abuse of process.

Conclusion

[51] The City's motion to strike Macumber's appeal is dismissed with costs. Macumber's appeal should be heard at the same time as the City's appeal in court file number AI19-30-09379.

"Spivak JA"

I agree: "Cameron JA"

I agree: "Burnett JA"