CITATION: Marks v. Ottawa (City), 2011 ONCA 248
DATE: 20110401
DOCKET: C51745

COURT OF APPEAL FOR ONTARIO

2011 ONCA 248 (CanLII)

Feldman, Juriansz and LaForme JJ.A.

BETWEEN

Bruce D. Marks, Irina Marks and Julia Marks,
by her litigation guardian, Bruce D. Marks

Appellants

and

The City of Ottawa, Justin Maheux and
Jennifer Natividad and Derek Petch

Respondents

Richard Marks, for the appellants

Pierre Champagne, for the respondents City of Ottawa and Derek Petch

No one appearing for the respondents Justin Maheux and Jennifer Natividad[1]

Heard: November 8, 2010

On appeal from the order of Justice Denis J. Power of the Superior Court of Justice dated January 28, 2010, with reasons reported at 2010 ONSC 112.

H.S. LaForme J.A.:

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[1] Counsel for these respondents informed the court that as the proposed amendments at issue in this appeal are in respect only of claims against the City of Ottawa and Derek Petch, she would not be taking a position on the appeal.

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OVERVIEW

[1] This case involves disgruntled neighbours in the City of Ottawa. It began with a request for access to a neighbour's property, which resulted in legal proceedings, intervention by the City of Ottawa, and the commencement of litigation.

[2] The appellants, Mr. and Ms. Marks (and their daughter Julia, who was born in the midst of the circumstances at issue), were next door neighbours of the respondents Justin Maheux and Jennifer Natividad. They respectively occupied the premises at 296 and 300 Royal Avenue. The by-laws in question are the right-of-entry by-law and the fencing by-law of the respondent City of Ottawa. The respondent Derek Petch at all relevant times was a by-law officer employed by the city.

[3] This appeal focuses on the litigation process and procedures. Basically, the Marks sought leave to amend their original statement of claim pursuant to rules 26.01, 26.02(c), 37.02(2), 77.12(1), 77.12(2)(a) and 77.12(4) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The motion judge denied leave to amend in some but not all respects and the Marks appeal.

BACKGROUND

[4] Because this appeal involves pleadings, I will set out the background as I understand it based on a combination of the assertions of the parties, the pleadings and proposed amendments, and the judgment below. Early in 2007 Ms. Natividad and Mr. Maheux sought permission to enter on the Marks' land in order to waterproof a portion of

their basement wall. Permission was granted subject to certain conditions, such as the acquisition of insurance and scheduling acceptable to the Marks.

[5] Ms. Natividad and Mr. Maheux refused to agree to the conditions and instead applied for a right-of-entry permit from the City of Ottawa pursuant to a recent by-law. Derek Petch became responsible for arranging the entry permit and approached the Marks to advise them of his involvement. They advised Mr. Petch of their concerns, and he agreed that he would bring these issues to the attention of the appropriate city officials.

[6] On Thursday May 24, 2007 the permit was issued, and early in the morning on the following Monday, workers hired by Ms. Natividad and Mr. Maheux removed the fence separating the properties and began excavating. The police were called and they, along with Mr. Petch, attended and Mr. Petch explained to the police that Ms. Natividad and Mr. Maheux had a valid permit.

[7] The Marks contest the permit's validity on the basis that the by-law requires at least one day's clear notice to the subservient owner before entry can be made. They allege Mr. Petch did not advise them he had issued the permit until late Friday afternoon. They say Mr. Petch did not tell the police that proper notice under the by-law had not been given for the entry.

[8] On May 28, 2007, the Marks obtained an *ex parte* injunction enjoining Ms. Natividad and Mr. Maheux from encroaching onto the Marks' property.

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[9] In early June 2007, Mr. Petch attended the Marks' property and conducted an investigation with the intent to prosecute the Marks for by-law infringement based on the existing fence. Apparently, a previous complaint about the fence had been made to the City in connection with a fence on the Marks' property. The previous complaint, it seems, resulted in a resolution that no further prosecution should be made unless the City received a new complaint. The Marks allege that Mr. Petch knew that no new complaint had been made.

[10] After the investigation, a City solicitor wrote to Mr. Petch advising him that he should prosecute the Marks for a breach of the city's fencing by-law. That prosecution was dismissed at the end of the City's case on a non-suit motion. The structures in question were found not to meet the definition of "fence" set out in the by-law.

[11] On June 6, 2007 – being the return of the *ex parte* injunction motion – a new survey of the boundary demonstrated that the work intended would result in a permanent encroachment on the Marks' land. Nevertheless, the injunction was lifted so as to allow the performance of work pursuant to the permit, subject to a written undertaking that the work would not encroach on the Marks' property. The work was completed on June 25, 2007.

[12] In December of 2007, Mr. and Ms. Marks commenced proceedings seeking: (i) $250,000 for trespass, nuisance and punitive damages against Ms. Natividad and Mr.

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Maheux; (ii) $350,000 from the City of Ottawa and Mr. Petch for breach of fiduciary duty, negligence and punitive damages; (iii) $300,000 from Mr. Petch alone for misfeasance in public office, negligent misrepresentation and punitive damages; and, (iv) general damages from all defendants in the amount of $100,000 alongside a series of declarations.

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[13] On August 21, 2009, the Marks served a notice of motion seeking leave to amend their statement of claim. Besides some changes made to the amounts of damages sought, the following claims were added to the initial claims made jointly against the City of Ottawa and Mr. Petch for breach of fiduciary duty and negligence:

- misfeasance in public office;
- negligent misrepresentation;
- intentional causation of mental suffering and distress;
- malicious prosecution, or in the alternative negligent investigation and prosecution, or in the further alternative counselling malicious prosecution, or in the further alternative negligent counselling of prosecution.

[14] The Marks did not seek to rely on any additional or new facts to support the additional claims they sought to add, other than in respect of malicious or negligent prosecution or counselling of prosecution. After noting that the parties were in disagreement with respect to the applicable law and reviewing extensively the applicable rules and relevant case law, the motion judge concluded at para. 36 that:

> Notwithstanding that the general rule is that amendments are presumptively approved, there is no absolute right to amend pleadings. The court has a residual right to deny amendments where appropriate.

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[15] The motion judge denied the Marks leave to amend their statement of claim in some but not all respects, and they appeal from that decision.

ISSUES

[16] The Marks argue that the motion judge erred in concluding that: (i) there was no possible cause of action for negligent misrepresentation or breach of fiduciary duty against a municipality or its by-law officer; and (ii) parts of the proposed amendments amounted to a collateral attack on an earlier judgment denying the appellants an injunction. The issues on appeal can, therefore, be described in the following questions:

1. Did the motion judge err in concluding that there was no possible cause of action for negligent misrepresentation?
2. Did the motion judge err in concluding that neither a municipal corporation, nor its by-law officers administering municipal by-laws could be acting in a fiduciary relationship with a member of the public?
3. Did the motion judge err in concluding that the amended statement of claim represented a collateral attack on the order of Ray J.?

[17] In respect of questions one and two, I would dismiss the appeal on these grounds. I believe that the motion judge did not err in either of these decisions and his reasoning was sound. The third question, however, is a different matter. I conclude the motion judge erred on this issue, and in this limited respect, the appeal should be allowed.

DISCUSSION

[18] Rule 26.01 provides that:

> On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

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[19] Although the general rule is that amendments are presumptively approved, there is no absolute right to amend pleadings. The court has a residual right to deny amendments where appropriate: *Daniele v. Johnson* (1999), 45 O.R. (3d) 498 (Div. Ct.) at paras. 11 - 15.[2] Further, I would agree that the proper factors to be considered are those first set out in *Simrod v. Cooper*, [1952] O.W.N. 720 (H.C.J. Master) at p. 721, aff'd at p. 723 (H.C.J.), and quoted with approval in *Vaiman v. Yates* (1987), 60 O.R. (2d) 696 (H.C.J.) at p. 698, which can be summarized as follows:

- An amendment should be allowed unless it would cause an injustice not compensable in costs.
- The proposed amendment must be shown to be an issue worthy of trial and prima facie meritorious.
- No amendment should be allowed which, if originally pleaded, would have been struck.
- The proposed amendment must contain sufficient particulars.

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[2] I note that the Divisional Court has since held this power to be in the jurisdiction of a judge only and not that of a master: *Herzig v. Markham (Town),* [2007] O.J. No. 4873 at para. 7. However, as the decision under appeal is that of a judge, it is unnecessary for me to comment on this point.

[20] There is no question that the motion judge was aware of the proper test. The Marks' complaint is that he misapplied it. I agree, but as I have noted, only in respect of issue three.

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Issue 1: Did the motion judge err in concluding that there was no possible cause of action for negligent misrepresentation?

[21] As the motion judge correctly recognized, the Supreme Court of Canada in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at p. 110 confirmed that there are five general elements to the tort of negligent misrepresentation:

1. There must be a duty of care based on a "special relationship" between the representor and the representee;
2. The representation in question must be untrue, inaccurate, or misleading;
3. The representor must have acted negligently in making said representation;
4. The representee must have relied, in a reasonable manner, on said negligent misrepresentation;
5. The reliance must have been detrimental to the representee in the sense that damages resulted.

[22] While the motion judge – relying on *Edmundston (City) v. Maison du Parc Ltée* (1999), 217 N.B.R. (2d) 291 (Q.B.) – accepted that a municipality can be held liable for negligent misrepresentation, he concluded at para. 70 that "the plaintiffs have failed to plead a minimum level of material facts with respect to this alleged tort." He noted at para. 71 that:

> [T]here is no special relationship between any of the plaintiffs and the defendants. There is no suggestion in the pleadings

> that any of the plaintiffs relied on any such negligent misrepresentations nor is there anything pleaded alleging that the reliance was detrimental to the plaintiffs in the sense that damages resulted.

[23] The motion judge thus held that "[i]n the circumstances, the pleadings with respect to this tort should be struck."

[24] The Marks argue that the elements of negligent misrepresentation were present in their pleadings. They note that they did allege a misrepresentation, as they indicated that Mr. Petch misrepresented to the Ottawa Police the circumstances governing the right-of-entry permit. They go on to say that the police relied on this misrepresentation as is evident from their decision to abandon their investigation. And finally, they argue that this reliance was detrimental to the Marks because it permitted Ms. Natividad and Mr. Maheux to continue with their trespass and excavation.

[25] Further, the Marks argue that the statement of claim does contain factual allegations which could support a finding that there is a "special relationship" between them and the City of Ottawa. And, while they acknowledge that these factual allegations may not strictly satisfy the elements of negligent misrepresentation, they say that to deny their motion on this basis is to improperly bar them from making a novel argument.

[26] Finally, the Marks also suggest that the motion judge's decision applies to both the allegations of negligent misrepresentation in the proposed amended statement of claim as

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well as in the original statement of claim. If this is correct, they submit that he lacked jurisdiction to strike anything contained in the original statement of claim.

[27] I agree that there should be some scope for a plaintiff to bring a novel claim or argue for the creation of a new tort. In this case, however, the facts alleged fall so far outside of what has been established as negligent misrepresentation that I agree that there is no realistic prospect that the action will succeed.

[28] As the respondents correctly note, the alleged misrepresentation was neither made to the Marks, nor did they rely on any such misrepresentation to their detriment – both necessary requirements. Indeed, in para. 12 of their statement of claim the Marks specifically plead that the representation alleged was not made to them. Accordingly, they could not have relied upon it.

[29] The motion judge was correct to strike the amended pleadings in respect of negligent misrepresentation against either the City of Ottawa or Derek Petch. As the motion judge found, the minimum level of material facts necessary to support a claim for negligent misrepresentation was not pleaded and this cause of action cannot succeed.

[30] Finally, at para. 65 of his reasons the motion judge clearly indicated that his decision applied only to the claims of negligent misrepresentation found in the proposed amended statement of claim. This ground of appeal must be dismissed.

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Issue 2: Did the motion judge err in concluding that neither a municipal corporation, nor its by-law officers administering municipal by-laws could be acting in a fiduciary relationship with a member of the public?

[31] The motion judge set out at para. 39 that according to the Supreme Court of Canada in *Frame v. Smith*, [1987] 2 S.C.R. 99 at p. 136, a fiduciary relationship typically has three general characteristics: (i) the fiduciary has scope for the exercise of some discretion or power; (ii) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and (iii) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[32] Citing *Windsor Roman Catholic Separate School Board v. Windsor (City)* (1988), 64 O.R. (2d) 241 (C.A.), *McLaren v. Stratford (City)* (2004), [2004] 50 C.P.C. (5th) 310 (Ont. S.C.), and *Little v. Ottawa (City)* (2004), 49 M.P.L.R. (3d) 115 (Ont. S.C.), the motion judge concluded at para. 42 that, "it has been long held that a municipality does not owe a fiduciary duty to its citizens."

[33] He distinguished the Marks' argument that *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129 is analogous to this case as it is concerned with the duties and liabilities of police officers. He noted that McLachlin C.J. expressly restricted the applicability of the decision to the relationship between a police officer and the particularized subject of an investigation.

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[34] The motion judge ultimately denied leave to amend the statement of claim because the cause of action is untenable.

[35] The Marks argue that the motion judge failed to undertake any analysis of the facts pleaded to determine whether a fiduciary relationship could be found based on those facts. Instead, they say he simply relied on case law indicating that a municipal corporation does not owe a fiduciary duty to its citizens. They argue further that they did allege that the respondent, Derek Petch owed a "special duty" to them and that whether this duty could be characterized as a fiduciary duty is a question of fact that should have been determined at trial.

[36] I would reject this ground of appeal. One, even if someone in the position of Mr. Petch can ever owe a fiduciary duty to the residents of a municipality – a question that I am not deciding – a breach of fiduciary duty could not be found in the instant case. I disagree with the Marks' assertion that the facts pleaded can reasonably support a finding that the city or Mr. Petch owed a fiduciary duty to the Marks.

[37] The essential elements of vulnerability or dependence of the appellants Irina and Julia Marks are clearly not present. As the motion judge found at para. 54:

> [N]either the City nor Mr. Petch (no allegations are made against him outside his status as a city employee) owed any fiduciary duty to Irina and Julia Marks since Bruce Marks was the registered owner of the property…. Neither was the subject of a charge under the City fencing by-law.

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[38] And, as the motion judge noted, at the relevant time Julia was not yet born.

[39] This leaves Bruce Marks. The paragraphs of the original statement of claim, which the Marks argue factually support the breach of fiduciary duty claim, merely allege that "the defendant Petch (in his role as By-Law Enforcement Officer for the City of Ottawa) owed a duty to the plaintiffs to conduct an appropriate investigation" and then list the alleged breaches.

[40] The Marks appear to rely simply on their use of the word "duty" to support their claim, but fail to plead any facts that would support the existence of a fiduciary duty. Consequently, sufficient material facts have not been pleaded to support a cause of action for the tort of breach of fiduciary duty. This ground of appeal must be dismissed.

Issue 3: Did the motion judge err in concluding that the Marks' claim constituted a collateral attack on a previous order?

[41] There are two parts to this issue, both in connection with prior decisions and orders made by Ray J.: *Marks v. Ottawa (City)* (2007), 40 M.P.L.R. (4th) 264 (Ont. S.C.). The first is in connection with the motion judge's finding that certain of the proposed amendments amount to a collateral attack on Ray J's order. The second is in respect of the motion judge's view that the proposed amendments might amount to an abuse of process.

[42] The Marks submit that the motion judge erred in both respects. I will deal with each of these arguments in order.

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Collateral attack

[43] First, in para. 132(c) of his reasons, the motion judge ordered that "[t]he plaintiffs shall remove from their Amended Statement of Claim all pleadings related to allegations of alleged wrongdoing by all defendants relating to their conduct in complying with the order of Ray J." He made this order, as I said, because he found that some of the proposed amendments were a collateral attack on Ray J's decision.

[44] It is helpful to recall that on May 28, 2007, the Marks obtained an *ex parte* injunction enjoining Ms. Natividad and Mr. Maheux from encroaching onto the Marks' property. This injunction was obtained pursuant to their judicial review application, wherein the Marks sought a declaration that the right-of-entry by-law was *ultra vires* and that it was null and void pursuant to the provisions of the *Canadian Bill of Rights* and the *Canadian Charter of Rights and Freedoms*. They also argued that the by-law was contrary to the principles of natural justice and that it was invalid. The remainder of the application was adjourned to June 6, 2007.

[45] On the return of the application on June 6, 2007 – some five months before the commencement of this action – the parties agreed that the only issue was the continuation of the injunction. For the purpose of the motion only, the Marks abandoned the issue of the validity of the by-law, and instead advanced as the "serious issue" that the right-of-

entry permit was invalid as not complying with the requirements of the by-law. The balance of the Marks' application for judicial review remains outstanding.

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[46] At the hearing, the respondents argued that many of the issues raised in both the original statement of claim and the proposed amended statement of claim directly and indirectly attack the June 2007 order of Ray J. In the instant case, the motion judge set out at para. 107 the doctrine of collateral attack by quoting the Supreme Court of Canada's decision in *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629 at para. 71:

> The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal.... Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review).

[47] The motion judge found that Ray J. gave directions to the parties that were binding and that continue to be binding authorizing the issuance of the permit and entry onto the Marks' property. Specifically, at para. 124, the motion judge described the directions given and their effect this way:

> Ray J. made an order - an order that, subject to the filing of a written undertaking, the respondents were entitled to enter upon Mr. Marks' property and carry out work pursuant to an amended or re-issued right-of-entry permit.… It was a court order authorizing the respondents to proceed in a certain fashion. Notwithstanding their compliance with this order,

> they have now been sued in this proceeding for hundreds of thousands of dollars for complying with the order.

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[48] The motion judge found that a substantial part of the Marks' original statement of claim, and the proposed amendments, arise out of the issuance and execution of the right-of-entry permit. As such, he held that these parts amount to a collateral attack on Ray J's order, although he noted at para. 128 that "[o]n this motion I am concerned only with the proposed amended pleadings."

[49] The Marks argue that the motion judge misapprehended the content and effect of the order made by Ray J. That is to say, the motion judge erred in concluding that in effect Ray J. had found and ruled that the right-of-entry by-law and the issuance of the right-of-entry permit pursuant to it were valid in law. They say he also erred in finding that Ray J. had authority and jurisdiction to in effect make a final order bestowing a licence upon the respondents entitling them to enter upon the property of the Marks.

[50] The core of the Marks' submissions is that the only jurisdiction Ray J. had in the matter was to make an order either lifting or continuing the injunction. They say that the motion judge's error had the effect of depriving them of their day in court relating to a substantial portion of their claim in trespass. Their view is that they are not seeking to set aside or challenge the order of Ray J. but simply seeking the damages related to the inappropriate actions of the respondents.

[51] Ray J. made clear that he was aware of the issue he was deciding, namely, whether or not to continue the interim injunction he granted on May 28, 2007. And, he acknowledged that the correct legal test to be applied – and as agreed to by the parties – was that stated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311: (1) serious issue to be tried; (2) irreparable damage if the injunction is not issued; and (3) balance of convenience.

[52] The analysis of Ray J.'s jurisdiction requires the leaving aside of any consideration of the legality of the right-of-entry by-law because it was not before him. As noted, the Marks argued before Ray J. that the "serious issue" for his consideration was the assertion by the Marks that the right-of-entry permit was invalid because it did not comply with the requirements of the right-of-entry by-law. Ray J., at para. 35, held: "I cannot find that the [Marks'] claim is 'frivolous or vexatious' however, and therefore according to the jurisprudence must move on to the second of the three tests."

[53] Indeed, nowhere in his reasons does Ray J. make a finding or a ruling on the validity of the by-law. The only issue was whether Ms. Natividad and Mr. Maheux should continue to be prohibited from entering on the Marks' property. He did not decide

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whether or not that entry was in all respects legal, nor did his decision otherwise legalize any entry.[3]

[54] To repeat, on May 28, 2007, Ray J. granted the Marks an *ex parte* injunction enjoining Ms. Natividad and Mr. Maheux from encroaching onto the Marks' property. Their right to enter upon the Marks' property was pursuant to a permit issued by the City of Ottawa under its right-of-entry by-law, not because of any order by Ray J. In June 2007, Ray J. ordered that the injunction should be lifted upon the giving of Mr. Maheux and Ms. Natividad's undertaking that any work constructed would not result in an encroachment onto Marks' land.

[55] The June order of Ray J. went no further than to apply the rule in *R.J.R.-MacDonald*. The result of this was simply that there would no longer be a court order preventing Ms. Natividad and Mr. Maheux from completing their project. Put another way, it was not – as the motion judge found – a court order authorizing the respondents to proceed in a certain fashion. Rather, it was an order removing a previous court-ordered impediment to their proceeding.

[56] At para. 71 in *Garland*, Iacobucci J. (writing for the court) held that the collateral attack doctrine did not apply in circumstances where orders of the Ontario Energy Board

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[3] Ray J's. remarks in para. 33 of his decision might suggest that he was deciding these two issues. However, it is clear that neither of these two issues was before him to decide and it is clear from reading his reasons as a whole that he was aware of this.

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permitted Consumers' Gas to charge its customers a criminal rate of interest in paying accounts late. Iacobucci J. noted that where the specific object of a party's action is not to invalidate or render inoperative a board's orders, but rather to recover money that was illegally collected by another party's conduct because of the board's orders, the collateral attack doctrine does not apply. Similarly, here the Marks are not seeking to set aside or challenge the order of Ray J.; rather, they are seeking damages related to the alleged inappropriate actions of the respondents, including those actions pursuant to the City of Ottawa's right-of-entry by-law.

[57] The orders made by Ray J. granting the injunction and subsequently lifting it did not resolve the issues in the main action and the rulings were without prejudice to the parties relating to those issues. These issues include the validity of the right-of-entry by-law, permits issued pursuant to it, and any legal remedies that might arise from the determination of validity. I would, therefore, allow this ground of appeal.

Abuse of process

[58] This second part of this issue is summarized by repeating the motion judge's observations at para. 131:

> A valid argument can also be made that the attempt of the plaintiffs in their amended pleadings to seek damages allegedly arising out of the post Ray J. decision issuance of the right-of-entry permit and the entry on the property is an abuse of process. This Court, of course, possesses an inherent jurisdiction to prevent the misuse of its procedures in a

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> manner that would bring the administration of justice into disrepute. [Citations omitted.]

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[59] The respondents' arguments in this regard are principally based upon their view that the proposed amendments amount to a collateral attack on the previous orders of Ray J. Given my decision on that issue, there is no abuse of process.

The effect of the motion judge's decision

[60] At para. 130 the motion judge held that:

> [T]o implement my conclusions, the amended pleadings require substantial further amendment to remove all claims related to the respondents' issuance of the entry permit following Ray J.'s order and, as well, the entry on the property following that order. At the very least, the pleading must make it clear that the malice alleged in paras. 57(a), (b), (c), (d), (e), (f), (g), (h), (i), and (j) relate to the time before Ray J. issued his reasons/decision on the injunction.

[61] At the beginning of my analysis of this issue I set out the motion judge's ultimate conclusion, which he expresses in para. 132(c) of his reasons. His holdings in these two paragraphs are reflected in the court order at para. 3. In the result, para. 3 of the court order must be deleted.

DISPOSITION

[62] For the foregoing reasons, I would dismiss the appeal in respect of issues one and two. I would allow the appeal in connection with issue three. Accordingly, I would set aside para. 3 of the motion judge's order. In all other respects, I would not disturb the

order. Given this mixed result, I would award the respondents their costs of the appeal fixed in the amount of $7,500, inclusive of disbursements and applicable taxes.

RELEASED:

"APR -1 2011"
"KF"

"H.S. LaForme J.A."
"I agree K. Feldman J.A."
"I agree R. Juriansz J.A."

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