Docket: CA 160894
CA 161263
Date: 20000710

NOVA SCOTIA COURT OF APPEAL
[Cite as: Society of Lloyd's v. Partridge, 2000 NSCA 84]

Roscoe, Hallett and Bateman, JJ.A.

IN THE MATTER OF: The *Reciprocal Enforcement of Judgments Act*, R.S.N.S. 1989, c. 388 and the *Canada and United Kingdom Reciprocal Recognition and Enforcement of Judgments Act,* R.S.N.S. 1989, c. 52

- and -

IN THE MATTER OF: An application to register a Judgment of the English High Court of Justice, Queen's Bench Division

BETWEEN:

WALTER ERNEST PARTRIDGE

Appellant

- and -

THE SOCIETY OF LLOYD'S

Respondent

BETWEEN:

THE SOCIETY OF LLOYD'S

Appellant

- and -

RICHARD MARCEL VAN SNICK

Respondent

REASONS FOR JUDGMENT

Counsel:	S. Bruce Outhouse, Q.C. and Lester Jesudason for the appellant, Partridge and the respondent Van Snick Clarence A. Beckett, Q.C. for The Society of Lloyd's Craig M. Garson, Q.C. and Stanley W. MacDonald for the Intervenors
Appeal Heard:	June 12, 2000
Judgment Delivered:	July , 2000
THE COURT:	Partridge appeal allowed and Van Snick appeal dismissed per reasons for judgment of Bateman, J.A.; Hallett and Roscoe, JJ.A. concurring.

BATEMAN, J.A.:

[1] These are related appeals. The appellant, Walter Ernest Partridge, appeals from a decision of Chief Justice Joseph Kennedy in chambers [S.H. No.160183, unreported] who allowed Lloyd's *ex parte* application to register an extraterritorial judgment against Mr. Partridge. The appellant, the Society of Lloyd's, appeals from the decision of Justice David MacAdam in chambers [reported at 2000 N.S.J. No. 28 (Q.L.)] who dismissed the appellant's *ex parte* application to register an extraterritorial judgment against Richard Marcel Van Snick.

BACKGROUND:

[2] The Society of Lloyd's (Lloyd's) is a society and corporation incorporated in England pursuant to the **Lloyd's Acts 1871 to 1982**. Lloyd's membership consists of individual members often called "Names". Mr. Partridge and Mr. Van Snick are members.

[3] In 1996 Lloyd's sued Mr. Partridge, Mr. Van Snick and many others in the United Kingdom seeking payment of dues which it said they were obliged to pay under its Membership Agreement. Defences were filed. Lloyd's succeeded in obtaining Summary Judgment on March 11, 1998 against Mr. Partridge in the amount of £249,221.68 plus costs and against Mr. Van Snick in the amount of £88,606.77 plus costs.

[4] Appeals by Partridge and Van Snick were dismissed by the Court of Appeal (Civil

Division) of the Supreme Court of Judicature on July 31, 1998. The period provided for under English law for further appeals from the judgment of the Court of Appeal (Civil Division) has expired, and no such appeals are pending. The judgments remain unsatisfied.

[5] On November 30, 1999, Lloyd's brought twenty-two separate *ex parte* applications against various Names to register the United Kingdom judgments in Nova Scotia. Included among those was the judgment against Mr. Partridge. The applications were made pursuant to the **Canada and United Kingdom Reciprocal Recognition and Enforcement of Judgments Act**, R.S.N.S. 1989, c. 52 (the "**Canada-UK Act**"). These applications came on for hearing, fifteen (15) before Chief Justice Kennedy and the remaining seven (7) before Justice Felix Cacchione on November 30, 1999. All twenty-two (22) applications were granted.

[6] In accordance with the Order of Chief Justice Kennedy, Mr. Partridge was served with a Notice of Registration on December 13, 1999. He filed a Notice of Appeal on December 24, 1999 (since amended). Mr. Partridge filed, as well, an Interlocutory Notice (Application Inter Partes) in the Supreme Court in this matter (S.H. No. 160183) on January 12, 2000. That application, which is yet to be heard, is brought pursuant to *Civil Procedure Rule 37.13* and seeks an Order setting aside the Order of the Chief Justice.

[7] On December 16, 1999, Lloyd's filed six (6) additional *ex parte* applications with respect to Names not included in the November 30, 1999, group. Mr. Van Snick is one of these Names. Counsel for Mr. Van Snick had contacted Lloyd's' solicitors before the chambers hearing, objected to the *ex parte* procedure and requested copies of all pleadings. Lloyd's counsel maintained that the *ex parte* procedure was proper but provided copies of the documentation. Justice MacAdam heard the applications in chambers on December 21, 1999.

[8] The preliminary issue before Justice MacAdam was whether the application for registration of the judgments pursuant to the **Canada-UK Act** could proceed *ex parte*. It was Mr. Van Snick's position that the applications should have been made *inter partes*.

[9] Justice MacAdam rendered an oral decision at the conclusion of the hearing dismissing the applications, accepting Mr. Van Snick's submission that the applications should have been by Originating Notice (Application *Inter Partes*), rather than Originating Notice (Application *Ex Parte*). Lloyd's have appealed. He issued a written decision on January 26, 2000.

[10] The parties have agreed that the present appeals are representative test cases on the understanding that the outcomes of these appeals will bind the parties with respect to all other *ex parte* applications before Chief Justice Kennedy, Justice Cacchione and Justice MacAdam.

GROUNDS OF APPEAL:

[11] The issue on both appeals is whether such applications for registration can be made without notice to the judgment debtor. On the Partridge appeal, counsel for Mr. Partridge submits, in the alternative, that the appeal should be allowed, in any event, because counsel for Lloyd's failed to disclose material information to the court on the application.

[12] The two lawyers, Christopher Robinson, Q.C. and Stephen Kingston, who represented Lloyd's before Justice MacAdam on the Van Snick application, seek leave to intervene as parties on that appeal and, if so permitted, allege that:

> (i) . . .the Learned Chambers Judge erred in finding that there had been "material non-disclosure" by counsel for the Appellant herein.
>
> (ii) . . . the Learned Chambers Judge erred in law and failed to meet the requirements of natural justice in finding that counsel for the Appellant had misapprehended their role as counsel and had failed to meet their ethical obligations without specifically raising this issue with counsel and allowing them a full opportunity to respond.

ANALYSIS:

(i) Standard of Review:

[13] This is an interlocutory appeal. The standard of review is well settled. Chipman, J.A. wrote in **Minkoff v. Poole and Lambert** (1991), 101 N.S.R. (2d) 143 at p. 145:

> [9] At the outset it is proper to remind ourselves that this court will not interfere with a discretionary order, especially an interlocutory one such as this, unless wrong principles of law have been applied or a patent injustice will result . . .
>
> [10] . . .Under these headings of wrong principles of law and patent injustice an Appeal Court will override a discretionary order in a number of well-recognized situations. The simplest cases involve an obvious legal error. As well, there are cases where no weight

> or insufficient weight has been given to relevant circumstances, where all the facts are not brought to the attention of the judge or where the judge has misapprehended the facts. The importance and gravity of the matter and the consequences of the order, as where an interlocutory application results in the final disposition of a case**,** are always underlying considerations. The list is not exhaustive but it covers the most common instances of appellate court interference in discretionary matters.

(ii) Procedure - *ex parte/inter partes*:

(a) The Van Snick appeal:

[14] As set out above, the application to register the judgments was made pursuant to the **Canada-UK Act**. The matter was commenced by Originating Notice (*Ex Parte* Application). Supporting the application was an affidavit from Christopher Robinson Q.C., Halifax counsel for Lloyd's, attesting to the particulars of the judgment, confirming that it had been granted in England, that all rights of appeal in that country were exhausted and stating that the judgment remained unpaid. Bruce Outhouse, Q.C., counsel for Mr. Van Snick, appeared at the hearing and objected to the *ex parte* procedure.

[15] It is Lloyd's' position that under the **Canada-UK Act** applications to register a judgment are to be made *ex parte* using a procedure akin to that in s.3(2) of the **Reciprocal Enforcement of Judgments Act**, R.S.N.S. 1989, c. 388 ("the **REJA**"). The appellant says that Justice MacAdam erred in rejecting that proposition.

[16] The appellant acknowledges that the provisions of the **REJA** have no direct bearing on the application to register the judgments. The United Kingdom is not a "reciprocating state" under the **REJA**, a precondition to its application (s.3(1)). It was

Lloyd's submission to the chambers judge, however, that the *ex parte* procedure authorized by **REJA** should be adopted under the **Canada-UK Act**. That latter **Act** makes no direct reference to a notice requirement on an application to register a judgment.

[17] The **Canada-UK Act** incorporates the *Convention Between Canada and the United Kingdom of Great Britain and Northern Ireland Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters* ("the **Convention**"). The **Convention** provides in relevant part:

> ARTICLE III
>
> 1. Where a judgment has been given by a court of one Contracting State, the judgment creditor may apply in accordance with Article VI to a court of the other Contracting State at any time within a period of six years after the date of the judgment (or, where there have been proceedings by way of appeal against the judgment, after the date of the last judgment given in those proceedings) to have the judgment registered, and on any such application the registering court shall, subject to such simple and rapid procedures as each Contracting State may prescribe and to the other provisions of this Convention, order the judgment to be registered.
>
> (Emphasis added)
>
> ARTICLE IV
>
> 1. Registration of a judgment shall be refused or set aside if
>
> (a) the judgment has been satisfied;
>
> (b) the judgment is not enforceable in the territory of origin;
>
> (c) the original court is not regarded by the registering court as having jurisdiction,
>
> (d) the judgment was obtained by fraud;
>
> (e) enforcement of the judgment would be contrary to public policy in the territory of the registering court;
>
> (f) the judgment is a judgment of a country or territory other than the territory of origin which has been registered in the original court or has become enforceable in the territory of origin in the same manner as a judgment of that court; or
>
> (g) in the view of the registering court the judgment debtor either is entitled to immunity from the jurisdiction of that court or was entitled to immunity in the original court and did not submit to its jurisdiction.
>
> 2. The law of the registering court may provide that registration of a judgment may or shall be set aside if

> (a) the judgment debtor, being the defendant in the original proceedings, either was not served with the process of the original court or did not receive notice of those proceedings in sufficient time to enable him to defend the proceedings and, in either case, did not appear;
>
> (b) another judgment has been given by a court having jurisdiction in the matter in dispute prior to the date of judgment in the original court; or
>
> (c) the judgment is not final or an appeal is pending or the judgment debtor is entitled to appeal or to apply for leave to appeal against the judgment in the territory of origin.
>
> . . .
>
> 4. A judgment shall not be enforced so long as, in accordance with the provisions of this Convention and the law of the registering court, it is competent for any party to make an application to have the registration of the judgment set aside or, where such an application is made, until the application has been finally determined.

[18] In his oral decision delivered at the conclusion of the application Justice MacAdam said:

> . . . as for the reasons I've outlined in my discussion or during the course of Mr. Robinson's argument . . . as I read Article 6, paragraph 3, it adopts, where not contradictory to the provisions of the convention, the law and procedure in the Province of Nova Scotia, and in that respect that law and procedure does not include the Reciprocal Enforcement of Judgements Act which is not applicable, it includes those rules and procedures governed by this province that are in force, and that would include [Civil Procedure Rule] 37.04(1). And pursuant to that, having regard to the spirit of the Court of Appeal in the **Howlett** case and the principle of natural justice that notice should be given, I find that there should have been notice . . .

[19] Article VI, 3, referred to by Justice MacAdam states:

> 3. The practice and procedure governing registration (<u>including notice to the judgment debtor</u> and applications to set registration aside) shall, except as otherwise provided in this Convention, be governed by the law of the registering court.
> (Emphasis added)

[20] In his written decision Justice MacAdam said, to the same effect:

> 15 Counsel for the applicant's submission is that the use of the phrase "set aside", as it appears both in the *R.E.J.A.* and the *Convention*, commends itself to only one logical conclusion, namely, the intention to adopt the procedure in the *R.E.J.A.* to the *Convention*, thereby providing for *ex parte* initial registration with the opportunity for the respondent to apply to set aside within a set "period of time". The submission is not

> persuasive. Neither is his submission that the legislation would have talked of "appeals" rather than "setting aside" if the legislature had not intended the same procedure in the *Convention*. Clearly the *Convention* recognizes the right of the province or the court, by its rules, to provide procedures or a process for registration. The use of the phrase "set aside" would clearly permit the province or the court to create a procedure similar to that now provided for in registering judgments under R.E.J.A.. However, it does not mandate such a two step procedure with notice only following initial registration. The Ontario *Rules*, adopted for registering U.K. judgments in Ontario, provide for notice on the application. There is nothing to suggest the same requirement could not have been legislated or incorporated in the Nova Scotia *Civil Procedure Rules*.
>
> 16 To be decided here is whether, absent any statutory provision or any rule, the application must be on notice or whether the application may be made by adopting the procedure for registering judgments under the *R.E.J.A.*.
>
> ...
>
> 20 Clearly, these applications should have been brought on notice. From the information provided, the applicant was aware of counsel, particularly in Ontario, representing many, if not all, of the respondents and there is nothing in the material submitted to suggest that counsel for the applicant would have had any difficulty in effecting service of notice of these applications. Absent specific provisions in a rule or statute stipulating that an application may be made *ex parte*, and absent any unusual or urgent circumstances, there is no merit to the argument that simply because there is no specific provision requiring notice, one party may apply to court to seek remedy, redress or affect the rights of another party without giving the other party an opportunity to present their position. There was nothing in these applications to suggest any "urgent or unusual circumstances", such as would warrant the granting of an order pending a further hearing to review the respective rights of the parties involved. To suggest that in respect to the Nova Scotia proceeding, service had not been effected pursuant to Civil Procedure Rule 37.01(b), is a submission of a technical argument that carries little, if any, weight since it is the judgments obtained in the United Kingdom which involved the respondents as parties that forms the foundation for these applications.
>
> 21 The circumstances when applications may be made *ex parte* can be no better stated than in the oral submission of counsel for the respondents:
>
> > ...the courts of this province or any other province don't imply the right to proceed on an ex parte basis unless the right to proceed *ex parte* is expressly provided for either in legislation or in the *Civil Procedure Rules*. The Courts imply precisely the opposite; they imply that the other party is entitled to notice."
>
> (Emphasis added)

[21] In my view Justice MacAdam was correct. Nova Scotia has not yet specified, through regulation or other means, procedures for the registration of judgments

pursuant to the **Act**. Absent such procedures the law in Nova Scotia governs. By contrast the **REJA** expressly authorizes an *ex parte* registration process (s.3(2)). The Supreme Court has further particularized the procedure under the **REJA** through *Civil Procedure Rule* 64.

[22] The appellant has argued that where an enactment is silent on the issue of notice, no notice is required. That proposition was rejected by this Court in **Burton v. Howlett**, (1998), 172 N.S.R. (2d) 342 (C.A.). There, a nonparty, Mr. Gaston, appealed from an order of the Supreme Court directing him to appear at a discovery examination and ordering that he pay costs of an aborted discovery and costs of the application. The application, pursuant to *Civil Procedure Rule 18.15,* had been made without notice to Mr. Gaston. That *Rule* empowers the court to grant relief where a person refuses or neglects to attend a discovery examination. It is silent on whether notice is required where such relief is sought. On the appeal the respondent argued that unless notice is specifically required by a *Rule*, an application may be made *ex parte*. Pugsley, J.A., for this Court, rejecting that submission said:

> 42 I do not accept, as was submitted by Mr. Saulnier before Justice Moir, that Mr. Saulnier's ex parte application before Justice Boudreau was sanctioned under C.P.R. 37.04(1).
>
> 43 It provides:
>
> > An application may be made ex parte where,
> > (a) under an enactment or rule, notice is not required;
> > (b) the application is made before any party is served;
> > (c) the applicant is the only party;
> > (d) the application is made during the course of a trial or hearing;
> > (e) the court is satisfied that the delay caused by giving notice would or might entail serious mischief, or that

> notice is not necessary.
>
> 44 Mr. Saulnier submitted to Justice Moir that since C.P.R. 18.15 does not explicitly provide that notice is required to be given to a person against whom a penalty is sought, that C.P.R. 37.04(1)(a) should be interpreted to mean no notice at all is required.
>
> 45 I interpret C.P.R. 37.04(1)(a) as impliedly stipulating that notice should always be given to a person who may be affected by any proceeding directed against him, or her.
>
> 46 That requirement is an essential ingredient of due process. No person should be "condemned unheard or without having had an opportunity of being heard." (Jowitt's **Dictionary of English Law**, Sweet and Maxwell, 1977, p. 161, definition of audi alteram partem).
>
> 47 I come to this conclusion notwithstanding the provisions of C.P.R. 37.04(1)(c).
>
> . . .
>
> 49 In my view, this section as well, should be interpreted in a way that is not inconsistent with the obligation of a court to give an opportunity to an individual to state his or her case when the decision of the court can affect that person's rights.
>
> 50 Such an interpretation is consistent with the decision of this court in **Walker v. Delory et al** (1988), 90 N.S.R. (2d) 1; 230 A.P.R. 1 (C.A.). In that case, the plaintiff brought an action in negligence against three doctors. Counsel could not agree as to which of them was first entitled to examine the opposite parties on discovery. The plaintiff then obtained an ex parte order compelling the doctors to appear and be discovered first. The defendants appealed.
>
> 51 In the course of allowing the appeal and setting aside the order of the Chambers judge, Justice Matthews, on behalf of the court, held at p. 4:
>
> > With deference to the Chambers judge, there was no account taken of the issues concerning the procedural rights of the parties. He ignored the basic principle that the other side should be heard ('Audi alteram partem').
>
> 52 The principle has long been identified as a part of natural justice and an essential constituent of a fair hearing.
>
> (Emphasis added)

[23] The appellant argues that the **Convention** is the law of Nova Scotia; its purpose is, *inter alia*, to expedite registration of U.K. judgments; that it has primacy over other legislation according to s.7 of the **Canada-UK Act**; and that the direction in Article III, 1 that such judgments "shall" be registered" reveals a clear intention to favour U.K. judgments over other foreign judgments. These factors do not, however, lead inevitably

to the conclusion that notice to the judgment debtor is not required. Article VI, 1 of the **Convention**, for example, enumerates circumstances under which registration of a judgment "shall be refused or set aside . . .". This wording, in my view, indicates an intention to leave open to the registering jurisdiction, the choice of procedure.

[24] The appellant further submits that Article IV, 4 is compatible only with a two stage procedure:

> 4. A judgment shall not be enforced so long as, in accordance with the provisions of this Convention and the law of the registering court, it is competent for any party to make an application to have the registration of the judgment set aside or, where such an application is made, until the application has been finally determined.

[25] The question is not, however, whether the **Convention** could be compatible with procedures which dispense with notice at the first instance, but whether it mandates such a procedure to the exclusion of local procedural requirements.

[26] While it is logical to argue, as does the appellant, that there would be no need in the **Convention** to refer to the "setting aside" of a judgment, if the judgment debtor was to have notice at the first instance, it could also be concluded that the **Convention** is intentionally ambiguous to accommodate whatever procedure is set in the registering jurisdiction.

[27] Of the Canadian provincial jurisdictions, only New Brunswick has adopted regulations pursuant to the **Convention**. The rules of practice as relates to registration

under the **Convention** vary, with some provinces requiring notice to the judgment debtor (Manitoba, Prince Edward Island, Ontario) and others not. Ontario, under essentially the same statute, requires, by rule of court, notice to the judgment debtor (*Civil Procedure Rule* 73.02(1); *Form* 73A). This substantially weakens the appellant's argument that the wording of the **Canada-UK Act** leads inescapably to the conclusion that notice is not required. Like Nova Scotia, Ontario does have an *ex parte* provision for initial registration under the **REJA**.

[28] In summary on this point, I agree with the submission of the respondent that:

> . . . the language referred to in our ***U.K. Convention*** that the Appellant says drives one to inescapably conclude the contemplation of an ex parte procedure to register U.K. judgments in Nova Scotia is merely reflective of the fact that it would be completely open to the Governor in Council to pass regulations under Section 6 of the ***U.K. Convention*** which might or might not provide for ex parte procedures. However, the Governor in Council has passed no such regulations.

[29] In my view, Justice MacAdam did not err in concluding that the judgment debtor is entitled to notice on an application to register a judgment pursuant to the **Canada-UK Act**, in the absence of local rules or regulations which expressly permit *ex parte* registration. I would dismiss the appeal.

(b) The Partridge appeal:

[30] The proceeding before Chief Justice Kennedy was brief. Mr. Robinson described it to the judge as a "fairly straightforward application". In his submission at chambers he said, in part, on behalf of Lloyd's':

> The application is brought, as you know, pursuant to the Canada and United

> Kingdom Reciprocal Recognition and Enforcement of Judgements Act and Reciprocal Enforcement of Judgments Act.
>
> The applications are brought *ex parte* pursuant to section 3.2 of the Reciprocal Enforcement of Judgments Act and, as provided in that legislation, if the applications are granted, each respondent will receive notice. . .

[31] There is no indication on the record that Justice Kennedy was specifically asked to consider whether the Orders should be granted *ex parte*. It appears that he did not consider *Civil Procedure Rule 37.04(1)* or its interpretation in **Burton v. Howlett**, **supra**. The Chief Justice referred to his earlier decision on a similar registration application, reported as **David and Snape v. Sampson** [1999] N.S.J. 350 (N.S.S.C.) (Q.L.). That decision was cited to Justice MacAdam in the Van Snick application as support for the *ex parte* procedure. Justice MacAdam said of the **Snape** decision:

> 18 This decision of Chief Justice Kennedy, after a hearing and oral decision on July 15, 1999, with written reasons on October 11, 1999, is of little assistance on this application since the issue of notice was apparently not raised before him.

[32] I would agree with that observation. There is no indication in the **Snape** decision that Justice Kennedy specifically focused upon the question of notice to the judgment debtor. Indeed, he appears to have assumed there that the judgment was being registered pursuant to the **REJA**. In granting the order in **Snape** the judge said:

> . . . I am prepared to sign the order or register that judgment in the Province of Nova Scotia and I do so mindful of s. 7, sub. 1, that will give the respondent an opportunity after this ex parte order is accomplished within one month from the registration, to contest the process should he wish to do so and, there obviously will be no action taken in relation to this judgment until such time as s. 7 has run its course.
> (Emphasis added)

[33] His reference to “s. 7, sub. 1" can only be to that section of the **REJA** which states:

> 7(1) Where a judgment is registered pursuant to an *ex parte* order,

> (a) within one month after the registration or within such further period as the registering court may at any time order, notice of the registration shall be served upon the judgment debtor in the same manner as an originating notice is required to be served; and
>
> (b) the judgment debtor, within one month after he has had notice of the registration, may apply to the registering court to have the registration set aside.

[34] At the time of the Partridge application, the **Snape** decision, cited as authority for the *ex parte* registration procedure, was on appeal. One of the grounds of appeal was that the judge erred in permitting registration of the judgment without notice to the judgment debtor. The parties to that matter have since consented to an order setting aside the Nova Scotia registration, the underlying judgment having been set aside in the British courts.

[35] For the reasons set out above pertaining to the Van Snick appeal, I am satisfied that the Chief Justice erred in permitting registration of the judgments without notice to the judgment debtor. I would allow the appeal.

(iii) Conduct:

[36] The intervenors say, on the Van Snick appeal, that Justice MacAdam erred:

> 2. . . . in finding that there had been “material non-disclosure” by counsel for the Appellant herein.
>
> 3. . . . in law and failed to meet the requirements of natural justice in finding that counsel for the Appellant had misapprehended their role as counsel and had failed to meet their ethical obligations without specifically raising this issue with counsel and allowing them a full opportunity to respond.

[37] It is my view that the above grounds substantially overstate the import of the judge's remarks. In relation to the intervenors, the chambers judge said:

> Like counsel for the respondents, the Court has the highest regard for counsel for the applicant. Nevertheless, and although his statement on the role of counsel, particularly on an *ex parte* application, meets the general parameters of counsel's duties, it is the failure to recognize the relevance of the omissions noted by counsel for the respondents and the non-disclosure of the fact his cited authority was under appeal that is here of concern. . . . I interpret counsel's position on what is relevant, and therefore to be disclosed on an *ex parte* application, as a misunderstanding of the role of counsel, rather than any deliberate attempt to mislead or deceive the Court.

[38] It is helpful to consider the context in which the judge's comments arose. The intervenors, on behalf of the appellant Lloyd's, and in support of their view that the judgment registration process be *ex parte*, relied upon the decision of Chief Justice Kennedy in **Snape**, **supra**. It was the respondent's position that the **Snape** decision was of no precedential value because the judge had not considered *Rule 37.04*; because the decision was on appeal on the very question of notice; and because it was subject to a set aside application in Supreme Court. In the respondent's submission these points were material and would entitle Justice MacAdam to render a decision contrary to that of the Chief Justice. Unable to comment upon precisely what other issues were not raised by counsel in **Snape**, Mr. Outhouse enumerated the relevant matters which had not been advanced by Lloyd's on the **Van Snick** appeal. After referring to the difficult situation which is presented when only one side of a legal dispute appears, Mr. Outhouse said:

> . . . Now, in this connection I want to refer back to what Justice Green said in the *Canadian Paraplegic Association* case. He indicated there -- and I think this is absolutely incontestible -- that <u>in an ex parte matter counsel must observe the utmost good faith</u> -- because that was the worded he used. -- "the utmost good faith." -- and I quote him, "The applicant is asking the judge to invoke a procedure that runs counter to the fundamental principle of justice that all sides of a dispute should be heard, and that as a result counsel

> is under a - [what he calls] - "superadded duty to the court and other parties to ensure that as balanced a consideration of the issue is undertaken as is consonant with the circumstances." Now, I say to the court, with respect to my friends, that that standard does not appear to have been met in Snape and it certainly has not been met in the circumstances of the present case. Why do I say that? First, there is no explicit mention of Rule 37.04, and that rule is fundamental to this case. It's not even mentioned to them. Secondly, there is no express statement anywhere in the material filed by the applicants to the effect that England is not a reciprocating state under the Reciprocal Enforcement of Judgments Act. Thirdly, the applications purport to be brought pursuant, at least in part, to the Reciprocal Enforcement of Judgments Act, even though it clearly doesn't apply other than, my friends argue, you can import the procedure from it by implication. But clearly my friends aren't applying under the Reciprocal Enforcement of Judgments Act. It doesn't apply. The fourth thing I say -- and this is a point Your Lordship has already raised with Mr. Robinson - there was no disclosure whatever to the court of the parallel proceedings which are taking place in Ontario, which are being brought under the very same Act, the Convention Act, they're being brought on notice and they are being contested by the Association, by Association counsel. That disclosure was never made to the court. Can you imagine what Chief Justice Kennedy's reaction would have been if he had been notified of that, he'd been told about that? His reaction would have been, "Why aren't you doing the same thing here? Why are you doing it differently here?" He would have been bound to ask those questions. And the fifth thing is, My Lord, that Rule 64 is never drawn to the court's attention. I'm not saying the court was unaware of it, but here you have Rule 64 dealing with the Reciprocal Enforcement of Judgments Act, it very neatly lays out the procedure you follow, and there's no such rule for the Convention Act. Again, the court would be bound, in my submission, to be troubled by that dichotomy, that different treatment. So, My Lord, I say that when you take those things together, these omissions amount to a material non-disclosure by the applicants within the meaning of the law as set out in the Canadian Paraplegic Association case, and we say that that material non-disclosure explains why the previous 22 orders came to be granted in the first place and parenthetically why they'll be overturned on appeal. But that's why they were granted. They also clearly demonstrate, in my submission, why ex parte proceedings are to be avoided save in exceptional circumstances which are either recognized expressly in legislation or the rules of this court.
> (Emphasis added)

[39] It was Mr. Outhouse's position that the **Snape** decision was liable to be set aside on account of the material non-disclosure. In **Canadian Paraplegic Association (Newfoundland and Labrador) v. Sparcott Engineering Ltd. et al.**, (1997), 150 Nfld. & P.E.I.R. 200, which case was relied upon by Mr. Outhouse at the chambers hearing, Green, J.A. writing for the court said:

> [22] Material misstatements or nondisclosure on an ex parte application will justify the court, on a subsequent review of the order, in setting aside the order for that reason alone. . . . The rationale is that the court, in the exercise of its inherent jurisdiction to control its process, is justified in dealing with an abuse of its process and this is so

> regardless of whether the abuser might in fact otherwise have a good case on the merits.

[40] Mr. Robinson was given an opportunity to respond to Mr. Outhouse's submission and did so. On the issue of whether these factors should have been raised by applicant counsel, Mr. Robinson commented, generally, on the duty of counsel on an *ex parte* application:

> MR. ROBINSON:
> But I guess the theory my friend is espousing in accusing us of making misrepresentations to the court, . . . I take that allegation extremely seriously.
>
> . . .
>
> MR. OUTHOUSE:
> . . . I don't think I ever said that my friend misrepresented things to the court, I said there was material non-disclosure, and there is a difference.

[41] Mr. Robinson continued:

> In order to accept that thesis, I suppose the onus on counsel on an *ex parte* application would be to raise every conceivable and I suppose, inconceivable, argument that could be raised as (inaudible) and then beat them down in order to satisfy the onus that my friend says we must discharge, so that any argument that he can possibly conceive of should have been raised if I am not to be guilty of material non-disclosure or is there some sort of brain...it's only one that he thinks out and not the one that someone thinks out...The point is, My Lord, that it's a serious allegation to make of counsel that material non-disclosure was made to the court.
>
> ...
>
> ...I, as counsel, would have to think of every conceivable argument that I really think Mr. Outhouse made or thought of...or something else I have thought of...to set them up and then knock them down. That is not...that is not, My Lord, the onus in an *ex parte* application. In an *ex parte* application the onus on the solicitor is to bring up relevant and cogent material representations and arguments to the court and we suggest that we have done that in all of these applications and never was there once an intention, nor a material omission made before this Court, My Lord.

[42] It was in this context that Justice MacAdam reviewed in his decision the duty of counsel in an *ex parte* proceeding. He said in part:

> 30 The difficulty here is not so much with counsel's statement as to his duty as an advocate on an ex parte application, but the failure to consider the fact the authority he

> was citing for the procedure he was following was, apparently to his knowledge, then under appeal on the very issue for which it was being presented. Although, as noted, it would have represented counsel's understanding of the law, as stated by the Chief Justice, surely a relevant consideration is that it is now under appeal on the issue of whether this application may be made ex parte or must be on notice. I cannot, of course, comment on what information may, or may not, have been provided to the Justices who heard the November applications.

[43] After referring to additional authorities on this point the judge concluded:

> 35 Although, as noted, counsel may have been technically correct in stating, as of the date of his representation, the decision of Chief Justice Kennedy represented the then understanding of the law in the Province of Nova Scotia, it could not be said this statement was "candid and comprehensive" when counsel failed to also add that the decision was under appeal, including on the issue as to whether in applying to register a U.K. judgment under the Convention, it was necessary to first give notice to the persons affected by the registration of such a judgment.
>
> 37 In prefacing his comments as to the "material non-disclosure" by counsel for the applicant, counsel for the respondent said:
>
> > . . . I want to preface what I am going to say by indicating that I have the highest regards for my friends both professionally and personally, who are here and I am not saying this to be unkind to them.
>
> 38 Like counsel for the respondents, the Court has the highest regard for counsel for the applicant. Nevertheless, and although his statement on the role of counsel, particularly on an ex parte application, meets the general parameters of counsel's duties, it is the failure to recognize the relevance of the omissions noted by counsel for the respondents and the non-disclosure of the fact his cited authority was under appeal that is here of concern. If applicant counsel's assessment on what is relevant to be disclosed on an *ex parte* application, and I do not suggest it does, represents the attitude or perspective of the Bar generally, then it raises serious questions as to the relationship, forged over many centuries, between the members of the legal profession and the court itself, including the propriety of the court relying on statements made in court by counsel. I interpret counsel's position on what is relevant, and therefore to be disclosed on an *ex parte* application, as a misunderstanding of the role of counsel, rather than any deliberate attempt to mislead or deceive the Court.
>
> (Emphasis added)

[44] The judge and counsel for Lloyd's clearly differed on what constituted, to use counsel's own words, "relevant and cogent material representations and arguments". The chambers judge apparently felt that the court's view on that issue bore clarification. The non-disclosure issue was placed before Justice MacAdam by the respondent and was relevant to the matter before him. Justice MacAdam was placed in the unenviable

position of being asked to depart from a procedure purportedly authorized in a recent decision by a judge of his own court. He accepted the respondent's submission that counsel for Lloyd's should have provided fuller information, particularly in view of the intended *ex parte* nature of the application.

[45] Counsel for the intervenors characterizes the judge's remarks about the intervenors as a scathing attack on their integrity. That is a misunderstanding of the judge's comments. The judge, while holding a view different from the intervenors as to the extent of counsel's duties on the *ex parte* application in question, expressly stated that he had the "highest regard" for them.

[46] I am not persuaded that the judge's remarks on this issue were in error or that the intervenors were denied natural justice in the manner in which the non-disclosure issue was considered. In reaching this conclusion I have reviewed and considered the additional evidence submitted by the intervenors. I would dismiss these grounds of appeal.

DISPOSITION SUMMARY:

[47] I would dismiss the appeal in the Van Snick matter and allow the appeal in the Partridge matter. I would set aside the order for costs against Mr. Partridge on the chambers hearing. Mr. Partridge and Mr. Van Snick shall have costs of the appeal in the amount of $2,000.00 plus disbursements, each, payable by Lloyd's. There shall be no costs in relation to the matters raised by the Intervenors.

Bateman, J.A.

Concurred in:

Hallett, J.A.

Roscoe, J.A.