

NOVA SCOTIA COURT OF APPEAL

Citation: *Aliant Inc. v. Ellph.com Solutions Inc.*, 2012 NSCA 89

Date: 20120823

Docket: CA 356044

Registry: Halifax

Between:

Aliant Inc., Aliant Telecom Inc. and Aliant
Telecom Inc./Telecommunications Aliant Inc.

Appellants

v.

Ellph.com Solutions Inc. and Ellph.com
Technologies Incorporated

Respondents

Judge: The Honourable Mr. Justice Jamie W.S. Saunders

Appeal Heard: April 16, 2012

Subject: **Civil Procedure Rule 45. Security for Costs. Exercise of Discretion. Error in Principle. Standard of Review. Lifting the Corporate Veil. Access to Justice. Scope of Appellate Review.**

Summary: Facing multi-million dollar litigation over an alleged breach of contract of a software licensing agreement, Aliant brought a motion in Chambers seeking an order requiring the plaintiff corporations to post security in the form of obliging the two shareholders to personally assume joint and several liability for any costs ordered payable to Aliant in the litigation. The motion was refused after the judge determined that it would not

be unfair to allow the claim to proceed without such a security for costs order in place. Aliant appealed.

Held:

Appeal dismissed. The Court undertook an extensive examination of the exercise of judicial discretion and its intersection with the boundaries of appellate review. An analytical framework was provided to explain how, during the decision-making process, the judge is performing several functions with the result that certain aspects of the judge's decision will attract different standards of review on appeal.

In this case, applying the proper legal test to a motion for security for costs, and choosing the relevant evaluative factors incidental to that test were questions of law, reviewable on a standard of correctness. Prioritizing and weighing those factors when balancing the competing interests at stake required a wise and finely tuned exercise of discretion, to which deference was owed, and was reviewable on a reasonableness standard.

There was no error in principle in the way the motions judge resolved the legal issues before him. His balancing of those factors when assessing fairness in all of the circumstances was reasonable. It is not this Court's role to second guess that discretion-driven adjudicative function or interfere with that stage of the inquiry simply because we might have assigned a different level of importance to certain factors, had we heard the motion in first instance.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 31 pages.