NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Innocente and Poirier***, 2003 NSCA 85

Date: 20030829
Docket: CA 163508
Registry: Halifax

Between:

Her Majesty the Queen

Applicant

v.

Giles Poirier

Respondent

Judge:	The Honourable Justice Linda Lee Oland
Application Heard:	August 21, 2003, in Halifax, Nova Scotia, in Chambers
Held:	**Application to amend order granted.**
Counsel:	Kevin Burke, Q.C., for the appellant James C. Martin, for the respondent

Decision:

[1] This is an application to amend a formal order for judgment to better express its intent, pursuant to **Civil Procedure Rules** 62.26(2) and 65.03(2).

[2] On April 7, 2000 Boudreau, J. of the Nova Scotia Supreme Court issued an order which stayed the prosecution against Daniel Innocente and Giles Poirier in a certain matter. He subsequently awarded the respondent Giles Poirier costs of $35,000 against the Crown. After its application for a stay of that order was dismissed, the Crown sent a cheque for $35,000 to counsel for the respondent.

[3] In its decision reported as **R. v. Innocente** (2001), 198 N.S.R. (2d) 277; N.S.J. No. 468 (Q.L.), this Court allowed the Crown's appeal and set aside the stay and the order for costs. While its order dated November 27, 2001 quashed the order for costs in favour of the respondent, it did not specify that he was to return the costs earlier awarded to him.

[4] The Crown included with its application materials a draft order requiring the respondent to pay to the Attorney General of Canada the award of costs paid him of $35,000, plus interest pursuant to the **Interest on Judgments Act**, R.S.N.S. 1987, c. 233. The respondent objects to the payment of interest and also seeks minor changes to the wording of the draft order.

[5] The orders in this proceeding which pertained to the costs awarded or paid to the respondent were silent as to any payment of interest. The Crown did not provide any memorandum of law in support of its request for interest on repayment of the costs paid earlier. In its oral submissions, the Crown acknowledged that it had been unable to locate any case authority supporting the payment of interest where costs previously awarded in a criminal matter were ordered returned.

[6] In seeking interest on repayment of the costs award, the Crown relies upon **Civil Procedure Rule 62.26(3)** and upon the **Interest on Judgments Act**, R.S.N.S. 1989, c. 233. I will deal with each in turn.

[7] **Civil Procedure Rule 62.26 (3)** reads:

> (3) Where the judgment appealed from has been reversed, and the judgment ordered on appeal provided for payment of money, it shall bear interest from the date of the judgment reversed.

[8] **Rule 62.26(1)** and **(2)** deal with the settlement and issuance of formal orders of judgments and with the amendment of orders respectively. It is my view that **Rule 62.26(3)**, which follows those provisions, does not direct the payment of interest on a judgement. Rather, its purpose is to establish the date interest starts to run in the circumstances set out in that **Rule**. This interpretation finds support in the rulings in **Beaver Maritime Ltd. v. City of Halifax** (1978), 30 N.S.R. (2d) 533 (S.C.,A.D.); **Eastern Canada Towing Ltd. v. Steel and Engine Products Ltd.** (1978), 26 N.S.R. (2d) 358 (S.C, A.D.) and **Greenwood Shopping Plaza Ltd. v. Buchanan et al**. (1981), 45 N.S.R. (2d) 487 (S.C.,T.D.).

[9] The second argument the Crown makes is based on s. 2 of **the Interest on Judgments Act** which provides that "every judgment debt" is to bear interest at five percent unless another rate is prescribed by regulation. The **Act** does not include any definition of that phrase. However, its s. 4 reads:

> 4 Any sum of money or any costs, charges or expenses made payable by or under any judgment, decree, rule or order of any court whatsoever in any civil proceeding shall for the purposes of this Act be deemed to be a judgment debt.
> (Emphasis added)

[10] It is to be noted that s. 4 refers only to civil proceedings. Other legislation includes broader definitions. See, for example, s. 2 of the **Judicature Act**, R.S. 1989, c. 240 which defines a "proceeding" as follows:

> **2** In this Act, and the Rules,
>
> ...
>
> (g) "proceeding" means any civil or criminal action, suit, cause or matter, or any interlocutory application therein, including a proceeding formerly commenced by a writ of summons, third party notice, counterclaim, petition, originating summons or originating motion or in any other manner;
> (Emphasis added)

[11] In these circumstances, the interpretive principle known as *expressio unius est exclusio alterius* would apply. At p. 168 of Ruth Sullivan, ed., *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994), the maxim's function is described as follows:

> One of the so-called maxims of statutory interpretation is *expressio unius est exclusio alterius*: to express one thing is to exclude another. The maxim reflects a form of reasoning that is widespread and important in interpretation. Côté refers to it as the *a contrario* argument. Dickerson refers to it as negative implication. The term "implied exclusion" has been adopted here.
>
> An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within the ambit of its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied.

[12] Where the **Interest on Judgments Act** does not contain a definition of "judgment debt", its s. 4 specifies civil proceedings, and the Crown has not presented any authorities on the interpretation of that legislation or on its application to criminal proceedings, I am unable to agree that interest should be charged on the costs previously awarded in this criminal matter.

[13] In the result, I would grant the Crown's application to amend the order dated November 27, 2001 to better express the intention of that order but on the terms which follow. The draft order submitted by the Crown is to be amended as follows:

(a) the date of the affidavit in support is to be inserted in the first recital;
(b) the words "to correct an error or omission" are to be deleted from the second recital; and
(c) in the paragraph ordered to be included, the word "wrongfully" and all references to interest are to be deleted.

[14] I would ask counsel for the Crown to make those amendments and to forward the order as amended for my signature.

Oland, J.A.