

A Deal's a Deal: The Enforcement of Settlements

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By

A short decision from the Court of Appeal for Ontario in *Neilas (799 College St) Inc. v Houston Engineering & Drafting Inc.*,^[1] released on August 6, 2020, suggests that litigants will be hard-pressed to unwind settlements on the basis of allegations against their own counsel.

The appeal concerned a motion in the *Ontario* Superior Court of Justice in Toronto to enforce a settlement agreement entered into by the parties in 2018.^[2] The plaintiffs were the owner of a condominium property in Toronto and a construction management company. The defendants provided engineering services for the condominium project.^[3]

The parties agreed to settlement terms at a meeting in July 2018. The terms were then documented in draft minutes of settlement circulated by counsel after the conclusion of the meeting, and included:

- Payment to the plaintiffs of the all-inclusive amount of \$100,000;
- Payment by the plaintiffs to one of the defendants, Houston Thomas Engio ("Engio"), in the amount of \$20,000;
- Dismissal of the action and a third party action on a without costs basis; and,
- The exchange of a full and final mutual release between the parties to the action and the third party action.^[4]

The parties had further discussions resulting in minor alternations to the minutes of settlement, but there were no material concerns about its terms.^[5]

In August 2018, Engio requested revisions to the mutual release, seeking to add a paragraph indicating that the plaintiffs had no grounds for any complaint against the defendants in relation to a disciplinary investigation by the Professional Engineers of Ontario. Although the plaintiffs agreed to an additional clause to address these concerns, Engio did not approve the language and the settlement process stalled.^[6]

The plaintiffs brought a motion seeking to enforce the settlement. Engio opposed the enforcement of the settlement terms (the other defendants did not). Engio took the position that the mutual release could prevent him from seeking recovery against the parties to the release for damages suffered by virtue of disciplinary proceedings before the Professional Engineers of Ontario. He asserted that his counsel had no instructions to agree to a mutual release, and that his agreement to the settlement was contingent on a satisfactory release. An affidavit was filed by Engio's former counsel which indicated that Engio was apprised of the settlement terms and involved in the settlement negotiations.^[7]

The motion judge granted the motion to enforce the settlement. The motion judge found that Engio was represented when the settlement terms were agreed to, including the mutual release, and that there were no material concerns about the settlement. The motion judge rejected Engio's argument that he was not represented by counsel at the relevant time, finding there was no evidence to support it. The motion judge further noted that concerns between Engio and his former counsel and concerns about the effect of the

mutual release were beyond the purview of the motion.^[8]

The Court of Appeal affirmed the conclusions of the motion judge, and dismissed the appeal. In particular, the Court of Appeal noted that it was proper for the motion judge to conclude that any concerns between the appellant and his former counsel or regarding the effect of the mutual release were beyond the scope of the motion.^[9]

On appeal, Engio sought to admit fresh evidence concerning allegations against his former counsel and allegations of abusive conduct, misrepresentations and bad faith by the respondents on the appeal. The Court of Appeal concluded the evidence would not have affected the motion judge's conclusion and dismissed the motion for fresh evidence.^[10]

The decision, while brief, demonstrates that a party will not be permitted to unwind a settlement on the basis of a dispute as between the party and their counsel. The decision also underscores the importance for lawyers to carefully explain the terms of settlement and risks to their client, and to document those discussions carefully.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

^[1] 2020 ONCA 496 [Appeal].

^[2] Endorsement of The Honourable Mr. Justice Sossin dated February 11, 2019 [Endorsement] at para. 1.

^[3] *Ibid* at para. 2.

^[4] *Ibid* at para. 3.

^[5] *Ibid* at para. 4.

^[6] *Ibid* at paras. 5-6.

^[7] *Ibid* at paras. 7-9.

^[8] *Ibid* at paras. 10-11; Appeal at paras. 3-4.

^[9] Appeal at paras. 3-4 & 6.

^[10] *Ibid* at paras. 5-6.

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