



SUPREME COURT OF CANADA

CITATION: Quebec (Criminal and Penal Prosecutions) v. Jodoin, 2017 SCC 26
APPEAL HEARD: December 5, 2016
JUDGMENT RENDERED: May 12, 2017
DOCKET: 36539

BETWEEN:

Director of Criminal and Penal Prosecutions
Appellant

and

Robert Jodoin
Respondent

- and -

**Director of Public Prosecutions, Criminal Lawyers' Association (Ontario),
Association des avocats de la défense de Montréal, Trial Lawyers Association of
British Columbia and Canadian Civil Liberties Association**
Interveners

OFFICIAL ENGLISH TRANSLATION: Reasons of Gascon J.

CORAM: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté,
Brown and Rowe JJ.

REASONS FOR JUDGMENT: Gascon J. (McLachlin C.J. and Moldaver, Karakatsanis,
(paras. 1 to 57) Wagner, Brown and Rowe JJ. concurring)

JOINT DISSENTING REASONS: Abella and Côté JJ.
(paras. 58 to 75)

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QUEBEC (CRIMINAL AND PENAL PROSECUTIONS) v. JODOIN

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Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté,
Brown and Rowe JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Criminal law — Costs — Lawyers — Courts — Jurisdiction — Superior Court dismissing motions of defence lawyer for writs of prohibition and awarding costs against lawyer personally — Court of Appeal setting award aside — Criteria and process applicable to exercise by courts of their power to impose such sanction on lawyer — Whether awarding costs against lawyer personally was justified in this case — Whether Court of Appeal erred in substituting its own opinion for that of Superior Court.

J, an experienced criminal lawyer, was representing 10 clients charged with impaired driving. On the morning of a scheduled hearing in the Court of Québec on a motion for disclosure of evidence in his clients' cases, before it even began, J had the office of the Superior Court stamp a series of motions for writs of prohibition in which he challenged the jurisdiction of the Court of Québec judge who was to preside over the hearing, alleging bias on the judge's part. However, before the motions were served, the parties learned that another judge would be presiding instead. The motions were therefore put aside, and the hearing on the motion for disclosure of evidence began. At the hearing, J objected to the testimony of an expert witness called by the Crown on the ground that he had not received the required notice. The judge decided to authorize the examination in chief of the expert after the lunch break. During the break, J drew up a new series of motions for writs of prohibition, this time challenging that judge's jurisdiction and alleging, once again, bias on the judge's part. After the break, he informed the judge of this and the hearing was adjourned, as the service of such motions suspends proceedings until the

Superior Court has ruled on them. The Superior Court dismissed the motions and, at the Crown's request, awarded costs against J personally. The Court of Appeal affirmed the Superior Court's judgment on the disposition of the motions, but allowed the appeal solely to set aside the award of costs against J personally.

Held (Abella and Côté JJ. dissenting): The appeal should be allowed and the award of costs restored.

Per McLachlin C.J. and Moldaver, Karakatsanis, Wagner, **Gascon**, Brown and Rowe JJ.: The courts have the power to maintain respect for their authority. This includes the power to manage and control the proceedings conducted before them. A court therefore has an inherent power to control abuse in this regard and to prevent the use of procedure in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. This is a discretion that must be exercised in a deferential manner, but it allows a court to ensure the integrity of the justice system.

The awarding of costs against lawyers personally flows from the right and duty of the courts to supervise the conduct of the lawyers who appear before them and to note, and sometimes penalize, any conduct of such a nature as to frustrate or interfere with the administration of justice. As officers of the court, lawyers have a duty to respect the court's authority. If they fail to act in a manner consistent with their status, the court may be required to deal with them by punishing their misconduct. This power of the courts to award costs against a lawyer personally is not

limited to civil proceedings, but can also be exercised in criminal cases, which means that it may be exercised against defence lawyers. This power applies in parallel with the power of the courts to punish by way of convictions for contempt of court and that of law societies to sanction unethical conduct by their members.

The threshold for exercising the courts' discretion to award costs against a lawyer personally is a high one. An award of costs against a lawyer personally can be justified only on an exceptional basis where the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice. This high threshold is met where a court has before it an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer, or dishonest or malicious misconduct on his or her part, that is deliberate.

There are two important guideposts that apply to the exercise of this discretion. The first guidepost relates to the specific context of criminal proceedings, in which the courts must show a certain flexibility toward the actions of defence lawyers, whose role is not comparable in every respect to that of a lawyer in a civil case. If costs are awarded against a lawyer personally, the purpose must not be to discourage the lawyer from defending his or her client's rights and interests, and in particular the client's right to make full answer and defence. Thus, the considerations to be taken into account in assessing the conduct of defence lawyers can be different from those that apply in the case of lawyers in civil proceedings. The second

guidepost requires a court to confine itself to the facts of the case before it and to refrain from indirectly putting the lawyer's disciplinary record, or indeed his or her career, on trial. To consider facts external to the case before the court can be justified only for the limited purpose of determining, first, the intention behind the lawyer's actions and whether he or she was acting in bad faith, and, second, whether the lawyer knew, on bringing the impugned proceeding, that the courts do not approve of such proceedings and that this one was unfounded.

A court cannot award costs against a lawyer personally without following a certain process and observing certain procedural safeguards. A lawyer upon whom such a sanction may be imposed should be given prior notice of the allegations against him or her and the possible consequences. The notice should contain sufficient information about the alleged facts and the nature of the evidence in support of those facts, and should be sent far enough in advance to enable the lawyer to prepare adequately. The lawyer should have an opportunity to make separate submissions on costs and to adduce any relevant evidence in this regard. The applicable standard of proof is the balance of probabilities. In criminal proceedings, the Crown's role on this issue must be limited to objectively presenting the evidence and the relevant arguments.

The circumstances of this case were exceptional and justified an award of costs against J personally. The Superior Court correctly identified the applicable criteria and properly exercised its discretion. As the court noted, J's conduct in the

cases in question was particularly reprehensible. The purpose of that conduct was unrelated to the motions he brought. J was motivated by a desire to have the hearing postponed rather than by a sincere belief that the judges targeted by his motions were hostile. J thus used the extraordinary remedies for a purely dilatory purpose with the sole objective of obstructing the orderly conduct of the judicial process in a calculated manner. It was therefore reasonable for the court to conclude that J had acted in bad faith and in a way that amounted to abuse of process, thereby seriously interfering with the administration of justice. The Court of Appeal should not have intervened in the absence of an error of law, a palpable and overriding error of fact or an unreasonable exercise of discretion by the Superior Court.

Per Abella and Côté JJ. (dissenting): Personal costs orders are of an exceptional nature. In the criminal context, such orders could have a chilling effect on criminal defence counsel's ability to properly defend their client. Accordingly, they should only be issued in the most exceptional of circumstances and the Crown should be very hesitant about pursuing them.

In the instant case, J's behaviour did not warrant the exceptional remedy of a personal costs order. It appears that his conduct was not unique and that he was being punished as a warning to other lawyers engaged in similar tactics. The desire to make an example of J's behaviour does not justify straying from the legal requirement that his conduct be rare and exceptional before costs are ordered personally against him.

Moreover, J's motions for writs of prohibition were not unfounded to a sufficient degree to attract a personal costs order. The Crown had not provided J with the notice required for an expert witness testimony under s. 657.3(3) of the *Criminal Code*. J was, as a result, entitled to an adjournment under s. 657.3(4). The judge presiding in the Court of Québec only granted him a brief one over the lunch break and mistakenly said that J had already cross-examined the Crown's expert in other matters. In the circumstances, J's filing of motions for writs of prohibition for the purpose of suspending the proceedings can easily be seen as an error of judgment, but hardly one justifying a personal costs order. For these reasons, the appeal should be dismissed.

Cases Cited

By Gascon J.

Applied: *Quebec (Attorney General) v. Cronier* (1981), 63 C.C.C. (2d) 437; **considered:** *Young v. Young*, [1993] 4 S.C.R. 3; *Pacific Mobile Corporation v. Hunter Douglas Canada Ltd.*, [1979] 1 S.C.R. 842; **referred to:** *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167; *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481, rev'd 2002 SCC 63, [2002] 3 S.C.R. 307; *Morel v. Canada*, 2008 FCA 53, [2009] 1 F.C.R. 629; *Myers v. Elman*, [1940] A.C. 282; *Pearl v. Gentra Canada Investments Inc.*, [1998] R.L. 581; *R. v. Liberatore*, 2010 NSCA 26, 292 N.S.R. (2d) 69; *R. v. Smith* (1999), 133 Man. R. (2d) 89; *Canada (Procureur général) v. Bisson*, [1995] R.J.Q. 2409; *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1

S.C.R. 901; *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575; *R. v. Trang*, 2002 ABQB 744, 323 A.R. 297; *Fearn v. Canada Customs*, 2014 ABQB 114, 586 A.R. 23; *R. v. Ciarniello* (2006), 81 O.R. (3d) 561; *Leyshon-Hughes v. Ontario Review Board*, 2009 ONCA 16, 240 C.C.C. (3d) 181; *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395; *Histed v. Law Society of Manitoba*, 2007 MBCA 150, 225 Man. R. (2d) 74; *Groia v. Law Society of Upper Canada*, 2016 ONCA 471, 131 O.R. (3d) 1; *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520; *R. v. Joannis* (1995), 102 C.C.C. (3d) 35; *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908; *R. v. Carrier*, 2012 QCCA 594; *St-Jean v. Mercier*, 2002 SCC 15, [2002] 1 S.C.R. 491; *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570; *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303; *Galganov v. Russell (Township)*, 2012 ONCA 410, 294 O.A.C. 13; *Trackom Systems International Inc. v. Trackom Systems Inc.*, 2014 QCCA 1136; *Québec (Procureur général) v. Bélanger*, 2012 QCCA 1669, 4 M.P.L.R. (5th) 21; *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631.

By Abella and Côté JJ. (dissenting)

Young v. Young, [1993] 4 S.C.R. 3; *R. v. Gunn*, 2003 ABQB 314; 335 A.R. 137.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 11.

Criminal Code, R.S.C. 1985, c. C-46, s. 657.3(3), (4).

Professional Code, CQLR, c. C-26, s. 23.

Rules of Practice of the Superior Court of the Province of Quebec, Criminal Division, 2002, SI/2002-46, s. 25.

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Code, Michael. “Counsel’s Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System” (2007), 11 *Can. Crim. L.R.* 97.

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Morissette, Yves-Marie. “L’initiative judiciaire vouée à l’échec et la responsabilité de l’avocat ou de son mandant” (1984), 44 *R. du B.* 397.

APPEAL from a judgment of the Quebec Court of Appeal (Dutil, Levesque and Émond JJ.A.), 2015 QCCA 847, [2015] AZ-51175627, [2015] J.Q. n° 4142 (QL), 2015 CarswellQue 4364 (WL Can.), setting aside in part a decision of Bellavance J., 2013 QCCS 4661, [2013] AZ-51004528, [2013] J.Q. n° 13287 (QL), 2013 CarswellQue 10170 (WL Can.). Appeal allowed, Abella and Côté JJ. dissenting.

Daniel Royer and *Catherine Dumais*, for the appellant.

Catherine Cantin-Dussault, for the respondent.

Gilles Villeneuve and *Mathieu Stanton*, for the intervener the Director of Public Prosecutions.

Maxime Hébrard and *Marlys A. Edwardh*, for the intervener the Criminal Lawyers' Association (Ontario).

Walid Hijazi, *Lida Sara Nourai* and *Nicholas St-Jacques*, for the intervener Association des avocats de la défense de Montréal.

Mathew P. Good and *Ariane Bisailon*, for the intervener the Trial Lawyers Association of British Columbia.

Frank Addario and *Stephen Aylward*, for the intervener the Canadian Civil Liberties Association.

English version of the judgment of McLachlin C.J. and Moldaver, Karakatsanis, Wagner, Gascon, Brown and Rowe JJ. delivered by

I. Overview

[1] This appeal concerns the scope of the courts' power to award costs¹ against a lawyer personally in a criminal proceeding. Although the courts have the power to maintain respect for their authority and to preserve the integrity of the administration of justice, the appropriateness of imposing such a sanction in a criminal proceeding must be assessed in light of the special role played by defence lawyers and the rights of the accused persons they represent. In such cases, the courts must be cautious in exercising this discretion.

[2] The respondent is an experienced criminal lawyer and a member of the Barreau du Québec. In several impaired driving cases joined for hearing on a single motion for disclosure of evidence, he filed two series of motions on the same day for writs of prohibition against two judges of the Court of Québec, each time on questionable grounds of bias, apparently in order to obtain a postponement of the scheduled hearing. A first judge had initially been assigned to preside over that hearing, but a second one replaced the first unexpectedly at the last minute. In response to that unprecedented strategy, which resulted in the postponement of the hearing in the Court of Québec, the appellant, the Crown, asked not only that the motions be dismissed, but also that the costs of the motions be awarded against the respondent personally.

¹ The Superior Court and the Court of Appeal used the French term “*dépens*” in their reasons and in their conclusions. The appellant and the respondent have referred sometimes to the concept of “*dépens*” and sometimes to that of “*frais*”. For consistency, I will use the term used by the courts below in the French version of these reasons.

[3] The Superior Court held that awarding costs against a lawyer personally can be justified in the case of a frivolous proceeding that denotes a serious and deliberate abuse of the judicial system. The judge expressed the opinion that the respondent's intentional acts were indicative of such abuse and constituted exceptional conduct that justified making an award against him personally. The Court of Appeal acknowledged that the motions for writs of prohibition should be dismissed, but nonetheless set aside the award of costs against the respondent personally, finding that his conduct did not satisfy the strict criteria developed by the courts in this regard.

[4] In my opinion, the appeal should be allowed. The Superior Court correctly identified the applicable criteria and properly exercised the discretion it has in such matters. The Court of Appeal should not have intervened in the absence of an error of law, a palpable and overriding error of fact or an unreasonable exercise of his discretion by the motion judge. Although the exercise of this discretion will be warranted only in rare cases, the circumstances of the instant case were exceptional and justified an award of costs against the respondent personally.

II. Context

[5] The relevant context of this case can be summarized briefly. In April 2013, the respondent was representing 10 clients charged with driving while impaired by alcohol or while their blood alcohol level exceeded the legal limit. There were 12 cases, and they were joined for a hearing scheduled in the Court of Québec on a

motion for disclosure of evidence, because the accused were all represented by the respondent. On the morning of the hearing, before it even began, the respondent had the office of the Superior Court stamp a series of motions for writs of prohibition in which he challenged the jurisdiction of the Court of Québec judge who was to preside over the hearing, alleging bias on the judge's part. As an experienced criminal lawyer, the respondent was well aware that the filing of such motions results in the immediate postponement of the hearing then under way until the Superior Court has ruled on them.

[6] However, the same morning, before the motions were served, the parties learned that another judge would be presiding over the hearing instead. The motions were therefore put aside, and the hearing on the motion for disclosure of evidence began. At the hearing, the Crown stated that it wished to call its expert witness. The respondent objected on the ground that he had not received the notice required by s. 657.3(3) of the *Criminal Code*, R.S.C. 1985, c. C-46, and that he had been unable to consult the expert's resumé. He requested a postponement. The judge heard the parties on this subject and decided to authorize the examination in chief of the expert after the lunch break. In his view, the respondent would have an opportunity to examine the expert's resumé before the hearing resumed.

[7] During the break, the respondent chose instead to draw up a new series of motions for writs of prohibition, this time challenging the second judge's jurisdiction and alleging, once again, bias on the judge's part. After the break, he informed the

judge of this. As a result of s. 25 of the *Rules of Practice of the Superior Court of the Province of Quebec, Criminal Division, 2002*, SI/2002-46, which provides that the service of such motions suspends proceedings, the judge had no choice but to adjourn the hearing.

[8] The appellant, believing that the sole purpose of these successive extraordinary remedies was to obtain a postponement for an ulterior motive, objected to the respondent's tactic. He told the respondent that he intended to seek an award of costs against the respondent personally because of the latter's dilatory motions and abuse of process. The Superior Court thus heard the motions for writs of prohibition both on the merits and on the award of costs being sought against the respondent personally.

III. Judicial History

A. *Quebec Superior Court (2013 QCCS 4661)*

[9] The Superior Court judge began by rejecting the arguments on the merits of the motions for writs of prohibition against the Court of Québec judge. He found that the motions were unfounded and frivolous and that they were of questionable legal value for an experienced lawyer such as the respondent.

[10] The judge then dealt with the costs award being sought against the respondent. Indeed, he devoted the bulk of his reasons to that issue, as it was clear, to

say the least, that the proceeding was frivolous, given that there was nothing in the words of the Court of Québec judge to indicate an excess of jurisdiction.

[11] On the law applicable to the issue of costs in criminal proceedings, the Superior Court judge cited *Quebec (Attorney-General) v. Cronier* (1981), 63 C.C.C. (2d) 437 (Que. C.A.). He noted that L’Heureux-Dubé J.A., as she then was, had emphasized [TRANSLATION] “the inherent power of the Superior Court to manage cases within its jurisdiction and to award costs not provided for by statute” (para. 115 (CanLII)). On the basis of the principles enunciated in *Cronier*, the judge found that the issue was whether what was before him was “a frivolous proceeding that denotes a serious abuse of the judicial system”, an abuse that was “deliberate” (para. 117).

[12] On the facts of the case before him, the judge found that the [TRANSLATION] “preparation, at lunchtime on April 23, 2013, of a series of motions for writs of prohibition in a legal situation that did not call for such a proceeding, and the continued presentation of those proceedings,” constituted abuse of “section 25 of the *Rules of Practice* and the suspension order it entails” (para. 118). In his analysis, the judge took the respondent’s conduct in other cases into account in determining whether he had had culpable intent to file, as a calculated act, proceedings that he knew to be frivolous and abusive.

[13] The judge concluded that the respondent’s conduct satisfied the applicable criteria and that it had [TRANSLATION] “led, in a manner that well-informed Canadians would not approve of, to paralysis of the legitimate work of the Court of

Québec sitting in a criminal proceeding and to disruption of its local judges' case management work" (para. 119). He dismissed the motions for writs of prohibition and awarded costs against the respondent personally, setting them at \$3,000 for all the cases combined, or \$250 per case.

B. *Quebec Court of Appeal (2015 QCCA 847)*

[14] The Court of Appeal affirmed the Superior Court's judgment on the disposition of the motions for writs of prohibition, but allowed the appeal solely to set aside the award of costs against the respondent personally. It noted that, in criminal cases, [TRANSLATION] "costs have no longer been systematically awarded since the 1954 reform of the criminal justice system" (para. 5 (CanLII)). However, it acknowledged that, "in circumstances that are quite rare and exceptional", the Superior Court can, "in the exercise of its inherent superintending and reforming powers, award costs" (para. 6). In the case at bar, the Court of Appeal was of the view that the Superior Court should not have exercised those inherent powers to sanction conduct that had occurred in another court that itself had the power to punish for contempt of court. It concluded that, on the facts, the situation [TRANSLATION] "does not have the exceptional and rare quality of an act that seriously undermines the authority of that court or that seriously interferes with the administration of justice" (para. 11).

IV. Issue

[15] The only issue in this appeal is whether the Superior Court was justified in awarding costs against the respondent personally. What must be done to resolve it is, first, to determine the scope of the courts' power to impose such a sanction, the applicable criteria and the process to be followed, next, to ascertain whether the criteria were properly applied by the Superior Court judge and, finally, to determine whether the intervention of the Court of Appeal was necessary.

V. Analysis

A. *Awarding of Costs Against a Lawyer Personally*

(1) Power of the Courts

[16] The courts have the power to maintain respect for their authority. This includes the power to manage and control the proceedings conducted before them (*R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 58). A court therefore has an inherent power to control abuse in this regard (*Young v. Young*, [1993] 4 S.C.R. 3, at p. 136) and to prevent the use of procedure “in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute”: *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting, reasons approved in 2002 SCC 63, [2002] 3 S.C.R. 307. This is a discretion that must, of course, be exercised in a deferential manner (*Anderson*, at para. 59), but it allows a court to

“ensure the integrity of the justice system” (*Morel v. Canada*, 2008 FCA 53, [2009] 1 F.C.R. 629, at para. 35).

[17] It is settled law that this power is possessed both by courts with inherent jurisdiction and by statutory courts (*Anderson*, at para. 58). It is therefore not reserved to superior courts but, rather, has its basis in the common law: *Myers v. Elman*, [1940] A.C. 282 (H.L.), at p. 319; M. Code, “Counsel’s Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System” (2007), 11 *Can. Crim. L.R.* 97, at p. 126.

[18] There is an established line of cases in which courts have recognized that the awarding of costs against lawyers personally flows from the right and duty of the courts to supervise the conduct of the lawyers who appear before them and to note, and sometimes penalize, any conduct of such a nature as to frustrate or interfere with the administration of justice: *Myers*, at p. 319; *Pacific Mobile Corporation v. Hunter Douglas Canada Ltd.*, [1979] 1 S.C.R. 842, at p. 845; *Cronier*, at p. 448; *Pearl v. Gentra Canada Investments Inc.*, [1998] R.L. 581 (Que. CA), at p. 587. As officers of the court, lawyers have a duty to respect the court’s authority. If they fail to act in a manner consistent with their status, the court may be required to deal with them by punishing their misconduct (M. Code, at p. 121).

[19] This power of the courts to award costs against a lawyer personally is not limited to civil proceedings, but can also be exercised in criminal cases (*Cronier*). This means that it may sometimes be exercised against defence lawyers in criminal

proceedings, although such situations are rare: *R. v. Liberatore*, 2010 NSCA 26, 292 N.S.R. (2d) 69; *R. v. Smith* (1999), 133 Man. R. (2d) 89 (Q.B.), at para. 43; *Canada (Procureur général) v. Bisson*, [1995] R.J.Q. 2409 (Sup. Ct.); M. Code, at p. 122.

[20] The power to control abuse of process and the judicial process by awarding costs against a lawyer personally applies in parallel with the power of the courts to punish by way of convictions for contempt of court and that of law societies to sanction unethical conduct by their members. Punishment for contempt is thus based on the same power the courts have “to enforce their process and maintain their dignity and respect” (*United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, at p. 931). These sanctions are not mutually exclusive, however. If need be, they can even be imposed concurrently in relation to the same conduct.

[21] This being said, although the criteria for an award of costs against a lawyer personally are comparable to those that apply to contempt of court (*Cronier*, at p. 449), the consequences are by no means identical. Contempt of court is strictly a matter of law and can result in harsh sanctions, including imprisonment. In addition, the rules of evidence that apply in a contempt proceeding are more exacting than those that apply to an award of costs against a lawyer personally, as contempt of court must be proved beyond a reasonable doubt. Because of the special status of lawyers as officers of the court, a court may therefore opt in a given situation to award costs against a lawyer personally rather than citing him or her for contempt (I. H. Jacob,

“The Inherent Jurisdiction of the Court” (1970), 23 *Current Leg. Probs.* 23, at pp. 46-48).

[22] As for law societies, the role they play in this regard is different from, but sometimes complementary to, that of the courts. They have, of course, an important responsibility in overseeing and sanctioning lawyers’ conduct, which derives from their primary mission of protecting the public (s. 23 of the *Professional Code*, CQLR, c. C-26). However, the judicial powers of the courts and the disciplinary powers of law societies in this area can be distinguished, as this Court has explained as follows:

The court’s authority is preventative — to protect the administration of justice and ensure trial fairness. The disciplinary role of the law society is reactive. Both roles are necessary to ensure effective regulation of the profession and protect the process of the court. [Emphasis deleted]

(*R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 35)

[23] The courts therefore do not have to rely on law societies to oversee and sanction any conduct they may witness. It is up to the courts to determine whether, in a given case, to exercise the power they have to award costs against a lawyer personally in response to the lawyer’s conduct before them. However, there is nothing to prevent the law society from exercising in parallel its power to assess its members’ conduct and impose appropriate sanctions.

[24] In most cases, of course, the implications for a lawyer of being ordered personally to pay costs are less serious than those of the other two alternatives. A

conviction for contempt of court or an entry in a lawyer's disciplinary record generally has more significant and more lasting consequences than a one-time order to pay costs. Moreover, as this appeal shows, an order to pay costs personally will normally involve relatively small amounts, given that the proceedings will inevitably be dismissed summarily on the basis that they are unfounded, frivolous, dilatory or vexatious.

(2) Applicable Criteria

[25] While the courts do have the power to award costs against a lawyer personally, the threshold for exercising it is a high one. It is in fact rarely exercised, and the question whether it should be arises only infrequently: *Cronier*; *Young*; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575, at para. 85; *R. v. Trang*, 2002 ABQB 744, 323 A.R. 297, at para. 481; *Fearn v. Canada Customs*, 2014 ABQB 114, 586 A.R. 23, at para. 121; *Smith*, at para. 43. Only serious misconduct can justify such a sanction against a lawyer. Moreover, the courts must be cautious in imposing it in light of the duties owed by lawyers to their clients:

Moreover, courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.
[*Young*, at p. 136]

[26] The type of conduct that can be sanctioned in this way was analyzed in depth in *Cronier*. L’Heureux-Dubé J.A. concluded after reviewing the case law that the courts are justified in exercising such a discretion in cases involving abuse of process, frivolous proceedings, misconduct or dishonesty, or actions taken for ulterior motives, where the effect is to seriously undermine the authority of the courts or to seriously interfere with the administration of justice. She noted, however, that this power must not be exercised in an arbitrary and unlimited manner, but rather with restraint and caution. The motion judge in the case at bar properly relied on *Cronier*, and the Court of Appeal also endorsed the principles stated in it.

[27] Several courts across the country have adopted the requirement of conduct that represents a marked and unacceptable departure from the standard of reasonable conduct expected of a player in the judicial system: *Bisson*; *R. v. Ciarniello* (2006), 81 O.R. (3d) 561 (C.A.), at para. 31; *Leyshon-Hughes v. Ontario Review Board*, 2009 ONCA 16, 240 C.C.C. (3d) 181, at para. 62; *Fearn*, at para. 119; *Smith*, at para. 58. Also, as the House of Lords stated in a case that has been cited by Canadian courts, including in *Cronier*, a mere mistake or error of judgment will not be sufficient to justify awarding costs against a lawyer personally; there must at the very least be gross neglect or inaccuracy (*Myers*, at p. 319).

[28] There are in this Court’s jurisprudence examples of conduct that has led to awards of costs being made against lawyers personally. In *Young*, the Court held that such a sanction is justified if “repetitive and irrelevant material, and excessive

motions and applications, characterized” the conduct in question and if this was the result of a lawyer’s acting “in bad faith in encouraging this abuse and delay” (pp.135-36). In *Pacific Mobile*, the Court awarded costs against a company’s solicitors personally in a bankruptcy case. The solicitors had been granted a number of adjournments and had instituted proceedings that were inconsistent with directions given by the trial judge. On the issue of costs, Pigeon J. stressed that he did “not consider it fair to make the debtor’s creditors bear the cost of proceedings which were not instituted in their interest: quite the contrary”. He added that such an award of costs, “far from appropriately discouraging unnecessary appeals occasioning costly delays, tends on the contrary to favour them” (p. 844). In the circumstances, he determined that “the Court should [therefore] make use of its power to order costs payable by solicitors personally” (p. 845).

[29] In my opinion, therefore, an award of costs against a lawyer personally can be justified only on an exceptional basis where the lawyer’s acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice. This high threshold is met where a court has before it an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer, or dishonest or malicious misconduct on his or her part, that is deliberate. Thus, a lawyer may not knowingly use judicial resources for a purely dilatory purpose with the sole objective of obstructing the orderly conduct of the judicial process in a calculated manner.

[30] This being said, however, it should be noted that there are two important guideposts that apply to the exercise of this discretion in a situation like the one in this appeal.

[31] The first guidepost relates to the specific context of criminal proceedings, in which the courts must show a certain flexibility toward the actions of defence lawyers. In considering the circumstances, the courts must bear in mind that the context of criminal proceedings differs from that of civil proceedings. In criminal cases, the rule is that costs are not awarded; no provision is made, for example, for awards of costs where extraordinary remedies are sought (*Cronier*, at p. 447). Awards of costs made against lawyers personally are therefore purely punitive and do not include the compensatory aspect costs have in civil cases.

[32] As well, the role of a defence lawyer is not comparable in every respect to that of a lawyer in a civil case. For example, the latter has an ethical duty to encourage compromise and agreement as much as possible. In contrast, a defence lawyer has no obligation to help the Crown in the conduct of its case. It is the very essence of the role of a defence lawyer to challenge, sometimes forcefully, the decisions and arguments of other players in the judicial system in light of the serious consequences they may have for the lawyer's client: *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, at paras. 64-66, citing *Histed v. Law Society of Manitoba*, 2007 MBCA 150, 225 Man. R. (2d) 74, at para. 71. Indeed, committed and zealous advocacy for clients' rights and interests and a strong and independent

defence bar are essential in an adversarial system of justice: *Groia v. Law Society of Upper Canada*, 2016 ONCA 471, 131 O.R. (3d) 1, at para. 129; P. J. Monahan, “The Independence of the Bar as a Constitutional Principle in Canada”, in Law Society of Upper Canada, ed., *In the Public Interest: The Report and Research Papers of the Law Society of Upper Canada’s Task Force on the Rule of Law and the Independence of the Bar* (2007), 117. If these conditions are not met, the reliability of the process and the fairness of the trial will suffer: *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520, at para. 25, quoting *R. v. Joannis* (1995), 102 C.C.C. (3d) 35 (Ont. C.A.), at p. 57. In short, if costs are awarded against a lawyer personally in criminal proceedings, the purpose must not be to discourage the lawyer from defending his or her client’s rights and interests, and in particular the client’s right to make full answer and defence. From this point of view, the considerations to be taken into account in assessing the conduct of defence lawyers can be different from those that apply in the case of lawyers in civil proceedings.

[33] The second guidepost requires a court to confine itself to the facts of the case before it and to refrain from indirectly putting the lawyer’s disciplinary record, or indeed his or her career, on trial. The facts that can be considered in awarding costs against a lawyer personally must generally be limited to those of the case before the court. In its analysis, the court must not conduct an ethics investigation or seek to assess the whole of the lawyer’s practice. It is not a matter of punishing the lawyer “for his or her entire body of work”. To consider facts external to the case before the court can be justified only for the limited purpose of determining, first, the intention

behind the lawyer's actions and whether he or she was acting in bad faith, and, second, whether the lawyer knew, on bringing the impugned proceeding, that the courts do not approve of such proceedings and that this one was unfounded.

[34] In this regard, certain evidence that is external to the case before the court may sometimes be considered, because it is of high probative value and has a strong similarity to the alleged facts, in order to establish, for example, wilful intent and knowledge on the lawyer's part. However, it must be limited to the specific issue before the court, that is, the lawyer's conduct. It may not serve more broadly as proof of a general propensity or bad character (*R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908, at paras. 71, 72 and 82).

(3) Process to be Followed

[35] This being said, a court obviously cannot award costs against a lawyer personally without following a certain process and observing certain procedural safeguards (Y.-M. Morissette, "L'initiative judiciaire vouée à l'échec et la responsabilité de l'avocat ou de son mandant" (1984), *R. du B.* 397, at p. 425). However, it is important that this process be flexible and that it enable the courts to adapt to the circumstances of each case.

[36] Thus, a lawyer upon whom such a sanction may be imposed should be given prior notice of the allegations against him or her and the possible consequences. The notice should contain sufficient information about the alleged facts and the nature

of the evidence in support of those facts. The notice should be sent far enough in advance to enable the lawyer to prepare adequately. The lawyer should, of course, have an opportunity to make separate submissions on costs and to adduce any relevant evidence in this regard. Ideally, the issue of awarding costs against the lawyer personally should be argued only after the proceeding has been resolved on its merits.

[37] However, these protections differ from the ones conferred by ss. 7 and 11 of the *Canadian Charter of Rights and Freedoms*. Where an award of costs is sought against a lawyer personally, the lawyer is not a “person charged with an offence” and the proceeding is not a criminal one *per se*. Although the applicable criteria are strict, the standard of proof is the balance of probabilities.

[38] In closing, I note that the Crown’s role on this specific issue must be limited in criminal proceedings. In such a situation, it is of course up to the parties as well as the court to raise a problem posed by a lawyer’s conduct. However, the Crown’s role is to objectively present the evidence and the relevant arguments on this point. It is the court that is responsible for determining whether a sanction should be imposed, and that has the power to impose one, in its role as guardian of the integrity of the administration of justice. The Crown must confine itself to its role as prosecutor of the accused. It must not also become the prosecutor of the defence lawyer.

B. *Application to the Facts of the Instant Case*

(1) Judgment of the Superior Court

[39] In light of the foregoing, I am of the view that the motion judge properly exercised his discretion in awarding costs against the respondent personally.

[40] The motion judge first correctly identified the standard of conduct on which such an award is based and correctly summed up the law in requiring that there be a [TRANSLATION] “frivolous proceeding that denotes a serious abuse of the judicial system” and a “deliberate strategy” (para. 117).

[41] Next, he properly analyzed the facts to find that the respondent’s acts constituted abusive conduct that was designed to indirectly obtain a postponement and had led to [TRANSLATION] “paralysis of the legitimate work of the Court of Québec” and “disruption of its local judges’ case management work” (para. 119). He correctly distinguished an [TRANSLATION] “unintended result” from a “deliberate strategy” (para. 117). The judge cannot be faulted for choosing to exercise his discretion in respect of a defence lawyer here.

[42] As the judge noted, the respondent’s conduct in the cases in question was particularly reprehensible. Its purpose was unrelated to the motions he brought. The respondent was motivated by a desire to have the hearing postponed rather than by a sincere belief that the judges targeted by his motions were hostile. His subsequent conduct was consistent with this finding. It is quite odd, if not unprecedented, for a lawyer to file, on the same day and in the same cases, two series of motions for writs

of prohibition against two different judges on the same ground of bias. The respondent thus used the extraordinary remedies for a purely dilatory purpose with the sole objective of obstructing the orderly conduct of the judicial process in a calculated manner. It was therefore reasonable for the judge to conclude that the respondent had acted in bad faith and in a way that amounted to abuse of process, thereby seriously interfering with the administration of justice.

[43] Finally, the procedural safeguards were observed in this case. The Crown sent the respondent two prior notices of its intention to seek an award of costs against him personally. The respondent had more than three months to prepare. The prosecution's role was limited to notifying the respondent of its intention to seek an award of costs against him personally and presenting the relevant evidence to the judge. The respondent had an opportunity to make submissions to the judge in this regard. Moreover, he raised no objection to the process or to the evidence adduced on the issue of costs. Nor did he insist on being represented by counsel or ask that the issue of costs be dealt with separately from the merits of the motions.

[44] That being the case, I do not accept the respondent's criticisms to the effect that the judge improperly relied on inadmissible similar fact evidence. On the contrary, I note that the judge's findings were based on admissible evidence that supported his analysis on the respondent's intention and knowledge:

[TRANSLATION] His preparation, at lunchtime on April 23, 2013, of a series of motions for writs of prohibition in a legal situation that did not call for such a proceeding, and the continued presentation of those

proceedings, were two calculated acts that did not result from ignorance of the law on the part of Mr. Jodoin, an able tactician who defends his clients forcefully when he is before the Court. [Emphasis added; para. 118]

[45] For this purpose, the judge focused primarily on evidence specific to the cases before him. He discussed the specific circumstances that led to the preparation of the motions for writs of prohibition. He reviewed in detail the transcript of the hearing that had culminated in the postponement being granted by the Court of Québec judge. And he considered the respondent's conduct in the broader context of the motions for which he was ordered to pay costs personally.

[46] It is true that the judge took note of certain facts from other cases in which the respondent had been involved, as the Crown had invited him to do with no objection from the respondent. However, the judge considered those facts to be [TRANSLATION] “relevant to the determination of whether [the respondent's] motions are frivolous and dilatory and whether an award of costs must be made against him personally, and in what amount” (para. 109). He found that this evidence was relevant to his analysis on whether the respondent had had culpable intent to file and present a proceeding that he knew to be frivolous and abusive. The judge referred to it in determining, among other things, that the impugned conduct was a deliberate strategy on the respondent's part and not an unintended result.

[47] In this regard, the judge was justified in referring to motions for writs of prohibition that had been filed in 2011 against one of the two Court of Québec judges

concerned in the 2013 motions (paras. 22-27). The motions from 2011 were all dismissed in a judgment that was subsequently affirmed by the Court of Appeal (*R. v. Carrier*, 2012 QCCA 594). In that case, the respondent had sought writs of prohibition in relation to a refusal by the judge in question to allow the withdrawal of a motion for the disclosure of evidence. In its judgment, the Court of Appeal mentioned that a court can review a party's decision to withdraw a proceeding, especially where the goal is to obtain a postponement. It concluded that the alleged apprehension of bias on the judge's part was without merit, because [TRANSLATION] "although the judge was overly interventionist, the fact remains that there is no reason to doubt his impartiality" (para. 4).

[48] As the motion judge observed, there is a strong similarity between those motions from 2011 and the 2013 motions in terms of the facts, the decisions being challenged, the procedures that were chosen and the nature of the exchanges between the respondent and the judge in question. This could support findings that the respondent's actions were calculated and intentional and that he had knowledge of the applicable legal rules and had deliberately ignored them. It could be concluded from this relevant evidence that the respondent was well aware of the invalidity of the extraordinary remedy he had chosen to seek and of the foreseeable consequences of his actions, the *modus operandi* of which was similar to that of 2011. This was not improper evidence of a general propensity or bad character, but admissible evidence of the respondent's state of mind when he filed the proceedings.

[49] As regards the respondent's argument that the judge wanted to make an example of his case in the district in question, I am of the view that there is not really any support for it. That is certainly not what the judge said at para. 11 of his reasons. Moreover, it is clear from his reasons as a whole that he did not rely either on that factor or on the specific context of the district to support his conclusions. As can be seen from his analysis, he objectively had enough evidence to justify awarding costs against the respondent personally on the basis of the specific facts of the case before him.

(2) Judgment of the Court of Appeal

[50] In this context, the Court of Appeal was in my view wrong to choose to substitute its own opinion for that of the Superior Court on this issue. In fact, the Court of Appeal reassessed the facts before concluding that the situation before the Superior Court did not have the exceptional character required in the case law. And it did so despite having acknowledged that the motion judge had, after thoroughly analyzing the facts, been right to dismiss the motions for writs of prohibition he had found to be frivolous, unfounded and abusive.

[51] It was not open to the Court of Appeal to intervene without first identifying an error of law, a palpable and overriding error in the motion judge's analysis of the facts, or an unreasonable or clearly wrong exercise of his discretion. It did not identify such an error. This Court, too, is subject to this standard for intervention (*St-Jean v. Mercier*, 2002 SCC 15, [2002] 1 S.C.R. 491, at para. 46).

Furthermore, given its position at the second level of appeal, this Court's role is not to reassess the findings of fact of a judge at the trial level that an appellate court has not questioned: "... the principle of non-intervention 'is all the stronger in the face of concurrent findings of both courts below' ..." (*ibid.*, at para. 45, quoting *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570, at p. 574 (emphasis deleted)).

[52] It is well established that costs are awarded on a discretionary basis: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27; *Galganov v. Russell (Township)*, 2012 ONCA 410, 294 O.A.C. 13, at paras. 23-25. In a case involving an exercise of discretion, an appellate court must show great deference and must be cautious in intervening, doing so only where it is established that the discretion was exercised in an abusive, unreasonable or non-judicial manner: *Trackcom Systems International Inc. v. Trackcom Systems Inc.*, 2014 QCCA 1136, at para. 36 (CanLII); *Québec (Procureur général) v. Bélanger*, 2012 QCCA 1669, 4 M.P.L.R. (5th) 21. In its brief judgment, the Court of Appeal did not specify an error of any kind whatsoever in the motion judge's reasons that would justify its intervention.

[53] As for the comment that the Superior Court should not have exercised its jurisdiction in relation to facts or conduct that had occurred in a court that itself had the power to punish the respondent for contempt of court, I believe that it reflects a misunderstanding of the situation. Costs are in order in this case because of the

frivolous and abusive nature of the motions for writs of prohibition that were heard and dismissed by the Superior Court. It was the Superior Court that had the discretion to determine whether the costs of those motions should be awarded against the respondent.

VI. Conclusion

[54] In the final analysis, the Superior Court judge addressed the valid concerns voiced by the Crown, which he summarized as follows:

[TRANSLATION] Take a more rigorous approach to the criminal law, fight tooth and nail for your clients, be demanding of the prosecution so that it makes its entire case competently, but face the music so that, in an overburdened judicial system in which each person's time must be used sparingly and efficiently, cases move forward. [Emphasis deleted, para. 11.]

[55] The judge sent a clear message to the players in the judicial system, in terms that were once again unequivocal, by denouncing actions and decisions that had led to an unjustified paralysis of the legitimate work of courts sitting in criminal proceedings and to the disruption of the management of cases by their judges, and by sanctioning an abuse of process whose sole purpose had been to obtain a postponement and delay cases.

[56] The judge's comments were consistent with the principles recently enunciated by this Court in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, in which

the majority denounced, among other things, the culture of complacency toward delay that impairs the efficiency of the criminal justice system. In *Jordan*, the Court emphasized the importance of timely justice and noted that all participants in the criminal justice system must co-operate in achieving reasonably prompt justice. From this perspective, it is essential to allow the courts to play their role as guardians of the integrity of the administration of justice by controlling proceedings and eliminating unnecessary delay. That is what the Superior Court did here.

[57] I would therefore allow the appeal and restore the award of costs against the respondent.

The following are the reasons delivered by

ABELLA AND CÔTÉ JJ. —

[58] We agree that superior courts have, in theory, the power to award costs personally against counsel in the criminal context in exceptional circumstances. Justice Gascon, drawing on caselaw from both the civil and criminal context, has set out an excellent summary of the relevant principles. In our respectful view, however, the test was not met in this case. As noted by the Quebec Court of Appeal:

[TRANSLATION] The situation in the Quebec Superior Court . . . as regards the conduct of the appellant . . . *does not have the exceptional and rare quality of an act that seriously undermines the authority of that court or*

that seriously interferes with the administration of justice. [Emphasis added; footnote omitted.]

(2015 QCCA 847, at para. 11 (CanLII))

[59] The exceptional nature of personal costs orders was emphasized by this Court in *Young v. Young*, [1993] 4 S.C.R. 3:

. . . courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling. [p. 136]

[60] These concerns are magnified in the criminal context. In *R. v. Gunn*, 2003 ABQB 314, 335 A.R. 137, the Court of Queen's Bench of Alberta highlighted the chilling effect that personal costs orders could have on criminal defence counsel, where Langston J. observed:

. . . to sanction defence counsel in the course of their duties of protecting the criminally accused could have a chilling effect on counsel's ability to properly and zealously defend their client against all the powers that a state has to wield against them. [para. 50]

[61] The more appropriate response, if any, is to seek a remedy from the law society in question. As Michael Code observed, disciplinary processes present advantages over awards of costs:

A useful intermediate remedy, when repeated injunctions and reprimands have failed to put an end to counsel's "incivility," is for the trial judge to report the offending counsel to the Law Society. This is the remedy that was adopted by the B.C. Court of Appeal in *R. v. Dunbar et al.* and it was only exercised at the end of the hearing, when the Court delivered its Judgment. *The great value of this remedy, before resorting to more punitive sanctions such as costs orders and contempt citations, is that it does not disrupt the trial and it does not cause prejudice to the client of the offending counsel.* When the misconduct escalates to the point that costs and contempt remedies are under consideration, the lawyer is entitled to a hearing and the trial will inevitably be disrupted. By simply reporting the lawyer's misconduct to the Law Society, the court is able to escalate the available remedies without the need to conduct its own hearing into the alleged "incivility." Furthermore, the client may not be complicit in the lawyer's "incivility" and should not bear the cost or the prejudice of a hearing to consider sanctions against the lawyer. [Footnote omitted; emphasis added.]

(Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007), 11 *Can. Crim. L.R.* 97, at p. 119)

[62] This forms the policy basis for why the threshold is so high before ordering costs against criminal defence counsel. Only in the most exceptional of circumstances should they be ordered. Given the policy concerns and the exceptional nature of costs orders against defence counsel, it is worth emphasizing that the Crown should be very hesitant about pursuing them.

[63] We do not challenge the motion judge's finding that the writs of prohibition were requested for the purpose of postponing the proceedings and that the motions seeking the writs may not have had a solid legal foundation. Like the Court of Appeal, however, we are of the view that Mr. Jodoin's behaviour did not warrant the exceptional remedy of a personal costs order.

[64] It appears that Mr. Jodoin’s conduct in this case was not unique in the district of Bedford, as reflected in the motions judge’s comment that: [TRANSLATION] “In seeking a personal costs order against Mr. Jodoin, the prosecution wants to send a message to certain defence lawyers” (2013 QCCS 4661, at para. 11 (CanLII)). This suggests that Mr. Jodoin was being punished as a warning to other lawyers engaged in similar tactics. The court ordered costs against Mr. Jodoin personally for a total of \$3000.

[65] The desire to make an “example” of Mr. Jodoin’s behaviour does not justify straying from the legal requirement that his conduct be “rare and exceptional” before costs are ordered personally against him.

[66] Logically, the idea that costs should only be ordered against a lawyer personally in rare and exceptional circumstances cannot be reconciled with the fact that other defence counsel appear to have engaged in similar conduct.

[67] Mr. Jodoin has certainly not engaged in conduct we would commend. But to the extent that his behaviour was not unique in the district of Bedford, it is hard to see how it would amount to “dishonest or malicious misconduct” that would justify awarding costs personally against him (reasons of Gascon J., at para. 29).

[68] Moreover, we are not persuaded that Mr. Jodoin’s motions for writs of prohibition were unfounded to a sufficient degree to attract a personal costs order. The Superior Court concluded that Mr. Jodoin had filed those motions only for the

purpose of obtaining an adjournment. This, however, does not take full account of the context of the proceedings, where one of the grounds raised involved the application of s. 657.3(3) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[69] This provision states that “a party who intends to call a person as an expert witness shall, at least thirty days before the commencement of the trial or within any other period fixed by the justice or judge, give notice to the other party or parties of his or her intention to do so”. Crown counsel intending to call an expert witness also has to provide a copy of the expert witness’s report or a summary of the opinion anticipated to be given by the expert witness to the other party within a reasonable period before trial (s. 657.3(3)(b)).

[70] If notice is not given, s. 657.3(4) states that

(4) . . . the court shall, at the request of any other party,

(a) grant an adjournment of the proceedings to the party who requests it to allow him or her to prepare for cross-examination of the expert witness;

(b) order the party who called the expert witness to provide that other party and any other party with the material referred to in paragraph (3)(b); and

(c) order the calling or recalling of any witness for the purpose of giving testimony on matters related to those raised in the expert witness’s testimony, unless the court considers it inappropriate to do so.

[71] The Crown had not provided Mr. Jodoin with the required notice. When Mr. Jodoin sought the adjournment to which he was entitled under s. 657.3(4), the judge presiding in the Court of Québec granted him a brief one over the lunch break. And, in refusing the requested adjournment, the judge mistakenly said that Mr. Jodoin had already cross-examined the Crown's expert witness in other matters.

[72] This is the context in which Mr. Jodoin filed his motions for writs of prohibition after the lunch hour.

[73] Mr. Jodoin now concedes, based on other decisions rendered subsequently in similar matters, that he ought not to have used motions for writs of prohibition in response to the court's refusal to grant the requested adjournment. But it is also undisputed that the Crown did not in fact give proper notice and that Mr. Jodoin was, as a result, entitled to an adjournment.

[74] In the circumstances, Mr. Jodoin's filing of motions for writs of prohibition for the purpose of suspending the proceedings can easily be seen as an error of judgment, but hardly one justifying a personal costs order.

[75] For these reasons, we would dismiss the appeal.

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