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A Service Clarification to Hold Crypto-Fraudsters Accountable: Analyzing the Appellate Holding of *Gokturk V. Nelson*

Tamie Dolny and Quinn Hartwig, Aird & Berlis LLP

Introduction:

Civil litigation stemming from one of Canada's largest crypto-insolvencies has resulted in an appellate holding on service issues in summary trial applications. In *Gokturk v. Nelson*,[1] the Court of Appeal for British Columbia (the "**BCCA**") held that despite errors in reliance on changing service addresses, unless errors rise to the level of material impact, the failure should not change a court's ultimate ruling. *Nelson* stems from a prior interim receivership where the British Columbia Securities Commission (the "**BCSC**") obtained the appointment of an interim receiver over the insolvent crypto-exchange "Einstein", which serviced approximately 200,000 customers, under section 152 of the *Securities Act*.[2]

Nelson is a welcome holding for insolvency litigators dealing with dissipated or stolen online assets, and will likely impact service determinations in litigation across Canada. The appellate decision will encourage judicial reflection on whether service errors or service issues, especially those dealing with litigants in online spaces, constitute reason for delays in justice. In response to the appellant's arguments, *Nelson* emerges as a leading Canadian decision that will assist parties in civil asset recovery processes when dealing with defendants or respondents who attempt to obfuscate or delay court processes by raising service defences to meritorious claims.

Factual Background

The appellant, Mr. Gokturk ("**Gokturk**"), operated a cryptocurrency exchange known as Einstein Exchange Inc. ("**Einstein**").[3] The respondent, Mr. Nelson ("**Nelson**") is a trader who previously dealt with Gokturk three times.[4] On June 7th, 2019, Nelson sold Gokturk 50 bitcoin for $535,000.[5]

Four months after the transaction, Nelson was still not paid by Gokturk, despite corresponding regularly to resolve the situation. During this time, Gokturk sent a heartfelt apology to Nelson by text:

> "None of this is your problem and I owe you what I owe you.

[1] 2023 BCCA 164 [*Nelson*].
[2] *British Columbia Securities Commission v Einstein Capital Partners Ltd* (14 November 2019), *British Columbia S-1912424*, (Order Made After Application) at para 2 online: *Grant Thornton LLP* <docs.grantthornton.ca/document-folder/viewer/docul8LWsxcWho7J/10244204721500480 4?ga=2.210310485.1131316686.-1574106687-1211224294.15728978344>; *Securities Act*, RSBC 1996, c 148.
[3] *Supra* note 1 at para 2.
[4] *Ibid* at para 12.
[5] *Ibid* at para 3.

> Keep these text messages and email records as proof. I am sorry I have been avoiding you. This has been the absolute worst year of my entire existence. These are not excuses, I just don't know what to tell you besides the truth."[6]

Despite seeming sincere, Gokturk continued to fail to repay Nelson. Nelson then filed an application seeking judgment for damages against Gokturk under Rules 9-6 and 9-7 of the Supreme Court Civil Rules.[7] Gokturk failed to respond to this application. Absent his response, the judge granted a summary trial decision in favour of Nelson.[8]

A sub-issue relevant to this decision was quantification of the damages for breach. On this point, "The plaintiff submits that it would work an injustice to deny him the benefit of the precipitous rise in BTC value since June 2019, and asks the Court to assess the damages for breach at present market value and in the amount of $3,084,393.15."[9]

The motion judge accordingly surveyed relevant case law surrounding breach of contract to conclude that the remedy ought to be what is required to put the non-breaching party in the position they would have been in had the contract been performed.[10] Applied to the facts, the judge found that the breach occurred on June 7, 2019, when the defendant failed to pay on delivery and that the damages at the time of breach equalled the contracted amount of $535,000.[11] Therefore, the Court held that:

> In the circumstances, using the date of breach to assess the damages puts the plaintiff in the position he would have been in had the Contract been fulfilled.
>
> The fact that BTC is worth more now than it was at the time of the Contract does not result in an injustice.[12]

By placing the damages at time of breach rather than at present value, the Court prevented Nelson from claiming approximately $2.5 million in additional value.

Gokturk then filed a notice of application seeking reconsideration of the decision, which was dismissed.[13] *Nelson* involves the appeal of both the dismissal of this reconsideration decision and findings of the prior summary trial decision. Gokturk as appellant relies on his assertions that he was not properly served and that he was not a party to the contract.

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[6] *Ibid* at para 14.
[7] Supreme Court Civil Rules, BC Reg 168/2009, <https://canlii.ca/t/55vff>, at sections 9-6 - 9-7.
[8] *Supra* note 1 at para 6.
[9] 2021 BCSC 813 at para 30 [*Nelson*].
[10] *Ibid* at paras 28-29, 32.
[11] *Ibid* at para 31.
[12] *Ibid* at paras 32-33.
[13] *Supra* note 1 at para 7.

Legal Analysis

This appeal challenges both the summary trial and reconsideration decisions. The core issues are:

(a) Whether the judge erred in finding Gokturk was duly served?

(b) Whether the judge erred in finding Gokturk's conduct was blameworthy and that he failed to establish a meritorious defence or one worthy of investigation?

Issues of interpretation and application of the Supreme Court Rules are questions of fact and law, and are reviewable on a standard of correctness.[14] The Court may only overturn a decision if the judge is deemed to have made an error in principle or a palpable and overriding error.[15] This case comment focuses on (a) of *Nelson*, in light of its significance and applicability to future litigation in Ontario involving crypto-tracing exercises.

Was Gokturk Served Properly?

Gokturk's primary argument against the validity of the application judgment is that he was not properly served. However, the record reflects that Nelson made every effort to serve Gokturk despite great difficulty. Nelson's inability to reach Gokturk led him to submit service by email on December 10, 2019.[16] Nelson continued advancing the action thereafter, submitting a notice to admit and an order to serve a list of documents and provide an affidavit.[17]

Gokturk responded amicably to these initial requests. However, from November 2020 onward, Gokturk's inability to correspond became a central aspect of this dispute. At this point, Nelson attempted to connect with Gokturk to schedule discovery and learned Gokturk's counsel were no longer representing him. Nelson thereafter received an email from Gokturk's former counsel serving a notice of intention to withdraw.[18] This interaction crucially provided a new address for Gokturk.[19] Nelson's counsel then reached out to Gokturk to ascertain whether he objected to his counsel's notice, but never heard back. Gokturk's inability to communicate became a theme throughout *Nelson*, as he then failed to respond to an appointment for discovery and the eventual judgment application.

Regarding the implied change of address, the BCCA sided with Gokturk and agreed that both the motion judge and application judge erred in finding the notice of intent effectively changed the address – but held that the error did not warrant allowing an appeal.[20] Gokturk also submitted that his service address did not change as the notice was not served. The BCCA

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[14] *Housen v. Nikolaisen,* 2002 SCC 33 at para 8.
[15] *Supra* note 1 at para 54.
[16] *Ibid* at para 15.
[17] *Ibid* at para 18.
[18] *Ibid* at para 20.
[19] *Ibid* at para 20.
[20] *Ibid* at para 61.

entertained this argument but did not find it changed the outcome.[21] Ultimately the BCCA found that Gokturk's challenge of the validity of materials (that he claimed never to have been served with) was highly irregular and held that the error made by both judges interpreting the effects of a notice of intent did not warrant intervention.[22]

The BCCA also endorsed the application judge's characterization of Gokturk's submissions as "vague and ambiguous."[23] Additionally, Gokturk's attempts to blame his former counsel for his failure to attend the summary trial without adequate evidence were deemed "an ill-considered tactic," as his arguments did nothing to undermine the trial.[24] The BCCA thus concluded that Gokturk failed to prove he had not been served with the notice or that there was anything unfair about his being bound by the consequences.

Conclusion:

The Court's unwillingness to indulge Gokturk's argument - that the trial and application judge's error interpreting the effects of the notice of intent relative to his service address undermined the entire trial - provides a welcome sign for insolvency and civil litigators, as this holding is posed to impact service determinations across Canada and encourage courts of all levels not to allow service errors to thwart the pursuit of justice. Though *Nelson* is a BCCA decision, the principle of comity which supports inter-provincial interactions suggests that this judgment will hopefully be persuasive to Ontario courts;[25] more specifically, comity may operate such that an extra-provincial appellate decision will hold weight in Ontario service disputes.[26] This precedent will be especially meaningful to both those operating in online spaces, and for those litigating against parties who attempt to raise technicalities to defend against *bona fide* claims.

[21] *Ibid* at para 67.
[22] *Ibid* at para 74.
[23] *Ibid* at para 45(f).
[24] *Ibid* at para 45(g).
[25] *Ibid* at para 35/ See also the Honourable La Forest's reasoning in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 SCR 1077, where it was held that Canadian provinces are not akin to foreign jurisdictions relative to one another.
[26] CED 4th (online), *Judges and Courts-Jurisdiction* (Western), "Effects of Decisions of Courts or Judges of Co-ordinate Jurisdiction: Authority of Judicial Decisions: Rule of Stare Decisis" at § 125 (February 2020).