

SUPERIOR COURT OF JUSTICE
SMALL CLAIMS COURT

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B E T W E E N:

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JEANNE A. ROBITAILLE-BROHART
FREDERICK BROHART
ANIKA BROHART

Plaintiffs

- and -

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MARC G. LEVASSEUR
AUGUSTO VERTOLLI
M.G.L. DRAFITNG AND CONSULTING

Defendants

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P R O C E E D I N G S A T T R I A L
BEFORE DEPUTY JUDGE P. CASSIDY
on September 12, 2013, at SUDBURY, Ontario

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APPEARANCES:

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J. Robitaille-Brohart
R. Lilly

Plaintiff, In Person
Counsel for Marc Levasseur/
M.G.L. Drafting and Consulting
Counsel for Augusto Vertolli

G. Marcuccio

ROBITAILLE-BROHART, JEANNE v. LEVASSEUR, MARC, VERTOLLI, AUGUSTO/
M.G.L. DRAFTING
THURSDAY, SEPTEMBER 6, 2013

THE COURT: Good morning folks.

MR. LILLY: Good morning.

MR. MARCUCCIO: Good morning.

THE COURT: Jeanne Robitaille-Brohart and
Frederick Brohart?

MS. ROBITAILLE-BROHART: Uh, he's not here. I
have their - my husband's and my daughter's power
of attorney.

THE COURT: Are they the other named plaintiffs?

MS. ROBITAILLE-BROHART: Yeah, yeah.

THE COURT: Mr. Levasseur?

MR. LILLY: Rob Lilly, L-I-L-L-Y, appearing for
the defendants, MR. Levasseur and his drafting
company, M.G.L. Drafting and Consulting.

THE COURT: Thank you Mr. Lilly. It's L-I-L-L?

MR. LILLY: Y.

THE COURT: Y, okay.

MR. MARCUCCIO: Yes Your Honour, I think the other
defendant is Mr. Gus Vertolli. He is present and
I represent him.

THE COURT: Thank you Mr. Marcuccio.

MR. MARCUCCIO: At this point I'm not taking any
issue with what Ms. Brohart has indicated. I, I
don't know what she means by having power of
attorney. As I understand, both her husband and
daughter are fully capable of their own
facilities, but I'll leave that for another time
if it becomes important.

MS. ROBITAILLE-BROHART: Your Honour?

THE COURT: Just a moment please...yes.

MS. ROBITAILLE-BROHART: The powers of attorneys

that I have for my husband and my daughter allow me to represent them in legal matters.

THE COURT: Do you have a copy of those documents?

MS. ROBITAILLE-BROHART: I do and I gave the clerk that this morning; that's in the file.

...

THE COURT: How old is you daughter Anika?

MS. ROBITAILLE-BROHART: She's uh, 21.

...

THE COURT: Mr. Marcuccio, Mr. Lilly do you want - have you seen these?

MR. MARCUCCIO: No. I think the issue of representation is something for the Court to decide. I'm not taking position one way or the other. I don't know if I need to see them. I leave it in the hands of the Court as to what issues may arise from it. I just - I hadn't been made privy to the documents before.

MS. ROBITAILLE-BROHART: Your Honour I brought those documents at every hearing and had made mention of them in the past, that I was acting as power of attorney.

MR. MARCUCCIO: That is true.

THE COURT: Mr. Lilly, do you want to ring in on this?

MR. LILLY: While we're dealing with housekeeping matters Your Honour, I don't think we should waste any more of the Court's time. My client's

consented to judgment in the full amount, and frankly, as a result of doing so, there are no matters to be tried before this court, and the only issue is costs at that point.

5 MS. ROBITAILLE-BROHART: No. Your Honour, I disagree with that because um, on June 3rd there was a motion before this - I came here because the file was so big, it's gonna be considerably shorter, um, asking if we could settle the issue of what would be considered exhibit admissible to court and the judge ruled this has to be decided by the judge who's gonna hear the case. And because I had spent the time of the defendant, I was asked to go and pay \$100.00 to each party um, for having spent their time with something they shouldn't have had to do. When I went to pay the \$100.00 for Mr. Vertolli and his attorney - and I gave you a copy of that - uh, when I asked the receptionist, "Here's the \$100.00 for the motion from today, for your client under Gary Marcuccio or Gus Vertolli" she could not find that client in her systems. And I said "Well look under"....

10 THE COURT: Okay but do you understand - excuse me.

15 MS. ROBITAILLE-BROHART: The real client....

20 THE COURT: Excuse me. Mr. Lilly just said that you went. His clients are consenting to judgment in the full amount.

25 MS. ROBITAILLE-BROHART: But no.

30 THE COURT: The only....

MS. ROBITAILLE-BROHART: May I finish saying what I need to say?

THE COURT: You filed a claim; counsel for two of the defendants has said that his clients are consenting to judgment.

MS. ROBITAILLE-BROHART: Okay, my issue....

THE COURT: The only thing I need to hear about is the issue of costs.

MS. ROBITAILLE-BROHART: Okay, well pertaining to the issue of costs....

THE COURT: I haven't invited submissions yet. Are you telling me you don't want judgment?

MS. ROBITAILLE-BROHART: No what I - well actually what I'm telling you is that - you know in court and to have justice, the person who gives you wrong is the person that's supposed to be paying for that wrong and that's not who is paying for that wrong in this case. It was the employer.

THE COURT: I'm not going to go behind an order that was made by another judge for an interim step in the proceeding.

MR. MARCUCCIO: Your Honour I might be of assistance. I know what this issue is about. I - frankly I think it's completely irrelevant. My office has been retained by Alpine Systems. There's no, absolutely no mystery there; I've made that very clear at every point. Mr. Vertolli's an employer; there's no issue there.

MS. ROBITAILLE-BROHART: There is a huge issue because part of the legal system is also to set precedent and there are certain precedents that I would argue the silent partners in all of this do not want to see set. And they are much bigger issues than this immediate case. And that's why

than just the damages; there's precedents. And that's my argument.

THE COURT: Precedents get set not all the time...

MS. ROBITAILLE-BROHART: Yes, but in this case...

THE COURT: ...and...

MS. ROBITAILLE-BROHART: ...there are many that can get set.

THE COURT: ...I've already indicated that I am granting the judgment on the consent of the defendants and I will entertain submissions on the issue of costs once I have completed that part of the endorsement.

MS. ROBITAILLE-BROHART: I guess I'll be running for mayor.

...

THE COURT: So, Mr. Lilly, again, your clients are Mr. Levasseur, M.G.L. Drafting & Consulting?

MR. LILLY: Yes, that's correct, Your Honour.

...

THE COURT: The amount of the claim is 25,000?

MR. LILLY: That's correct Your Honour.

...

MS. ROBITAILLE-BROHART: Uh, Your Honour I have a question.

THE COURT: Could you sit down please?

Submissions - Mr. Lilly

issue of costs?

MR. LILLY: Yes Your Honour, thank you. I came onto this scene fairly late in the process. I came on about June of this year. I quickly analyzed the case and realized that the economics didn't justify in proceeding with a five-day trial. I advised the plaintiff that...

THE COURT: I'm sorry Mr. Lilly. Are you clicking your pen Mr. Marcuccio?

MR. MARCUCCIO: No.

THE COURT: Somebody is clicking something.

MR. LILLY: It's typing I believe.

THE COURT: Oh, well stop that.

...

THE COURT: Sorry I was very distracted.

MR. LILLY: That's okay. As I was saying, I reviewed that case and realized the economics didn't justify proceeding with a five-day trial. I advised the plaintiff that an offer to settle would be forthcoming and if she would be patient, I would provide her with one shortly. In response to that, she wrote to me advising, and I'll pass this up to the, Your Honour if you wouldn't mind, the Clerk. There's a copy of your email there. On the third page, the highlighted portion there. I was advised that there was possibly no offer whatsoever that could be made. Nonetheless, in accordance with the rules of Court and the defendants' rights, an offer to settle was advanced shortly thereafter, on the

Submissions - Mr. Lilly

same day, sent by email and also by regular mail. I'll pass a copy of that package up to Your Honour.

THE COURT: Thank you.

MR. LILLY: You have a copy of this offer. Ms. Robitaille-Brohart, would you like me to provide you with a copy as well?

MS. ROBITAILLE-BROHART: I'm fine.

MR. LILLY: Okay. Under the cover page of the email of the covering letter dated July 24, 2013, at the top; without prejudice except as to costs. It's a full page letter outlining the implications of what the offer means, how much will be paid, interest calculated in accordance with the Court of Justice Act. There's a calculation as to how that is made as well, on a per day basis at .5 percent cumulatively for 1392 days. I was very, very careful, because I was dealing with a lay litigant, to explain the full ramifications if the offer wasn't settled, or if the offer wasn't accepted and I was advising of cost consequences in that regard. I explained how rule 14 operated and I explained how rule 19 and rule 29 of the Courts of Justice Act operated. The Courts of Justice Act rule 29 says that 15 percent of the claim is the maximum amount or could/should be the top amount that a plaintiff's entitled to, however, rule 14 when read in conjunction with that, provides for double cost. There is case law and I attached a case that in fact, where double cost can apply. In one case - sorry when I say 15,000, it's 15

Submissions - Mr. Lilly

percent - so in one case the maximum amount at the time was 10,000 at 15 percent, so that was \$15,000.00 or sorry \$1,500.00 and the Court awarded \$3,000.00 because it was double cost. On page two in bold text and underlined it says, "That means if you do not accept the offer, we will ask the Court to award double cost against you, because it's impossible for you to obtain an amount higher than defendants have offered, because they have offered the maximum amount". In other words, the defendants will likely entitled to award of 15 percent of the claim; i.e. \$3,750.00. But that amount would be doubled by operation of rule 14, so the cost award against you will be \$7,500.00. We advised on page three, the bottom paragraph, that if we did not obtain the relief, we would do exactly what we did today. The plaintiff was well aware of what we were doing today, which was, we would advise the court that we consent to judgment for the maximum amount by virtue of the defendants' offer to settle. We said that we would ask the Court to view the plaintiff's refusal of the offer to settle and deliberate decision to proceed with the matter as constituting an abuse of process, which is deserving of penalty costs against the plaintiff for unnecessarily prolonging and complicating the action, pursuant to rule 19 of the Small Claims Rules. Over the page, I have expressly cited the rule 19.06, "penalty; if the Court is satisfied that the party has unduly complicated or prolonged an

Submissions - Mr. Lilly

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action and has otherwise acted unreasonably, the Court may order the party to pay an amount as compensation to another party". I included a copy of the case to which I referred earlier; Barry Trim and Health et al. It's a 2010 judgment of the Small Claims Court - my apologies - of the Divisional Court, in which double costs were awarded by operation of rule 14. My offer to settle was also enclosed. I have attached Schedule A and Schedule B which is in the package before you Your Honour. Schedule A outlined the offer; \$25,000.00 payable to the plaintiffs, again emphasizing that's the maximum amount of recovery in Small Claims Court. B, pre-judgment interest prescribed by sections 128 and 129 of the Court of Justice Act, to the plaintiffs, accruing per diem from the date of loss to the trial date, when in fact the offer really only needed - interest only needed to be accrued until the point the offer was made. So it was a more generous offer, and costs to the plaintiff in the maximum amount of \$500.00. As you know Your Honour, in accordance with rule 14.07(3) of the Small Claims Rules, self-represented litigants are only entitled to \$500.00 costs. We agreed to pay that amount as well. We also agreed to pay the plaintiff's reasonable disbursements in (d) as you can see before you, "it occurred up to the point the offer is accepted". Again, that was more generous than need be because it just really needs to be up to the point that the offer was made. The terms of the offer were not severable

Submissions - Mr. Lilly/Ms. Robitaille-Brohart

5 and we advised that we would rely on rules 14 and 19 and section 29 of the rules of the Courts of Justice Act. As you can see in paragraph two, the offer remained open for acceptance until one minute following the commencement of trial and was made well before the seven day deadline prior to this trial date.

10 I also enclose a release. I intentionally took out a confidentiality clause because that would take the release outside the scope of an offer to settle because this court can't enforce confidentiality, therefore I took it out making the offer to settle in accordance with rule 19 and rule 14. If it pleases the Court, I'm
15 prepared to take it through to the plaintiff's response, or you have any questions about the offer, I'd be pleased to address them now or whenever you see fit.

20 ...

25 THE COURT: Ms. Brohart-Robitaille, do you have anything you want to say on the issue of costs?

MS. ROBITAILLE-BROHART: Um, okay. I didn't sign any confidentiality clause and since this did come to trial, because this is considered trial right - nothing here is confidential, is that correct?

30 THE COURT: I'm asking you if you any comments you want to make...

MS. ROBITAILLE-BROHART: As far as the costs...

Submissions - Ms. Robitaille-Brohart

THE COURT: ...with regard to the issue of costs?

MS. ROBITAILLE-BROHART: Well I haven't - since the uh - I have incurred, yes, other costs that I've just been tabulating compared to what I've submitted to the Court and was gonna keep tabulating them until October and present those at the end, since I wasn't thinking it would be over today.

THE COURT: Okay. Let me - because you don't do this every day...

MS. ROBITAILLE-BROHART: No, I don't.

THE COURT: ...let me just explain to you that costs - there's no automatic entitlement to costs.

MS. ROBITAILLE-BROHART: M-hmm.

THE COURT: Costs are always within the discretion of the judge.

MS. ROBITAILLE-BROHART: M-hmm.

THE COURT: Having said that, they almost always go to the successful party. There are exceptions to that.

MS. ROBITAILLE-BROHART: Oh, I understand the seven, whatever, eight, ten - whatever thousands you'd want; it cost me over a hundred thousand. It doesn't matter at this point. My issue - I mean - quite frankly, I expect I'll be selling my files on the internet because this scandal is too massive to hide, so I'll just sell my files and my questions to other plaintiffs who will probably go class action, because I will be running for mayor. I don't need to win; I just need to run, but if I do win, as an MA in finance, I will

Submissions - Ms. Robitaille-Brohart

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take the job; because I can prove that this City Council has been hiding a building scandal for over three years and so I will run for mayor. So you can award them whatever you want, I have - the only other costs I have are money orders, whatever - I will give you a summary of that but I need some time, obviously, to do it.

THE COURT: Are you prepared to listen to what I have to say now?

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MS. ROBITAILLE-BROHART: Sure. Oh, the other - I only have one other point.

THE COURT: I guess not.

MS. ROBITAILLE-BROHART: Um, ma'am, I don't see justice being done, sorry.

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THE COURT: And please don't call me ma'am.

MS. ROBITAILLE-BROHART: I, I'm, sorry Your Honour but I just don't feel that this is justice for the people of Ontario. Um, now as far as....

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THE COURT: I don't see that you are representing the people of Ontario.

MS. ROBITAILLE-BROHART: Well, if you understand....

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THE COURT: You are a self-represented litigant....

MS. ROBITAILLE-BROHART: But the issues are much bigger ma'am, Your Honour.

THE COURT: Don't argue with me, please.

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MS. ROBITAILLE-BROHART: Whatever. I have one other as to the \$500.00 per plaintiff. If I'm representing my husband and my daughter, if they've help me, I'm not allowed the extra 500 for those two? Let's not ask for it, but I will

Submissions - Mr. Marcuccio

not ever sign anything pertaining to confidentiality. That's my main point.

MR. MARCUCCIO: Your Honour, would it please the Court if I may make submissions as to costs. First off, there is - no one's ever asked for a signing of a confidentiality clause so that's fine. The offer that my friend has spoken about was a joint offer, so we will be seeking on behalf of Mr. Vertolli, the same double maximum cost. The point I would like to make Your Honour, and I believe Ms. Brohart has assisted me in making this point, is this has never about the damages. This, from the very start, has been an abuse of process. The defendants have time and again, whenever this has been in Court, attempted to deal with the issue of damages; to figure out what the damages were and to try to settle this matter. Your brother and sister deputy judges have consistently told Ms. Brohart to focus on the damages. And even today, it's quite clear that's not what she's doing. Given the fact that this is clearly an abuse of process, we feel that both defendants should be awarded costs and be awarded double costs. Those are my submissions.

MS. ROBITAILLE-BROHART: Okay....

THE COURT: Sorry, this isn't American courtroom television.

MS. ROBITAILLE-BROHART: I know but I feel...

THE COURT: There are rules that govern the process.

MS. ROBITAILLE-BROHART: And there are rules that....

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THE COURT: I - and one of the rules is you don't interrupt the judge. Okay? I get to control the process in this courtroom. Not you. And when I call upon you and you choose not to address the questions that I have asked, but instead go off on some tangent and then I ask you again if you have any submissions on the issue we're addressing, and you say, "No", and go off on a tangent, then you can't just jump up when the spirit moves you and say whatever you want. There are rules of process.

MS. ROBITAILLE-BROHART: May I say something else now?

THE COURT: I have asked you for your submissions on costs and you wouldn't give them to me.

MS. ROBITAILLE-BROHART: This - well, how can I give you - I wasn't prepared....

THE COURT: And if you have something to say on the issue of costs, then I will hear it. I don't....

MS. ROBITAILLE-BROHART: What about the matter I asked for you to hear prior to this case, which apparently has been completely denied.

THE COURT: What matter did you ask me to hear prior to this case?

MS. ROBITAILLE-BROHART: A matter of two attorneys discussing the fine line between genius and insanity, or uh, you know, attempts....

THE COURT: Ms. Brohart, I don't know....

MS. ROBITAILLE-BROHART: You know what? That is slander. I'm sorry but I was a witness to that.

THE COURT: Ms. Brohart. I don't know what you're referring to. You have not spoken to me about anything.

MS. ROBITAILLE-BROHART: Do you want to hear it?

THE COURT: If you are concerned about conduct of either of the lawyers here, I have no jurisdiction to deal with that if it occurred outside my courtroom. Your remedy does not lie with me.

MS. ROBITAILLE-BROHART: Okay, that's fine.

...

THE COURT: Mr. Marcuccio, I don't fully understand your submission with regard to this being a joint offer.

MR. MARCUCCIO: The offer to settle was a joint offer; the one that Mr. Lilly prepared. It was on behalf of all defendants at that time. The consent to judgment is not joint. And my friend can correct me if I'm wrong but that was my understanding.

MR. LILLY: Your Honour, yes. It was made on behalf of all three defendants.

THE COURT: Yes, I write on behalf of all of the defendants.

MR. LILLY: Indeed.

THE COURT: Thank you.

...

THE COURT: Are you finished?

MS. ROBITAILLE-BROHART: I am, I am.

...

5 THE COURT: As I was saying, with regard to the
issue of costs; costs are in the discretion of
the Court. There's no automatic entitlement to
costs. Having said that, they do usually flow to
10 the successful party. However, there are
exceptions to that practice. Clearly the most
obvious is where an offer to settle has been made
within the reasonable timeframes prescribed by
the rules and at the end of the day, the
15 successful party ends up doing as well as, or
better - or pardon me, the successful party ends
up doing no better than the amount that they
could have settled the matter for had they
accepted the offer. The rationale behind that
20 is, in part, to prevent people from forcing the
matter on for trial that ought not to be going to
trial. In the present case, I am satisfied that
the offer to settle made by Mr. Lilly on behalf
of all of the defendants, in the full amount of
25 the claim, ought to have been accepted. It's
totally unreasonable, given this forum, that the
plaintiffs would not have accepted judgment in
the full amount of the claim without forcing this
matter to this point. So, certainly, although
30 the plaintiffs arguably are the successful
parties, certainly, they are not entitled to
costs and this is one of the rare areas, or rare
times when I am persuaded to award costs against

the successful party for failing to settle that which should have been settled.

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As Mr. Lilly stated, there is a limit on a cost award given in Small Claims Court. Rule 29 of the Courts of Justice Act provides that an award of costs in Small Claims Court, other than disbursements, shall not exceed 15 percent of the amount claimed, or the value of property sought to be recovered unless the Court considers it necessary in the interests of justice to penalize a party or a party's representative for unreasonable behaviour in the proceeding. He also referred the Court to rule 14.07 which addresses the issue of cost consequences of a failure to accept an offer to settle, and it provides as follows, "When a plaintiff makes an offer to settle that is not accepted by the defendant, the Court may award the plaintiff an amount not exceeding twice the costs of an action if the following conditions are met" and it goes on and explains the conditions. The same thing applies in sub-section 2 where a defendant makes an offer to settle that is not accepted by the plaintiff, which is the case here. "The Court may award the defendant an amount not exceeding twice the costs awardable to a successful party from the date the offer was served if the following conditions are met: the plaintiff obtains judgment as favourable as, or less favourable than the terms of the offer, the offer was made at least seven days before trial, the

offer was not withdrawn and did not expire before trial." So, having regard to those rules, do you have anything to say on the issue of costs Ms. Brohart?

MS. ROBITAILLE-BROHART: No.

...

MR. MARCUCCIO: Your Honour? I didn't know if you saw. I just thought I'd be helpful.

...

THE COURT: Yes, Ms. Brohart?

MS. ROBITAILLE-BROHART: Yes, before you rule on me in matters of uh, unreasonable, I need to bring to the Court's attention that there are very specific reasons why I was really unable to secure legal representation for this case because, at the centre of this building scandal is none other, in my opinion, and I'm entitled to my opinion based on my documentation, is the Attorney-General of Ontario. And the Law Society of Upper Canada owns Title Plus, which in my opinion as an MA in finance stands to lose a lot of money in the building scandal and as such, there are not a lot of attorneys who would take this case - actually I found none - until it went class action. And as such, if I was found to be unreasonable by the defendants, it is because of the players again, behind the scenes. And I think it is unfair that my due process of law

Decision - Cassidy, D.J.

should be violated because of all of the hidden players and I would like that documented.

D E C I S I O N

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CASSIDY, D.J. (Orally):

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Thank you. In the present case, I'm prepared to award costs to the defendants. I'm not prepared to grant double the costs. Rule 14 - certainly it's not an automatic right and it's an upper cap. It refers to "up to double the cost" awards. I do acknowledge that where an offer to settle has been served, and in this case, so far in advance of the trial - the date I believe was July 24th, so there was plenty of time to consider the ramifications and accept, if in fact the plaintiff was in a conciliatory frame of mind. Having said that, I am prepared to award costs pursuant to the Courts of Justice Act as well as an additional...\$1,250.00 pursuant to rule 14 for a total cost award of \$5,000.00.

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So, for the oral reasons given, my endorsement will read as follows. Defendants Marc G. Levasseur and M.G.L. Drafting and Consulting consent to judgment in the amount claimed, therefore judgment will go to the plaintiffs in the amount of \$25,000.00 payable by the defendants Marc G. Levasseur and M.G.L. Drafting and Consulting. The defendants Marc G. Levasseur, Augusto Vertolli and M.G.L. Drafting and Consulting shall have their costs paid by the

Decision - Cassidy, D.J.

plaintiff, Jeanne A. Robitaille-Brohart fixed in the amount of \$5,000.00 which may be set off from the judgment. Anything else folks?

MR. LILLY: No, Your Honour, thank you.

THE COURT: We are adjourned.

MS. ROBITAILLE-BROHART: Thank you.

M A T T E R C O N C L U D E D

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FORM 2

CERTIFICATE OF TRANSCRIPT (SUBSECTION 5 (2))

Evidence Act

I, we Tonie A. C. Stevens, certify that
(Please print name of authorized person(s))

this document is a true and accurate transcript of the recording of Jeanne Robitaille-Brohart
v. _____

Marc G. Levasseur/M.G.L. Drafting in the Superior Court of Justice-
and Consulting/Augusto Vertolli Small Claims Court
(Case name) *(Name of Court)*

held at 159 Cedar St. Sudbury, ON taken from Recording No.
(Court address)

4031-20130912-092243-2-SCC, which has been certified in Form 1.

October 5, 2013
(Date)



(Signature of authorized person(s))
TONIE A.C.STEVENS

