

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**Re:** Juan Donoso v. Canac Kitchens Limited, Kohler Co., Paul H. Ten Pas, Brian McGee, Joseph A Capone, Douglas W. Robinson, and Arthur Andersen

**Before:** Swinton J.

**Counsel:** Gina Rogakos for Canac Kitchens Limited and Kohler Co., Defendants  
(Moving Parties)  
Theodore P. Charney for the Plaintiff (Responding Party)

**Heard at Toronto:** January 19, 2007

**ENDORSEMENT**

[1] The defendants Canac Kitchens Limited and Kohler Co. seek leave to appeal an order of Lane J. dated August 31, 2006, in which he allowed an appeal from the decision of Master Abrams dated June 8, 2005 refusing an order to produce Paul Ten Pas, Senior Attorney and Vice President of Labour Relations for Kohler, for discovery.

[2] In his original Notice of Motion before the Master, the plaintiff sought an order that the defendant produce Mr. Ten Pas for examination for discovery or, in the alternative, leave to examine Mr. Ten Pas.

[3] The motions judge held that the Master erred in principle in holding that it would be more efficient and practical to examine someone other than Mr. Ten Pas, because he was in-house counsel and would be constrained by solicitor-client privilege. The motions judge went on to say that privilege must be determined on a question by question basis. Having found an error in principle, he exercised his discretion to order that Mr. Ten Pas be produced for examination for discovery.

[4] While the moving parties submit that the motions judge erred in not applying the test for leave to discover a second individual pursuant to Rule 31.03(2)(b), neither the motions judge nor the Master referred in their endorsements to that rule or the appropriate test under that rule. Instead, they appear to be proceeding under Rule 31.03(2)(a).

[5] The initial discovery of a representative of the corporate defendants was adjourned at a preliminary stage after plaintiff's counsel learned that Mr. Ten Pas was still associated with the defendant Kohler, as counsel wished to examine the representative of the corporate defendants whom he thought most appropriate.

[6] In my view, the moving parties have not met the test for leave under Rule 62.02(4)(a). Their counsel did not take issue with the proposition that there is no blanket exclusion of lawyers as witnesses because they would be constrained by solicitor-client privilege. Therefore, there is no decision in conflict with the motions judge's holding that the Master erred in principle.

[7] Moreover, the test in Rule 62.02(4)(b) has not been met, as I do not have good reason to doubt the correctness of the motions judge's decision. Once he determined that the Master made an error in principle, he exercised his discretion to order Mr. Ten Pas produced. A party has a *prima facie* right to examine the representative of his or her choice. It is evident that Mr. Ten Pas has knowledge of the investigation and what occurred at the termination meeting. If issues of privilege arise, they can be determined on a case by case basis.

[8] Finally, even if there were reason to doubt the correctness of this decision or there were conflicting decisions, this appeal does not raise issues of general importance beyond the interests of the immediate parties. The basic issue here is whether a particular individual should be produced for an examination for discovery, given the facts of this case.

[9] Therefore, the motion for leave to appeal is dismissed. Costs to the plaintiff are fixed at \$2,500.00 payable within 30 days.

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Swinton J.

**Released:** January , 2007